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COVERING CASES REPORTED IN

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7 Cal.2d 307

BALLINGER v. BALLINGER.*

S. F. 15665.

Supreme Court of California.

Oct. 1, 1936.

Appeal and error 🔑480

Denial of application for supersedeas *held* authorized where applicant had not complied with conditions prescribed by Supreme Court, even if court was in error in requiring compliance, since supersedeas is a discretionary writ (Code Civ.Proc. §§ 943, 944).

◆

In Bank.

On petition for rehearing.

Petition denied.

Prior opinion, 60 P.(2d) 279.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Frederick W. Kant and Horace T. Beverly, both of San Francisco, for respondent.

PER CURIAM.

The petition for a rehearing herein is denied.

Assuming, for the purpose of argument only, that the court was in error in requiring the appellant to comply with the provisions of sections 943 and 944 of the Code of Civil Procedure as a prerequisite to the granting of an application for supersedeas, supersedeas is a discretionary writ, and it was within the province of the court to prescribe that a certain thing be done as a prerequisite to the granting of such writ. The appellant not having complied with the conditions prescribed by the court, by the doing of such thing, the court was within its province in denying the petition.

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7 Cal.2d 465

CRANFORD v. JORDAN, Secretary of State (TRANSAMERICA SERVICE CORPORATION et al. Interveners).

S. F. 15727.

Supreme Court of California.

Sept. 29, 1936.

1. Corporations 🔑49(1)

Action of secretary of state in refusing articles of incorporation on ground that the name "Transamerica Corporation" was not open for corporate use because the proposed name resembled so closely the name of "Transamerica Service Corporation" as to tend to deceive *held* not abuse of discretion (Civ.Code, § 291).

2. Mandamus 🔑88

Statute providing that secretary of state should not file articles of incorporation which set forth name which resembles so closely, as to tend to deceive, the name of a domestic corporation, vests in secretary discretionary power which he may be compelled to exercise, but which, in absence of abuse of discretion, he cannot be compelled to exercise in any particular manner (Civ.Code, § 291).

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*For subsequent opinion see 70 P.2d 629.

In Bank.

Proceedings for writ of mandate by J. H. Cranford against Frank C. Jordan, Secretary of the State, wherein the Transamerica Service Corporation and another intervened.

Peremptory writ denied.

Sterling Carr, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, Louis W. Myers, Jackson W. Chance, Ray H. Lindman, and John B. Hurlbut, all of Los Angeles, for interveners.

PER CURIAM.

[1] The petitioner tendered to the respondent, as secretary of state, for filing, articles of incorporation of Transamerica Corporation which the respondent declined to file on the ground that the name "Transamerica Corporation" was not open for corporate use or adoption in this state. He seeks the writ of mandate to compel respondent to file the articles of incorporation. By leave of this court the Transamerica Service Corporation, a domestic corporation, and the Transamerica Corporation, have intervened on behalf of the respondent. The former of the two corporations acquired its name by amendment of its articles of incorporation in December, 1931, and ever since that time has been known as "Transamerica Service Corporation." Under the view we now entertain it is unnecessary for us to further describe the Transamerica Corporation, organized under the laws of the state of Delaware, than to say that it is a holding corporation of many corporations doing business in California, including the Transamerica Service Corporation.

The respondent refused to file the articles of incorporation tendered by petitioner under the authority of section 291 of the Civil Code, the first paragraph of which reads as follows: "The secretary of state shall not file articles which set forth a name which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive, (1) the name of a domestic corporation, or (2) the name of a foreign corporation which is authorized to transact business in this state, or (3) a name which is under reservation, except to the applicant therefor."

The question is whether the name proposed by petitioner resembles so closely the name of Transamerica Service Corporation as to tend to deceive. We have no hesitancy in declaring that respondent executed the duty reposing upon him strictly in accord with the quoted section in order to prevent deception. Obviously, the key word in the name of the intervening domestic corporation is "Transamerica." That key word is proposed as the name of the new corporation. The authorities are legion to the effect that two names in which the key word is identical are so similar as to tend to deceive. Among them we may cite: Delaware Charter Co. v. Delaware Charter Service Co., 16 Del. Ch. 246, 144 A. 659; State ex rel. Cohen v. Hinkle, 139 Wash. 651, 247 P. 1029 (the names involved being [1] Carnation Milk Products Co. and [2] Carnation Ice Cream Co.); Chas. S. Higgins Co. v. Higgins Soap Co., 144 N.Y. 462, 39 N.E. 490, 27 L.R.A. 42, 43 Am.St.Rep. 769, and cases there cited; B. Forman Co. v. Forman Mfg. Co., 119 Misc. 87, 195 N.Y.S. 597; Holland Furnace Co. v. New Holland Mach. Co. (D.C.) 24 F.(2d) 751; Lloyds Bank v. Lloyds Investment Trust Co., Limited, 28 Times Law Rep. 379. Assuming that the public would make use of reasonable intelligence and discrimination, yet we are persuaded that the similarity is sufficient that great confusion would result. It is to be noted that, unlike those cases where proof of actual deception is required, the section here involved precludes the adoption of a corporate name which "will tend to deceive." The secretary of state is required, under such circumstances, to refuse to file the articles.

Petitioner places great reliance upon the case of Rixford v. Jordan, 214 Cal. 547, 6 P.(2d) 959, but there is nothing in that case at variance with or inconsistent with our conclusion here. In fact, the reasoning and the text support the opinion at which we have arrived.

[2] Finally, it should be said that the respondent has obeyed the mandate of the section which we have quoted. It is his opinion that the name is one which would tend to mislead the public. The section vests in him a certain discretionary power which he may be compelled to exer-

cise, but which, in the absence of an abuse of discretion, we should not compel him to exercise in any particular manner. In other words, where it appears that there is a reasonable basis for the action of a public officer possessing discretionary power, we cannot substitute our judgment for his. Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784; Rixford v. Jordan, supra, 214 Cal. 547, at page 555, 6 P.(2d) 959; State ex rel. Cohen v. Hinkle, supra. The petitioner has failed to disclose a meritorious reason why we should interfere by the writ of mandate to allow him to make use of a corporate designation which is apt to deceive. No other points require discussion.

The peremptory writ is denied.

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16 Cal.App.2d 670

In re PALMER'S ESTATE.

Civ. 10323.

District Court of Appeal, First District.
Division 2, California.
Oct. 2, 1936.

1. Wills 🔑671

Where testator gave specific legacy to daughter, "knowing that her mother will provide for her according to her needs," and residue to wife, provision for daughter *held* insufficient to indicate intention that residue should be held in trust for daughter.

2. Wills 🔑487(5)

Where testator gave specific legacy to daughter, "knowing that her mother will provide for her according to her needs," and residue to wife, provision for daughter *held* not to create uncertainty justifying admission of evidence of circumstances under which will was made to show intention that residue should be held in trust for daughter (Probate Code, § 105).

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of O. B. Palmer, also known as Oscar B. Palmer, deceased, wherein Mildred B. Palmer Howell filed exceptions to the order settling final account and decreeing distribution. From the decree of settlement of final account and of final distribution, Mildred B. Palmer Howell appeals, opposed by Lillie J. Palmer, executrix.

Affirmed.

J. S. Hutchinson, of San Francisco, for appellant.

Ira Abraham, of Oakland, for respondent.

SPENCE, Justice.

This is an appeal by Mildred B. Palmer Howell, the daughter of the deceased, from the decree of settlement of final account and of final distribution.

[1] The only question presented by the briefs relates to the propriety of the provisions of the portion of the decree distributing the estate. This question involves the construction of the terms of the will of the deceased. Said will provided:

"Second: I give, devise and bequeath unto my beloved daughter Mildred B. Palmer the sum of Two hundred and fifty ($250.00) Dollars, *knowing that her mother will provide for her according to her needs, having regard to her best interest, advantage and welfare;*

"Third: All the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situate, I give, devise and bequeath unto my beloved wife, Lillie J. Palmer." (Italics ours.)

The probate court distributed the sum of $250 to appellant, Mildred B. Palmer Howell, and the residue of the estate to respondent, Lillie J. Palmer.

Appellant contends that it was error to distribute the residue of the estate to respondent without declaring that said residue was held in trust for appellant's benefit. We find no merit in this contention. Appellant relies upon the italicized words above set forth, but in our opinion those words are insufficient to indicate any intention upon the part of the testator to create a trust. On the contrary, we believe said words clearly express the reason of the testator for not creating a trust.

Numerous cases are discussed by the parties in their briefs, but none of the cases cited involved language similar to that before us. Nevertheless, the general rules relating to the effect of the use of precatory words in wills seem to be well settled in this state. See In re Estate of Price, 138

Cal.App. 462, 32 P.(2d) 994; In re Estate of Lee, 104 Cal.App. 15, 284 P. 948; In re Estate of Browne, 175 Cal. 361, 165 P. 960; In re Estate of Purcell, 167 Cal. 176, 138 P. 704; In re Estate of Mitchell, 160 Cal. 618, 117 P. 774; In re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071. We find nothing in the holdings in the cases cited nor in the language of the opinions in said cases which supports appellant's position.

[2] Contending that said italicized words created an uncertainty upon the face of the will, appellant sought to introduce evidence of the circumstances under which the will was made. Probate Code, § 105. This evidence was admitted over the objection of respondent, but the probate court determined that said evidence was insufficient to show an intention to create a trust. Appellant again relies upon said evidence in this court. We have above indicated that, in our opinion, there was no uncertainty in the terms of the will justifying the admission of such evidence, but, even if that evidence be considered, the trial court properly determined that it was insufficient for the purpose for which it was offered.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

16 Cal.App.2d 640

ENGLAND v. HOSPITAL OF THE GOOD SAMARITAN.

Civ. 11036.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Trial ⚷178

Defendant, by presenting motion for directed verdict, concedes as true evidence in behalf of plaintiff with all fair and reasonable inferences to be deduced therefrom.

2. Charities ⚷45(2)

Person accepting benefit of public or private charity exempts by implied contract benefactor from liability for negligence of servants in administering charity, if benefactor has used due care in selection of servants.

3. Charities ⚷45(2)

In patient's action against hospital for injury received through negligence of nurse, questions whether hospital was conducted for profit or operated only for charity and of patient's knowledge of hospital's claim to nonliability on account of charitable activities and whether hospital had used due care in employing nurse who attended patient *held* for jury.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles E. England against the Hospital of the Good Samaritan. Judgment for defendant, and plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

William K. Young, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, by Philip C. Sterry, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff sought a judgment against defendant for damages for injuries suffered on October 16, 1935, while he was a patient in the hospital operated by defendant. It is claimed that a nurse employed by defendant to care for plaintiff negligently placed hot water bottles against plaintiff's leg in such manner as to cause third-degree burns. When plaintiff finished the presentation of evidence, the trial court, upon motion of defendant, directed the jury to return a verdict in defendant's favor. From the resulting judgment, plaintiff prosecutes this appeal.

[1] By presenting a motion for a directed verdict defendant concedes as true the evidence in behalf of plaintiff with all fair and reasonable inferences to be deduced therefrom. Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 247 P. 597. Considering plaintiff's evidence in the light of this rule, the following facts may be considered as established: Plaintiff applied for admission to defendant's hospital and was received as a patient paying the customary rate, the amount quoted by defendant's cashier. He was injured through the negligence of a nurse assigned to care for him by defendant. The articles of incorporation of defendant provide that the hospital "shall be conducted under the auspices of the Prot-

estant Episcopal Church. * * *" The by-laws, as amended June 20, 1921, provide that "the corporation is organized not for profit, but for the purpose of establishing and maintaining an institution under Christian influence, for the training of nurses, and for the care of the sick, including those who are unable to pay wholly or in part for medical or surgical aid." Defendant's hospital is one of the larger hospitals of the city of Los Angeles. Defendant operated for profit a number of departments to which the public had access, such as pharmacy, lunch counter, and soda fountain, including magazines and toilet articles. In 1935, the year in which plaintiff was injured, defendant realized a profit of $62,767 from operations. Defendant's earned surplus on January 1, 1931, was $142,720. Continuous operations were carried on thereafter and on December 31, 1935, the earned surplus was $65,464. During 1935 defendant cared for 7,672 patients. Of this number 191 were free patients and most of these were physicians, nurses, or clergymen, or members of their families. Of the total number, 354 patients paid less than the established rates, some of them having been cared for at a financial loss. The amount paid by the last-mentioned class does not appear in the record. Defendant has no fixed or established rule either verbal or written governing the admission of nonrevenue patients. The admission of such patients rests in the discretion of defendant's secretary-treasurer. No showing was made that plaintiff was aware that defendant claimed to be a charitable institution or that it claimed to be free from liability for negligence on the part of its employees.

[2] The general rule applicable to those receiving benefits from charitable institutions is stated in Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46, 48: "The true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." In the Stewart Case the defendant claimed exemption from liability on account of the charitable nature of its work. Its articles of incorporation provided that "all of which work and acts shall be done without pecuniary profit or dividend, direct or indirect, to any person." In that case the trial court found that no charity patients would be received or had been received or treated except by previous arrangement and that the plaintiff "did not know or believe that the defendant owned the sanitarium in question, or that it was carried on or run as a charitable institution, but that plaintiff believed that she was dealing with the St. Helena Sanitarium, and in all her dealings she had no knowledge that it was or claimed to be a charitable institution; and that she paid the full price for the operation and all treatment and for the room furnished to her, and was not the recipient of any charity." In upholding a judgment for the plaintiff, the court said: "The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting the hospital * * * the declaration in the articles alone are insufficient to establish the character of the St. Helena Hospital as a public charity, and the evidence of the manner it was conducted shows that it was not. * * * In the instant case, we hold that the trial court was required to look, not only to the defendant's articles of incorporation and by-laws to determine the character of the hospital conducted by it, but also to the method of transacting the business of the corporation. Its finding that the hospital was in fact operated for profit is supported by the evidence, and we see no good reason for exempting the defendant from the liability incurred by other hospitals conducted for profit." In discussing the several theories on which the nonliability of charitable corporations is based and the doctrine of nonliability, the court stated: "It may be noted, however, that if this rule is followed, the defendant could hardly claim to be thereby relieved of responsibility, for the reason that the plaintiffs had no knowledge whatever of the charitable character of the organization." In Baker v. Board of Trustees, etc., 133 Cal.App. 243, 23 P.(2d) 1071, 1072, the court referred to the Stewart Case, saying: "In Stewart v. California Medical, etc., Ass'n, supra, it was held that a corporation organized for a public charity may also conduct an enterprise for gain and be liable for the negligence of its employees in such enterprise, although the profits derived therefrom are devoted to the general purpose of the charity." In Hallinan v. Prindle, 220 Cal. 46, 29 P.(2d) 202, 203, the Stewart Case was referred to with approval: "The character of the corporation, however, is to be determined not alone by its powers as defined in its charter, but also

by the method of transacting the business of the hospital."

[3] We cannot hold that one who, without knowledge that a hospital claims to be a charitable institution and therefore exempt from liability, applies for admission and is received as a patient, paying the regular rates at which the hospital derives a profit, is without redress for injuries occasioned by negligence on the part of the employees of the hospital on the theory that he is accepting the benefits of charity from a benefactor. Our conclusion is in line with the decision in the Stewart Case. The trial court erred in refusing to submit to the jury the issue of plaintiff's claim that the hospital was conducted for profit and defendant's claim that it was operated only for charity. The court should also have submitted to the jury under appropriate instructions the question of plaintiff's knowledge of defendant's claim to nonliability on account of its charitable activities.

Defendant refers to Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 2 P.(2d) 520; Ritchie v. Long Beach Community Hosp. Ass'n, 139 Cal.App. 688, 34 P.(2d) 771; Shane v. Hospital of the Good Samaritan, 2 Cal.App.(2d) 334, 37 P.(2d) 1066. The decisions in these cases are based upon the general rule that one who accepts the benefits of a charity impliedly exempts the benefactor from liability. Nothing is contained in any of the decisions referred to which negatives the rule that the owners of the hospital are liable for negligence if the hospital is in fact operated for profit. No proof was offered in any of these cases to establish operation of the hospitals for profit. All were decided on the theory that the charitable nature of the institutions was established without question.

Plaintiff contends that he presented sufficient proof that defendant did not use due care in the selection of its employees and that regardless of the determination of the question above discussed he was entitled to have the issue submitted to the jury. This contention must be upheld. Evidence was introduced upon which a finding could be predicated that the negligence of the attending nurse had occasioned plaintiff's injuries. The director of defendant's nursing service testified that the nurse in question had submitted a written application for employment, but that the references therein had never been checked; that she commenced work on April 21, 1935, and that no inquiry was made of the bureau of nurses of the state department of health with respect to her standing. The chief of the bureau of registration of nurses of the state of California testified that said nurse filed an application for registration as a nurse in California on March 8, 1935; that on March 11, 1935, she was rejected for registration on the ground that she was ineligible. A written notice of rejection was forwarded to her in which it was stated: "We find that the hospital with which your school of nursing was connected was too small to meet the California requirements and that you did not have the affidavit executed on your application. If you wish to qualify for registration in California, you may do so by completing a six months' post graduate course, three months of which must be spent in pediatric nursing and one month in obstetrical nursing." The evidence was sufficient to call for the submission to the jury of the question whether defendant had used due care in employing the nurse who attended plaintiff.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

BURKET et al. v. BANK OF HOLLYWOOD et al.*

Civ. 11050.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1936.

Rehearing Denied Oct. 20, 1936.

Hearing Granted by Supreme Court Nov. 25, 1936.

1. Banks and banking 🔑63½

Liquidation of banks under superintendent of banks is not a "judicial function" but an "administrative power" conferred by the Legislature, and the court has no inherent power to ameliorate the rigor of the provision of such statutory directions as are prescribed.

2. Banks and banking 🔑80(4)

Although claim against insolvent bank was timely filed and approved as common claim, action to obtain reclassification as preferred claim which was instituted after four months after first publication of notice to creditors and after four separate dividends had been disbursed to claimants in common with other general claims *held* barred (Gen. Laws 1931, Act 652, § 136).

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*For subsequent opinion see 69 P.2d 421.

3. **Banks and banking** ⟹80(4)

Claimants against insolvent bank who accepted four dividends as general claimants and stood silent while affairs of bank were being liquidated on basis of their claim being a general one *held* estopped from asserting claim of preference (Gen.Laws 1931, Act 652, § 136).

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Virginia Burket and another against the Bank of Hollywood and Friend W. Richardson, State Superintendent of Banks, in charge of liquidation of the Bank of Hollywood. From an adverse judgment, the defendants appeal.

Reversed.

Clock, McWhinney & Clock and Merritt D. Jergins, all of Long Beach, for appellants.

West & McKinney, of Santa Ana (George H. Tobias, of Los Angeles, of counsel), for respondents.

GOULD, Justice pro tem.

F. O. Burket, Sr., deposited with the Bank of Hollywood in an "escrow" account certain moneys received from the operation of an oil well, the bank agreeing to disburse the same to the various royalty owners and holders entitled thereto. Mr. Burket was killed in an automobile accident November 1, 1930, and on December 8, 1930, the bank's doors were closed and it was taken over for liquidation by the state superintendent of banks. Virginia Burket, surviving widow, was appointed executrix of her husband's estate and thereafter handled its affairs, including the matter of the deposit at the Bank of Hollywood. Through her attorney she presented to the superintendent of banks "general claims" against the moneys held in the F. O. Burket, Sr., account or "escrow," and accepted dividends in liquidation amounting to $1,228.32 out of the original sum of $3,534.83 deposited by deceased with the bank. After the estate was distributed to Mrs. Burket and to her son, and more than four years after the death of Mr. Burket and the closing of the bank, they discovered, so they allege, that this particular account, which had been treated by all parties as constituting a "general claim" against the bank, was in fact entitled to a preferential rating, and that they as distributees of the estate were entitled to recover, from the moneys belonging to the bank and in process of liquidation, the full balance of the original deposit, to wit, $2,296.61. In a suit brought for that purpose the trial court ruled in their favor, and from the judgment accordingly entered defendants appeal.

Section 136 of the State Bank Act (Act No. 652, Deering's Gen.Laws, vol. 1, p. 215) sets up the machinery governing the superintendent of banks when taking possession of an institution for the purpose of liquidation. That section specifically provides that "all claims of every kind or nature * * * must be presented to the superintendent of banks in writing, verified by the claimant or someone in his behalf, within four months after the first publication of the notice to creditors; * * * and any claim not so presented shall be forever barred." It is also provided that a claim, the justice or validity of which is in doubt, may be rejected, and that action upon such rejected claim must be brought within six months after service of notice of rejection. After the expiration of the date fixed for the presentation of claims, the superintendent of banks under authority of the superior court is permitted to declare dividends in the manner set forth in the act.

In the instant case it is undisputed that respondents filed their claim upon the "general claim" form furnished by the superintendent of banks within the time fixed by law. It was duly allowed as a general claim, and thereafter four separate dividends, declared pursuant to authority of the superior court, were disbursed to respondents in common with the hundreds of other general claimants.

[1, 2] It is apparent from a reading of the pertinent provisions of the Bank Act that the Legislature has set up a comprehensive and exclusive system for the liquidation of banks and has removed from the superintendent of banks or courts the power to alter or amend the terms upon which claims may be filed. As pointed out in Matter of Horowitz, 235 App.Div. 248, 256 N.Y.S. 705, 707, a case construing a situation where an attempt was made to file a claim after the statutory period fixed by the New York banking law: "The

liquidation of banks under the superintendent of banks is not a judicial function but an administrative power conferred by the Legislature, and the * * * Court has no inherent power to ameliorate the rigor of the provision of such statutory directions as are prescribed for the administrator." The tardy claimant in that case was denied relief. So in the present case respondents cannot claim, after the lapse of four years, the right to refile their claim or amend their demand so as to place them in the preferred class of claimants. In the first instance they elected to file as general claimants, and there is no suggestion in the law that they may change their position with a new filing at this date. In fact, every inference from the wording of the act is against such a course of procedure.

Although the point has never been treated in this state, a very similar situation arose under a like banking act in the state of Missouri [Ogan v. Farmers, etc., Bank (Mo.App.) 90 S.W.(2d) 438, 442], where plaintiff claimed as respondents do in this case, that, having filed an original claim within the time limited by the act, he might at a later time, and after the time for filing claims had expired, seek its reclassification as a preferred claim. The Missouri Court of Appeals there held that "the statute relative to the department of finance and to banking institutions was designed to and does provide a complete and exclusive scheme for the liquidation of insolvent banks and the distribution of their assets; that such statutory provisions contemplate and were intended to require the prompt presentation and disposition of all claims of whatever character against an insolvent bank, on which the claimant seeks to recover and practically can recover only by an award to be paid out of the assets in the hands of the liquidating commissioner; * * * that, until all such claims are presented and determined, the bank's assets cannot be properly distributed and its affairs wound up." Because the claim for preference was not presented within the period limited by statute, the court in that case held that an action for preference instituted beyond the statutory time was untimely and therefore barred. By parity of reasoning it follows that respondents in this case are limited to their original status as general claimants and may not at this late date seek preference over other claimants.

[3] In defense of their delay respondents urge that they were unfamiliar with the business of F. O. Burket, Sr., and were not apprised of the nature of his claim against the defunct bank until they conducted an investigation through an attorney more than four years after his death. No good excuse is shown why they did not make the discovery in the first instance. They signed and verified claims against the bank, the executrix of the estate was represented then by an attorney, and the bank's records as well as deceased's private papers were available to disclose the exact status of his account and deposit. Moreover, there is merit in appellants' position that respondents, having accepted four dividends and having stood silent while the affairs of the bank were being liquidated upon the basis of their claim being a general one, are now estopped from asserting their claim of preference. Such preferential rating would impose a greater burden on the other claimants and would necessitate a corresponding readjustment of accounts. In fact, it was testified by appellants' witness A. J. McFaul that the allowance of respondents' claim as preferential would necessitate the sacrifice of some bank assets to make up the amount necessary to pay off dividends. Four dividend payments to the bank's claimants have been made, it was testified without dispute, upon superior court orders and decrees based upon schedules of assets and allowed claims, in which respondents' claims were certified as general. No sufficient reason is asserted by respondents to invoke the equity jurisdiction of the court to give recognition to their tardy claim of preference, and statutory and equitable considerations militate against any change in their status.

Judgment reversed.

We concur: CRAIL, P. J.; WOOD, J.

COOK et al. v. SNYDER et al.

Civ. 10750.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1936.

Rehearing Denied Oct. 22, 1936.

Hearing Denied by Supreme Court Nov. 25, 1936.

1. Vendor and purchaser ⚷340

Where defendants purchased lots in name of a trustee for subsequent sale for their benefit and one of such lots was sold by one defendant under contract executed by trustee, subsequent assignment to such defendant by other defendant of other's interest in such contract *held* not to release other defendant from his obligation as undisclosed principal to purchasers under contract.

2. Vendor and purchaser ⚷339

Where defendant's connection with joint enterprise for resale of lots had been concealed up until time of filing of action by purchasers to recover purchase price because of failure to convey lots purchased, purchasers were not required, as a condition of recovery, to give such defendant notice of compliance or make demand upon him for a deed, especially where it appeared that demand or notice would have been futile (Civ.Code, § 3532).

3. Vendor and purchaser ⚷341(1)

Purchasers of lot suing to recover purchase price paid because of failure of defendants to convey *held* not barred from recovery on ground of laches because seven months had elapsed after they had completed their payments before one of defendants received notice of rescission, where such defendant had kept purchasers in ignorance of his relation to transaction up to filing of answer in suit.

4. Contracts ⚷303(1)

Courts will not ordinarily relieve party from performance of contract for light and trivial reasons, as parties voluntarily entering into contract are bound by it in absence of equitable grounds for avoidance.

5. Appeal and error ⚷113(1)

Order denying motion to vacate judgment *held* not appealable.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Lorena W. Cook and another against P. N. Snyder, Robert James Richards, and others. From so much of the judgment rendered as denied relief to plaintiffs from defendant Richards, and from an order denying a motion to vacate the judgment, plaintiffs appeal.

Judgment reversed, with a direction, and the attempted appeal from the order denying the motion to vacate the judgment dismissed.

Walter M. Campbell, Jr., and Walter M. Campbell, both of Los Angeles, for appellants.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for the recovery of the purchase price of real property on account of the alleged failure of the seller to convey the property. Pursuant to an agreement between them, respondent and his codefendant herein, P. N. Snyder, purchased twelve lots in a certain subdivision, to be sold later for the benefit of both parties. The purchase was made by them in the name of C. H. Gaul, who acted in the transaction as their agent and trustee, and the contract of purchase provided for payments therefor in instalments covering a period of years.

On December 13, 1927, about six months later, appellants purchased one of these lots from said P. N. Snyder, to wit, lot 45, for the contract price of $7,500, made a down payment of $1,500, and under the terms of the contract of purchase agreed to pay the balance in monthly instalments. This contract was executed by Gaul as seller and by appellants as buyers.

On June 30, 1930, respondent Richards and Snyder divided their interest in the venture, whereupon Gaul, the trustee for them, assigned to each, six of the lots. In this division Snyder received the contract for the purchase by appellants of lot 45. At this time there was a balance of $2,150 unpaid on account of the purchase of lot 45 by Snyder and respondent, and at the same time there was a balance of $3,750 unpaid and due Snyder and respondent on account of the purchase from them by appellants of said lot 45. After these assignments were made, as between Snyder and respondent, Snyder had no monetary interest in the contracts so assigned to respondent and likewise respondent had no monetary interest in, or connection with, the contracts so assigned to Snyder.

The negotiations for the purchase of lot 45 by appellants were solely between them and Snyder; neither Gaul nor respondent took any part in the transaction. Appellants completed the payment of the purchase price of lot 45 on August 17, 1934. Some time previous to that date Snyder had assigned appellants' contract for the purchase of lot 45 to the Vega Corporation, and had notified appellants of the assignment. On October 8, 1934, appellants notified the Vega Corporation that final payment for said lot had been made by them and requested that they be advised when they might expect a deed to the lot. Subsequently, in December, 1934, appellants made demand upon Snyder for a deed and were advised that on account of pending litigation a deed could not be delivered at that time. It also appears that Snyder and respondent had not paid for said lot 45 and therefore could make no delivery of the deed to appellants. On February 16, 1935, appellants served notice of rescission on Snyder, the Vega Corporation and Gaul, and on March 4, 1935, filed this action against Snyder, Gaul, and the Vega Corporation for the recovery of the purchase price. Thereafter, on March 20, 1935, appellants, upon learning of respondent's relation to the transaction, served notice of rescission on respondent and on the same day filed an amended complaint making respondent a party defendant. No demand for a deed was made by appellants on Gaul or respondent. Five months after the action herein was filed and three days before the commencement of the trial in the court below, to wit, on August 2, 1935, a deed to said lot was obtained by Snyder and tendered to appellants, which tender was then and there rejected.

The court found that Snyder and respondent Richards were the undisclosed principals of Gaul in the original purchase of the twelve lots and in the sale of lot 45 to appellants, and that appellants had fully complied with their contract of purchase and had received no consideration therefor, in that neither of said defendants nor any one for or on their behalf had conveyed to appellants said lot 45 nor was an offer made to so convey prior to August 2, 1935.

Judgment was entered in favor of appellants against Snyder, but all relief was denied to appellants against respondent Richards. The action against Gaul and the Vega Corporation had been dismissed by appellants during the trial.

The appeal herein is from so much of the judgment as denies relief to appellants from respondent. No appeal was taken by Snyder from the judgment against him in appellants' favor.

It is contended by respondent: First, that he was not in default for failure to deliver a deed because, over four years before appellants had completed their payments, he had transferred to his covendor, Snyder, all of his interest in the property and in the contract of sale, and had received no notice of compliance from appellants nor was demand made upon him for a deed; second, that appellants were guilty of laches because seven months had elapsed after the time that appellants had completed their payments on account of the purchase price and before he had received notice of the rescission. In the light of the record, both defenses are untenable.

It is contended by respondent that the following cases support the claim that demand was necessary: Hooe v. O'Callaghan, 10 Cal.App. 567, 103 P. 175; Griesemer v. Hammond, 18 Cal.App. 535, 123 P. 818; Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am.St.Rep. 123; Shively v. Semi-Tropic L. & W. Co., 99 Cal. 259, 33 P. 848; Garberino v. Roberts, 109 Cal. 125, 41 P. 857; Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.(N.S.) 338, 132 Am.St.Rep. 72; San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 P. 325. None of the foregoing authorities are in point.

Respondent also relies on the authority of North Stockton, etc., Co. v. Fischer, 138 Cal. 100, 70 P. 1082, 71 P. 438, wherein the court used the following expression: "The plaintiff could not put the defendant in default without demanding payment and tendering a deed. Neither could defendant put plaintiff in default without tendering the amount due and demanding a deed." In support of the argument quoted, the court in the same opinion relies on Leaird v. Smith, 44 N.Y. 618, 625, and quotes therefrom as follows: "It is impossible to perceive that either party could complain of the other without first tendering a full performance." These observations are general. Moreover, it will be observed in reading the North Stockton, etc., Co. v. Fischer Case, supra, that the expression, "neither could defendant put plaintiff in default without tendering the amount due and demanding a deed," is clearly obiter dictum. In the case at bar appellant had not only tendered performance, but had in fact fully performed the contract in every respect.

[1, 2] As an undisclosed principal, respondent's liability attaches just as definitely and effectively as if his signature appeared upon the original contract of sale. The assignment of the contract by respondent to Snyder did not release respondent from his obligation to appellants; the rights and liabilities of the parties to the contract remained the same. Nor can respondent be heard to complain because he had received no notice of compliance or because no demand had been made upon him for a deed. No demand was necessary. Chatfield v. Williams, 85 Cal. 518, 24 P. 839; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 P. 899; Van Buren v. Green, 120 Cal.App. 461, 7 P.(2d) 1079. Respondent was already in default and had been for months before the action was commenced. During all of the time that appellants were making payments on account of the purchase price of the lot and up until the time the action was filed, respondent's connection with the transaction had been concealed. Moreover, it appears from the evidence and from respondent's answer to plaintiffs' complaint, that a demand or notice would have been futile, and the law does not require idle acts. Section 3532, Civ.Code; Hooe v. O'Callaghan, supra; San Diego Construction Co. v. Mannix, supra; Tatum v. Levi, 117 Cal.App. 83, 3 P.(2d) 963.

[3, 4] Respondent is hardly in a position to set up, as a defense, laches on the part of appellants when, by his own conduct, he kept appellants in ignorance of his relation to the transaction even up to and including the filing of an untruthful answer denying any connection therewith. Respondent urges that if appellants had acted promptly in giving respondent notice and in making demand for a deed, respondent could have obtained a conveyance from the bank trustee and thereby effected a substantial saving. Such claim is merely a speculative argument at the most. There is nowhere, in the briefs, the evidence or the pleadings, any assurance that respondent would have done so. The courts "ordinarily take the attitude that parties should be careful about making contracts, and will not relieve them from performance for light and trivial reasons. The parties may have made an unfortunate arrangement, but when they have entered into it voluntarily, they are bound by it, in the absence of equitable grounds for avoidance. The parties must be presumed to have contracted with reference to existing conditions which are known to them. Moreover, unforeseen hardships is no excuse. Thus, where one contracts to furnish capital, a financial panic does not excuse performance. And, although there is some authority to the contrary, the general rule seems to be that the fact that compliance with his contract would involve greater expense than he anticipated will not excuse the promisor. Nor is it a defense that the law has rendered performance difficult or very expensive." 6 Cal.Jur., § 259, p. 434, and cases there cited. Furthermore, respondent received his share of the benefits of appellants' purchase when the assets and proceeds of the venture between respondent and Snyder were divided, and it was respondent's duty to guard against loss resulting from a liability of which he must be charged with knowledge. There is nothing in the record that can, under the law, operate to relieve respondent of his obligations under the contract. In the absence of legal objections, it is appellants' right to have the contract performed and it is the function of the court to enforce performance unless such performance is prevented by valid reasons that intervene. Respondent and Snyder launched the venture in connection with which appellants purchased the lot in question; appellants thereafter faithfully performed their part of the agreement in every respect, and respondent and Snyder, having defaulted, are jointly and severally liable to appellants for the return of the purchase price.

The finding by the trial judge that appellants were guilty of laches as to respondent, and that each and all of the causes of action were barred by appellants' laches, is wholly and entirely unsupported by the evidence. See Moresco v. Foppiano et al. (Cal.Sup.) 60 P.(2d) 430.

[5] The judgment appealed from is reversed, with direction to enter judgment against respondent as prayed. The attempted appeal from the order denying the motion to vacate the judgment is dismissed. Such order is not appealable.

I concur: YORK, J.;

I dissent: HOUSER, P. J.

KOYER v. DETROIT FIRE & MARINE INS. CO. OF DETROIT, MICH. et al. *

SAME v. PACIFIC NAT. FIRE INS. CO. OF CALIFORNIA et al.

Civ. 10514.

District Court of Appeal, Second District,
Division 1, California.

Sept. 29, 1936

Rehearing Denied Oct. 23, 1936.

Hearing Granted by Supreme Court
Nov. 25, 1936.

1. Insurance 🔑612(3)

Where appraiser selected by insured and appraiser selected by insurer were equally at fault in delaying selection of umpire, failure of appraisement within 90-day period was not fault of insured so as to preclude him from resorting to legal action (Gen.Laws 1931, Act 3735, § 1).

2. Insurance 🔑612(3)

Where 90-day period fixed by policy expired without completed appraisement for cause not attributable to insured or his appraiser, limitation on insured's right to sue was removed, and his motive in withdrawing from appraisal proceedings was immaterial as regards right to maintain suit.

3. Insurance 🔑661

Admission of evidence as to condition of damaged building as found from 12 to 17 months after earthquake insured against *held* not error, notwithstanding subsequent earthquakes, where testimony disclosed that condition of building remained unchanged and that later shocks caused no substantial damage.

4. Insurance 🔑666

Amount received by insured from plate-glass insurance could not be deducted from judgment against insurers for damage caused by earthquake, where court had instructed jury that in arriving at value of building they should disregard any portion thereof covered by insurance other than that of defendant companies.

5. Insurance 🔑598

Where, under policies, loss was payable 90 days after receipt of preliminary proofs of loss by insurers, amount of loss caused by earthquake *held* capable of being made certain by calculation, so that interest was allowable from date when loss became payable, as against contention that interest should not have been allowed prior to judgment (Civ. Code, § 3289).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Actions by A. S. Koyer against the Detroit Fire & Marine Insurance Company of Detroit, Mich., and another, and against the Pacific National Fire Insurance Company of California and another. The actions were consolidated. From adverse judgments, the named defendants appeal.

Judgments modified and, as so modified, affirmed.

Thornton, Menzies & Penney, of Los Angeles, for appellant Detroit Fire & Marine Ins. Co. of Detroit, Mich.

Keyes & Erskine, of San Francisco, and Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant Pacific Nat. Fire Ins. Co. of California.

Laurence B. Martin, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Consolidated actions on policies of fire insurance on account of loss suffered by earthquake.

The principal defense of the insurers was that the actions could not be maintained because of plaintiff's alleged failure to comply with the provisions of the policies requiring proceedings for arbitration of the amount of the loss.

The policies provided that the insurers and insured should each appoint an appraiser who would appoint an umpire to adjust the loss, the decision of any two of them to constitute the award and establish the loss. Each policy further provided: "If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this Company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement."

Appraisers and an umpire were appointed, but the appraisement was not completed and no award was made. After the expiration of the 90-day period, plaintiff withdrew from further participation in the appraisement and notified his appraiser to proceed no further therewith. He then instituted these actions. Each party relies upon the language which we have quoted from the policies. It is conceded by plaintiff, as it must be, that the provision for the appraisement of the loss is a valid one and that, unless he has done that which was required of him with reference to an appraisement, he has no right to sue.

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*For subsequent opinion see 70 P.2d 927.

It is the contention of the defendants that the failure to complete the appraisal within the 90-day period was attributable to the plaintiff because he interfered with the selection of an umpire and delayed the submission of amended proofs of loss. Except for the delays for which they seek to hold plaintiff responsible, the appraisement, as the defendants contend, would have been completed in time.

After the appraisers were appointed, they agreed upon one Brent as umpire. Upon being advised of this selection, plaintiff expressed his objection thereto, and a month later another man was selected by the appraisers. After plaintiff's objection to Brent, expressed on or about June 1, 1933, plaintiff was not consulted with reference to the appointment of an umpire and took no part therein. The failure of the appraisers to promptly appoint an umpire after the rejection of Brent is wholly unexplained. Plaintiff was not responsible for this delay nor was his appraiser shown to have been negligent or obstinate in the selection of an umpire. Defendants' argument is, in effect, that plaintiff had no right to voice his objections to the selection of Brent, and that therefore the delay of a month in the appointment of an umpire was attributable to plaintiff. It may be conceded that plaintiff had no right to interfere or to dictate in the matter of the selection of an umpire, but from that fact it does not follow that in so doing he became responsible for the ensuing delay of 30 days in the selection of some suitable person by the appraisers. The appraisal work was undertaken by the appraisers and was carried on without consultation with the umpire, whose services in deciding matters in difference between the appraisers was at no time required. While plaintiff's objections to Brent apparently caused his rejection as umpire, he cannot be held responsible for the delay of 30 days or for any definite time in the final selection.

The loss occurred March 10, 1933, and preliminary proofs of loss were submitted by plaintiff April 11, 1933. On April 13, 1933, defendants mailed to plaintiff objections to the preliminary proofs of loss, as they had a right to do under the policies. Plaintiff thereupon had 10 days within which to present amended proofs of loss. He did nothing within this period, but on May 17, 1933, he mailed to defendants a letter which, while answering defendants' objections to the preliminary proofs in minor particulars, also gave the defendants a detailed estimate by the contractors who had erected the building as to the cost of replacement. This letter and its accompanying data are regarded by defendants as amended proofs of loss and by plaintiff as not more than an attempt at justification of the sufficiency of the original proofs.

It is the contention of the defendants that the appointment of appraisers was not necessary until the amended proofs of loss had been submitted and the defendants had thereafter notified the insured of disagreement as to the amount of the loss, and that therefore the delay in submitting the amended proofs, if they were such in fact, delayed the appointment of the appraisers and consequently the appraisal. But if defendants, as they contend, had the right to delay their notification of disagreement and their demand for the appointment of appraisers until after the submission of amended proofs, and to regard the data furnished on May 17 as amended proofs of loss, there yet remains no basis for the claim that the delay in submitting amended proofs delayed the appraisal. On May 3, 1933, defendants mailed to plaintiff a notice of total disagreement with plaintiff's claims of loss, as provided by section 1 of Statutes of 1909, page 404 (Deering's General Laws 1931, Act 3735). No agreement having been reached within 10 days thereafter as to the amount of the loss, it became the duty of the defendants to forthwith demand an appraisement and to name an appraiser, and it became the duty of the insured within 5 days thereafter to select an appraiser and notify the defendants thereof. Defendants, therefore, did not wait for the submission of amended proofs before giving notice of disagreement, nor did they make demand for appraisement or name an appraiser until May 20, although they could have made such demand and named their appraiser as early as May 13. Therefore the plaintiff's letter of May 17 with its accompanying data, even though it be regarded as an amended proof of loss, is an unimportant factor in resolving the question of responsibility for the delay in the appraisement.

It appears that the umpire finally selected on July 1, 1933, did not accept his appointment until July 10, 1933. The appraisers met with each other to compare notes for the first time on July 1, 1933, which was the date of expiration of the 90-day period after the submission of preliminary proofs of loss. It appears from the testimony of the appraisers that they did not meet at an earlier date to agree upon their appraisement because no umpire had been selected. The statute above referred to in fact requires the appraisers to choose an umpire before commencing the appraisement. But, if the appraisers had acted promptly, after the rejection of Mr. Brent's name on or about the 1st of June, to appoint an umpire and thereafter had proceeded diligently with the appraisement, it might have been completed before July 12. Our attention had not been called to any evidence which would indicate that this could not have been done nor has our inspection of the record disclosed any.

The trial court found "that the failure of the appraisement and the fact that an award or appraisement was not had or completed within the ninety-day period, was through no fault of the plaintiff or of the appraiser appointed by him, or attributable to the said plaintiff or the appraiser appointed by him."

[1] Under the terms of the policies, while an award by the arbitrators would have been conclusive between the parties as to the amount of the loss, it was not a condition precedent to plaintiff's right to sue on the policies. And, if the efforts at arbitration failed for causes not attributable to the insured or his appraiser, the insured was not required to submit the matter to another attempted arbitration. The standard form of policy prescribed by statute removes all doubt as to these features of the contracts. Therefore the rule by which plaintiff's conduct is to be judged is the following: Where a submission to arbitration fails of results by reason of the failure of the appraisers to agree upon an umpire, and both the insured and insurer have acted in good faith so that the failure is not due to the fault of either, the insured has fully performed his obligation as to arbitration and need not proceed further with a view to ultimate arbitration as a condition precedent to suing on the policy. See 94 A.L.R. 502. A reasonable interpretation of the finding which we have quoted is that the delay was caused by the failure of the appraisers to select an umpire and thereafter to proceed diligently with their work. This interpretation, which is borne out by the evidence, would imply that the appraisers were equally at fault—at least that the fault was not entirely that of the insured's appraiser—and under these circumstances it could not be said that the delay was attributable to the insured or his appraiser within the meaning of the policy provisions. The insured would be no more to blame than the insurers. By the terms of the policies the insured was responsible for the fault of his appraiser if it resulted in the failure of the appraisal, and the insurers had an equal responsibility for the conduct of the appraiser appointed by them. When, therefore, the appraisement failed for causes not attributable to the appraiser for the insured (and the failure due to the fault of both appraisers presents such a case), the insured was not precluded from maintaining an action on the policies. The limitation of plaintiff's right to sue was removed when the appraisal failed because of the fault of both appraisers. The provisions of the policies admit of no other construction.

[2] Plaintiff is charged by defendants with having acted in bad faith throughout the appraisement proceedings, but we doubt whether this is a material question. If plaintiff caused the efforts at arbitration to fail, even though he acted in good faith and without intent to defeat the arbitration he would be responsible for the failure. The policies so provide. But, if he was guilty of acts committed in bad faith which did not cause the failure of the arbitration, he would not thereby be foreclosed of his right to sue. When plaintiff appointed his appraiser, he stated that he would insist upon the right to approve the selection of an umpire. He did interfere in the selection of the first umpire chosen but not thereafter. This interference was unjustified, regardless of plaintiff's motives, but, as we have already pointed out, we cannot find as against the finding of the trial court that this single act of interference prevented the completion of the appraisal within the 90-day period. Again, plaintiff is charged with bad faith in withdrawing from the appraisal some 30 days after the expiration of the 90-day period. The evidence showed that he learned from his appraiser what

his estimate of the loss would be and thereupon withdrew from the appraisal proceedings and started suit. But his motive in so doing is of no consequence. The agreement did not call unconditionally for a completed arbitration. Therefore the rule invoked by defendants that each party to an unconditional agreement to arbitrate must in good faith do everything possible to accomplish a final award has no application. When the 90-day period expired without a completed appraisement, for causes not attributable to plaintiff or his appraiser, the limitation upon plaintiff's right to sue was removed. His refusal to proceed further with the appraisal was not made wrongful because he believed it would be to his advantage to prove his damage in court. De Bairos v. Barlin, 46 Cal.App. 665, 190 P. 188.

[3] Error is assigned in the receipt of evidence as to the condition of the damaged building as found from 12 to 17 months after the occurrence of the earthquake insured against. When this evidence was offered, plaintiff's counsel admitted that other shocks had occurred in the meantime. It is conceded that defendants were liable only for the original damage—that which occurred within 72 hours after the commencement of the first shock. The jury found that plaintiff's building was totally destroyed. Manifestly, then, if the conditions testified to as having existed more than a year after the first shock were not attributable thereto, they were not to be taken into account and should not have been described to the jury. The building was a two-story brick structure. It remained unoccupied after the earthquake and was eventually razed. The testimony of plaintiff's witnesses Hubbard and Chadwick related to conditions found to exist when the building was demolished. In allowing testimony as to conditions found to exist during the wrecking of the building, the court obviously attempted to restrict the proof to evidence in rebuttal of that of the defendants. The testimony related principally to conditions that were disclosed in the process of demolition, such as the finding of some fifteen broken floor joists out of a total of several hundred, the pulling away of the second floor joists from the walls, the separation of bridging from joists, and the crushed condition of about 30 per cent. of the bricks within the walls, and broken pipes, which were disclosed when the walls were wrecked. Such conditions as these could not have been ascertained until the building was demolished. The sole ground of defendants' objection was that the evidence was inadmissible until plaintiff had shown that the conditions sought to be proved were not caused by subsequent earthquake shocks or exposure to the weather.

It is a generally recognized rule that before evidence may be received of conditions existing at a remote later date, as proof of conditions existing at an earlier date, a prima facie showing should be made that the conditions have not changed in the meantime. But the rule must always be given a reasonable application and one that takes into consideration the particular facts of the case. The requirement in any case is that there must be a connection shown between the conditions sought to be proven and the causes to which it is sought to attribute such conditions. If the connection established is sufficient to support a reasonable inference that the conditions shown to exist at the later time also existed at the earlier date, the element of time between the two dates is not important. In the instant case the test of the admissibility of the evidence objected to was whether, upon the entire evidence, the conditions found to exist some 17 months later could reasonably be attributed to the first shock rather than to some other cause. If such inference could reasonably be drawn, the evidence was not to be excluded upon the mere suspicion that the hidden damage might have resulted from some later minor shocks or from other causes. The severity of the first shock was not questioned. At that time the upper half of the south wall fell out carrying with it a portion of the roof. All of the walls were badly cracked. The upper part of the front wall was badly shattered and the terra cotta was broken. The front wall was completely disconnected from the side walls. The floors had buckled and settled. The steel girders were badly buckled. The second story floor was disconnected from the side walls of the building. Some of the columns along the side walls were broken loose and extended two or more inches beyond the walls. There was testimony to the effect that the brick in the walls was shattered and the pipes in the walls were broken. There was also testimony that the condition of the building remained unchanged between the date of the original shock and the time when it was razed, and also to the effect that the later shocks caused no substantial damage in the vicinity. Upon this evidence the court as we view it, correctly held that a sufficient foundation had been laid for the offered evidence. A wide discretion must be accorded the trial court in ruling upon the sufficiency of the foundation. The condition of damage as found immediately after the first shock justified a rational inference that the entire damage was caused by the major earthquake. Defendants did not attempt to show any later injuries nor any change of conditions. There was, indeed, ample evidence to support the finding of the jury of total destruction of the building without the evidence given in rebuttal. We are satisfied that the evidence objected to was received under a proper construction of the rules of evidence.

[4] Defendants' point that the sum of $602 received by plaintiff from plate-glass insurance should have been deducted from the judgment is not well taken. The verdict fixed the sound value of the building at $27,500 and the replacement cost at $31,000. No other issue was submitted to the jury. The court, as a condition to a denial of a new trial, caused a reduction of the amount found to be the replacement cost to the sum of $27,500, and under a provision of the policies fixed the liability of defendants at 90 per cent. of that amount. The jury was instructed that in arriving at the value of the building they should disregard any portion or portions thereof covered by insurance other than that of defendant companies. We must therefore assume that the value of the building as found by the jury was exclusive of the value of the plate glass, insurance of which was carried by other companies.

[5] The judgment allowed interest from the date of the occurrence of the loss. Defendants assert that no interest prior to judgment should have been allowed. Under the terms of the policies the loss was payable 90 days after receipt of preliminary proofs of loss by the companies. This date would have been July 12, 1933. Although defendants disputed the amount of the loss, they did not deny liability. Therefore the earliest date upon which interest could commence was the date when the loss was payable to the insured. Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and these are the methods of adjustment contemplated by the parties and stipulated in the policies. Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss. In each case total destruction of the building was taken as the basis of the loss. In such a case the liability of each insurer was for the proportion of 90 per cent. of the actual value of the property at the time of the loss which its coverage bore to the total insurance on the property. By the terms of the policies the actual value could not exceed the amount which it would cost the insured to repair or replace the property with material of like kind and quality, "said cash value to be *estimated* without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings." (Italics ours.) There was available to the parties before suit all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them or to the court or jury upon a trial of the question of loss. The contracts of insurance prefer settlement by estimate or calculation of loss to the determination of the question in court. Where the parties have agreed upon the use of that method in fixing the amount of the insurers' liability and have bound themselves to settle upon that basis, they cannot consistently ask the court to declare the method they have adopted as an important element of their contract to be inadequate and uncertain and insist that trial of the issue in court is necessary for a correct and just determination. The principal complaint of the defendants here is that the matter has been taken to court, and, while contending that calculation and appraisement furnish an uncertain means

of fixing the insurers' liability, they also complain bitterly of the conclusions reached by the jury. In support of our conclusion that the loss in question was capable of being made certain by calculation, we refer to the following authorities: Mabrey v. McCormick, 205 Cal. 667, 272 P. 289; Anselmo v. Sebastiani, 219 Cal. 292, 26 P.(2d) 1; Jacobs v. Farmers' Mutual Fire Insurance Co., 5 Cal.App.(2d) 1, 41 P.(2d) 960; Pacific Coast Adjustment Bureau v. Indemnity Insurance Co., 115 Cal.App. 583, 2 P.(2d) 218; Hargett v. Gulf Insurance Co. (Cal.App.) 55 P.(2d) 1258; National Union Fire Insurance Co. v. California Cotton Credit Corp. (C.C.A.) 76 F.(2d) 279. Our views are entirely consistent with the holding of the Supreme Court in Perry v. Magneson, 207 Cal. 617, 279 P. 650. The liability in that case depended upon the amount that had actually been expended in the completion of a building, whereas in the instant cases calculation of the amount of liability was adopted as an essential part of the insurance contracts.

The judgment in each case is modified by substituting July 12, 1933, for March 10, 1933, as the date from which interest is allowed, and, as modified, the judgments are affirmed, respondent to recover costs of appeal.

We concur: HOUSER, P. J.; DORAN, J.

* * *

16 Cal.App.2d 597

RODEHAVER v. MANKEL.

Civ. 5554.

District Court of Appeal, Third District, California.

Sept. 29, 1936.

Rehearing Denied Oct. 29, 1936.

Hearing Denied by Supreme Court Nov. 25, 1936.

1. Judgment 🔑564(1)

Where plaintiff, defendant, and intervener in suit all sought dissolution and accounting of alleged copartnership, and court held that defendant was entitled only to costs against plaintiff and intervener, judgment amounted to determination that account between defendant and intervener was completely settled, and on failure of defendant to appeal, judgment became final (Code Civ. Proc. § 387).

2. Judgment 🔑627

Where party intervened in suit for dissolution and accounting of alleged copartnership, and there was no demurrer to cross-complaint on ground of misjoinder of parties, nor motion to strike out cross-complaint on that ground, judgment was binding on defendant as to intervener and was res judicata on issues determined (Code Civ.Proc. § 387).

3. Parties 🔑45

Where trial court made order granting party permission to intervene in suit, order amounted to determination that intervener had such interest in subject-matter of suit as to entitle him to become party thereto (Code Civ.Proc. § 387).

4. Judgment 🔑627

Doctrine of res judicata applies equally to proper issues which are raised and determined by means of complaint in intervention, as it does to issues which are tendered by pleadings of original parties.

5. Judgment 🔑576(1)

Where defendant had pleaded present claim in former action in which plaintiff had intervened, and court had passed adversely on merits of claim in that action from which judgment defendant had not appealed, judgment of former action was res judicata of issues determined therein, regardless of any errors which might have occurred in determination thereof (Code Civ.Proc. § 387).

6. Evidence 🔑354(11)

In action for indebtedness on open book account, permitting plaintiff to introduce ledger entries in name other than defendant's *held* not error, where record indicated that case was tried by both parties on theory that other name was merely name under which defendant conducted business.

7. Appeal and error 🔑882(18)

Party could not, on appeal, object to items included in judgment which he had specifically conceded to be correct before referee.

8. Appeal and error 🔑907(2)

In absence of testimony on which referee had determined items of account which had been adopted by trial court, reviewing court would assume that findings were supported by evidence (Code Civ.Proc. § 645).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by H. B. Rodehaver against C. Mankel, wherein the defendant filed a cross-complaint. From an adverse judgment, the defendant appeals.

Affirmed.

Howe, Hibbitt & Johnston, of Sacramento, for appellant.

Devlin & Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against him in the sum of $2,066.63 for a balance due the plaintiff on an open book account. In a cross-complaint filed by the defendant, he claimed that plaintiff owed him $9,500 as a balance due on an open book account. In plaintiff's answer to the cross-complaint he alleged that the judgment which was rendered in a former case between the same parties was res adjudicata with respect to the defendant's claim asserted in his cross-complaint. In the present action the court found that the defendant was indebted to plaintiff on an open book account in the sum of $2,066.63; that the judgment in the former action is res adjudicata and that defendant was entitled to recover nothing on his cross-complaint. Judgment was accordingly rendered in favor of the plaintiff for the sum of $2,066.63.

The appellant contends that the court erred in admitting in evidence, over his objection, the judgment roll in the former case upon the plea of res adjudicata for the reason that it appears the defendant's claim asserted in his cross-complaint grew out of "an entirely different contract" from the one determined in the former case; that the amount of the judgment in this case is excessive, and that the court erred in admitting evidence affecting an account with the Northwest Construction Company, a stranger to the transactions involved in this proceeding.

We are of the opinion the court did not err in admitting in evidence the judgment roll in the former cause. The court's finding that the former judgment between the same parties is res adjudicata upon the claim asserted by the defendant in his cross-complaint in this suit appears to be adequately supported by the evidence.

An examination of the judgment roll of the former action discloses the fact that one J. C. North brought suit against this defendant, C. Mankel, in 1930, for dissolution and an accounting of an alleged copartnership in the business of construction work, including highway construction, surfacing of roads, ditches, excavations, trucking, and in all equipment owned by them and used for those purposes. By leave of court, this plaintiff, H. B. Rodehaver, intervened in that suit and filed a cross-complaint, alleging that he was a partner with the defendant Mankel in the same business which was involved in the suit for an accounting and dissolution of copartnership between North and Mankel; that on January 12, 1931, by mutual consent, that copartnership was dissolved, but that the defendant, Mankel, collected and retained proceeds derived from that business and from the sale of machinery and equipment belonging to the copartnership which he failed and refused to account for, and prayed for an accounting thereof. Answering the complaint in intervention, Mankel denied the material allegations thereof and affirmatively alleged that in October, 1929, he did orally agree with Rodehaver to enter into a joint adventure involving certain construction work to be performed by them for the Pacific Gas & Electric Company and with the Northwest Construction Company, but that Rodehaver collected and retained in his possession money derived from the proceeds of those contracts, which he failed and refused to account for, and prayed for an accounting therefor. North also answered the complaint in intervention, denying the material allegations thereof and praying that the intervener take nothing thereby. In that suit the court adopted findings holding specifically that the allegations of both the original complaint and the complaint in intervention were untrue. The court further found that the defendant's allegations in reply to the cross-complaint were true. As conclusions of law, the court held that the defendant Mankel was entitled to recover only his costs of suit against both North and Rodehaver. The evidence which was adduced in that case is not before us. Judgment was rendered pursuant to the findings. No appeal was taken from that judgment and is become final.

[1] That judgment amounted to a determination that there was an agreement of joint adventure between Mankel and Rodehaver with respect to the construc-

tion contracts with the Pacific Gas & Electric Company and with the Northwest Construction Company, but that nothing was due from Rodehaver to Mankel on that account, for the reason that the court awarded Mankel nothing more than his costs of suit. It must, therefore, be inferred that the court determined that the account between Mankel and Rodehaver involving those contracts was completely settled. If, as a matter of fact, Rodehaver did owe Mankel a balance derived from the joint adventure, Mankel should have appealed from that judgment, in the absence of which it became final and conclusive respecting the adverse claims which were involved in that suit. No such appeal was taken. That suit also determines the fact that Rodehaver had no interest in the general copartnership with Mankel in construction work, which was alleged in the original complaint.

It is true that the clerk first inadvertently entered judgment in that suit to the effect that an accounting between Mankel and Rodehaver was "denied without prejudice." But upon motion based on adequate notice therefor, the court subsequently set that inadvertent provision of the judgment aside with the specific statement that it was not so determined by the court. The above-quoted clause was eliminated, leaving a mere judgment in favor of Mankel for his costs of suit, with the necessary inference that Rodehaver owed Mankel nothing growing out of the copartnership or joint adventure. This affirmative action of the court was certainly notice to Mankel that if he claimed the evidence showed a balance due from Rodehaver growing out of the joint adventure he should have appealed from the judgment which allowed him only his costs of suit.

[2, 3] It is asserted by the appellant that since it was held in the former suit that Rodehaver was not a copartner in the general construction business, but, on the contrary, that he was a mere partner with Mankel in a special joint adventure involving certain contracts for construction with the Pacific Gas & Electric Company and with the Northwest Construction Company, he was, therefore, not a proper party to that suit and should not have been permitted to intervene therein, and that the judgment determining that a partnership did exist between Mankel and Rodehaver in certain contracts is not binding on this appellant and that the former judgment is not res adjudicata of that issue in this proceeding. We are of the opinion that result does not follow. There was no demurrer to the cross-complaint in the former action on the ground of misjoinder of parties, or at all, and no motion was made to strike out the cross-complaint on that ground. The cause was tried on the theory that Rodehaver was a proper party in that suit, and that the joint adventure with respect to the two contracts was mingled with the general contract for construction work which was involved therein. Indeed, Mankel tendered that very issue in the former action. That issue was tried and determined in the former suit and the judgment in that regard is therefore binding on the appellant. When the trial court made its order in the former action granting this respondent, Rodehaver, permission to intervene in that case under the provisions of section 387 of the Code of Civil Procedure, that order amounted to a determination that the intervener had such an interest in the subject-matter of that suit as entitled him to become a party thereto. Townsend v. Driver, 5 Cal.App. 581, 90 P. 1071; 20 Cal. Jur. 525, sec. 29. It may not be said, in the absence of an appeal from that judgment, that he was not a proper party to the suit, or that the judgment is not res adjudicata in this action as to the issues which were actually, or by necessary implication, determined thereby.

[4] The doctrine of res adjudicata applies with equal force to the proper issues which are raised and determined by means of a complaint in intervention, the same as it does to the issues which are tendered by the pleadings of the original parties to the action. The intervener becomes an actual party to the suit by virtue of the order authorizing him to intervene. In the case of Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 766, 103 Am.St. Rep. 66, it is said: "As between the parties to the action, the judgment therein is an estoppel as to all matters which are actually and necessarily included in the judgment. Code Civ.Proc., § 1911. The determination in the former action of an issue presented on the part of the defendant therein by way of counterclaim, or in recoupment, or by way of a cross-complaint against the plaintiff, is res judicata, as fully as if determined in a separate and independent action brought by the defendant against the plaintiff. Freeman on Judgments, § 282; Black on Judgments, §

761; Taylor on Evidence (9th Ed.) § 1699; Timmons v. Dunn, 4 Ohio St. 680; Howell v. Goodrich, 69 Ill. 556; Litch v. Clinch, 136 Ill. 410, 26 N.E. 579; McNicholas v. Lake, 13 Colo.App. 164, 56 P. 987; Ehle v. Bingham, 7 Barb. [N.Y.] 494; Baker v. Stinchfield, 57 Me. 363; South & North, etc., R. Co. v. Henlein, 56 Ala. 368; Jennison v. West Springfield, 13 Gray [Mass.] 544."

To the same effect is the text found in 2 Freeman on Judgments (5th Ed.), 1665, § 786, as declared on page 1668 thereof.

[5] Since the appellant in this case affirmatively pleaded his present claim in answer to the intervener's complaint in the former action, and the court passed on the merits of that claim by adopting findings with relation thereto, and by rendering judgment in his favor for costs of suit, in the absence of an appeal from that judgment, we must assume the court determined there was no balance due to this appellant. If the court failed to take evidence in that case of the status of the account between Rodehaver and Mankel with relation to the contracts in question that must have been the fault of this appellant for that account was an issue, and evidence with relation thereto would have been competent. If testimony was adduced which shows that this appellant was entitled to judgment therein other than for his costs of suit, and the judgment is not in accordance with the evidence, that error should have been corrected on appeal. In other language, the judgment in the former action is res adjudicata and conclusive on the issues which were determined therein or which under the pleadings should have been decided therein regardless of any errors which might have occurred in the determination thereof. Ernsting v. United Stages, Inc., 206 Cal. 733, 276 P. 103. The Lamb Case, supra, says in that regard:

"The omission of the court to give him any relief for the payment of this excess was, in its legal effect, an adjudication that he was not entitled to relief therefor. Thompson v. McKay, 41 Cal. 221. The court erred in giving this judgment. Laidlaw v. Marye, 133 Cal. 170, 65 P. 391. But the plaintiff did not appeal therefrom, and the judgment became a final determination of the respective rights * * * upon this issue. * * *

"The judgment is none the less a bar for the reason that it was erroneous. 'In passing upon the plea of res judicata, the question is not whether a court decided the point involved right or wrong, but the question is, did the court decide the point, and is the decision final?' Chouteau v. Gibson, 76 Mo. 38. By failing to appeal and seek a correction of the error through a reversal of the judgment, it is as conclusive upon the plaintiff as if at the trial he had omitted to present sufficient evidence to the court in support of his demand."

There appears to be no doubt that the claim of $9,500 which was asserted by the appellant in his cross-complaint in this suit involves the same transactions which were included in the issues determined in the former case. When the judgment roll in the former action was offered in evidence on this trial, the following colloquy occurred:

"Q. [By Mr. Wulff, attorney for respondent.] In your Answer and Cross-Complaint in North v. Mankel, you set forth that in October, 1929, the Northwest Construction Company entered into a contract with the Pacific Gas & Electric Company to do certain work, is that correct? A. Yes.

"Q. Now, that work in October, 1929, is the same work you have testified to heretofore in this action, is it not? A. Yes, the same work.

"Q. * * * You state in there that you have not received any of the money coming from that work except $10,000.00; now, in this proceeding, this is the same money that you are talking about, is it not, the same $10,000.00?

"Mr. Meldon [attorney for appellant]: We will admit it.

"Mr. Hibbitt [attorney for appellant]: We will admit that.

"Mr. Wulff: In other words, I think it is conceded, * * * that both actions cover the same subject matter. Isn't that correct? If it is not, I can save time: You know it is and I know it is.

"Mr. Meldon: It arises out of the same transaction, yes."

Since the transactions which were involved in the former suit are the same as those which are included in this suit, and the parties to this suit were also parties to that suit, the former judgment is res adjudicata with respect to that issue.

[6] The court did not err in admitting testimony with relation to the account of

the Northwest Construction Company. It appears that much of the evidence with respect to the account of the Northwest Construction Company was brought out by the appellant himself. He offered in evidence the bank account of that company. We are directed to no objection to this evidence which was made by the appellant. This cause is based on an open book account. The plaintiff is a broker. His claim against the appellant is for premiums earned in furnishing Mankel with bonds and insurance policies in connection with the various contracts for construction which were performed over a period of time from November, 1925, to October, 1930. In proof of the claim the plaintiff offered in evidence the original pages of his ledger account thereof. It consisted of ten separate sheets which were received in evidence without objection. It does appear that the last two sheets of the ledger were headed "Northwest Construction Company." The original ledger entries appear in the name of "Starring & Mankel." Mr. Rodehaver testified that Mankel and Starring were copartners in the construction business, and that all of the entries in the ledger apply to the same account. He said:

"Q. I will show you these cards, ledger cards, and ask you whether or not that represents the transaction of business with Mr. Starring and Mr. Mankel? A. Yes."

This witness also testified the name in which the account was kept was changed, first from Starring & Mankel to Mankel & Starring, then to Mankel & Starring and C. Mankel, and finally to Northwest Construction Company, at the request of Mr. Mankel, who said they were conducting the construction business under that fictitious name. The record furnishes ample evidence to support the finding that these ledger sheets all apply to the account with the appellant, and that they are therefore competent evidence in this case. An examination of the record indicates that the case was tried by both parties on the theory that the Northwest Construction Company was merely the name under which Mankel conducted the business which is involved in this suit. That fact is not denied. No objection to the reception in evidence of these ledger sheets was made by the appellant, except on the ground that some of the items were not in accord with the bill of particulars which was previously rendered by the plaintiff. There appears to be no merit in the contention that the court erred in receiving evidence with respect to the account in the name of the Northwest Construction Company.

The appellant claims the amount of the judgment is excessive. Upon the record which is before us we are unable to say the amount of the judgment which was awarded to the plaintiff is excessive. As we have previously held there is substantial evidence to support that portion of the book account which was kept in the name of Northwest Construction Company as a proper part of the account against the appellant. Moreover, the judgment is based on the findings of fact, with respect to the various items of the account, which were adopted and filed in the case by a referee who was appointed by the court under the provisions of section 638, subd. 2, of the Code of Civil Procedure (as amended by St.1933, p. 1877). These findings of the referee were adopted by the court in its conclusions of law, as follows: "As conclusions of law to the above and foregoing facts and to the facts as found by the referee, as set forth in his said report, the court finds as follows: * * *"

[7, 8] Upon demand, a bill of particulars was furnished to the appellant under the provisions of section 454 of the Code of Civil Procedure. It consists of 132 separate items. A hearing of the facts was had before the referee, who received evidence and considered separately each of these items. The referee adopted and filed his findings upon each of these items. It appears that many of these items which are now objected to by the appellant were conceded by him at the hearing before the referee as shown by his findings. None of the items which were disallowed by the referee are included in this judgment. An appellant may not on appeal object to items which he specifically conceded to be correct before the referee. Moreover, the evidence which was adduced at the hearing before the referee is not before this court. The findings of a referee may be reviewed on appeal only in the same manner in which findings of the court can be reviewed. Section 645, Code Civ.Proc. Under the circumstances of this case we must assume, in the absence of testimony upon which the referee determined the various items of the account, that each of his findings is amply supported by the evidence. Lewis v. Grunberg, 205 Cal. 158, 270 P. 181; In re Riccardi, 80 Cal.App. 66, 73, 251 P. 650. The findings of the

referee became the findings of the court in the present action. There is no evidence before us to dispute them. We may, therefore, not hold they are not supported by the evidence. There is nothing in the record to show that the amount of the judgment is excessive.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

16 Cal.App.2d 687

PEOPLE v. McDONALD.

Cr. 1513.

District Court of Appeal, Third District, California.

Oct. 3, 1936.

1. Forgery 🔑32

Information alleging that check known to accused to be false and forged was passed as true and genuine, to the prejudice of a named party, which did not allege whether name which was forged was that of fictitious person or of natural living person, *held* not demurrable (Pen.Code, § 470).

2. Criminal law 🔑1169(2)

In forgery prosecution, any error in introduction of improperly authenticated exemplars of fingerprinting and photographs of accused *held* not prejudicial, where record showed that accused passed fictitious check for which he was tried and also numerous other checks of similar character (Pen.Code, § 470).

3. Forgery 🔑35

In forgery prosecution, prosecution was not required to establish whether name of individual forged was real or fictitious (Pen. Code, § 470).

4. Criminal law 🔑829(1)

Refusal of instruction for accused *held* not error, where substance of such instruction was given in another instruction.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

R. McDonald was convicted of forgery, and he appeals.

Affirmed.

Chester Monette, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted of the crime of forgery upon an information based upon section 470 of the Penal Code, and appeals from the judgment of conviction. The charge against the appellant in the information is in the following words and figures:

"The said defendant R. McDonald, is accused by the District Attorney of the County of Humboldt by this information of the crime of forgery committed as follows: The said defendant R. McDonald, on the 18th day of March, A. D. nineteen hundred and thirty-six, at and in the County of Humboldt and State of California, did then and there unlawfully, feloniously, knowingly, falsely and fraudulently, and with intent to prejudice, damage and defraud Ronald Russell, make, alter, forge and counterfeit a certain instrument in writing, in the words and figures following, to-wit:

"Eureka, Cal. Mar. 18, 1936. No.
"Commercial
"The Bank of America 12
"Red Bluff
"Pay to the order of Ronald Russell
$5 no/100
"Five Dollars and no/100—Dollars
"Holmes & Wing, Inc.
"R. V. Wing
"Endorsed: Ronald Russell.

and he, the said R. McDonald, then and there well knowing the same to be false, altered, forged and counterfeited, did then and there, to-wit: on the 18th day of March, 1936, at and in said County of Humboldt, wilfully and unlawfully, feloniously and fraudulently, and with intent to prejudice, damage and defraud said Ronald Russell, utter, publish and pass the same as genuine and true to the said Ronald Russell, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California."

The appellant filed a general demurrer to the information, which was overruled.

[1] On this appeal the first ground alleged for reversal is that the information does not charge whether the name alleged to have been forged was that of a fictitious person, or of a natural, living person.

In People v. Gayle, 202 Cal. 159, 259 P. 750, the Supreme Court has decided that it is unnecessary to allege whether the signature to a false instrument is the forgery of an existing person, or of a fictitious person. Under section 470 of the Penal Code, the crime of forgery may consist of making a false instrument or of passing a false instrument.

In the case of People v. Lucas, 67 Cal. App. 452, 227 P. 709, this court had before it a cause in which the charging part of the offense against the defendant was in language identical with that employed in the instant case. The judgment of conviction in the Lucas Case was upheld. The ruling of the court in the case of People v. Lucas was affirmed in People v. Whitaker, 127 Cal.App. 370, 15 P.(2d) 883.

The case of People v. Whitaker, 127 Cal. App. 370, 15 P.(2d) 883, held the essential elements to be alleged are the making of a false instrument, and the intent to defraud. The information in this case alleges that the check was passed as true and genuine; that the defendant knew the same to be false; that it was passed to the prejudice of one Ronald Russell. This appears to be all that is necessary. People v. Smith, 103 Cal. 563, 37 P. 516, and People v. Lucas, supra.

The defendant relies upon the case of People v. Carmona, 80 Cal.App. 159, 251 P. 315. That action was based upon the provisions of section 476 of the Penal Code, and therefore the ruling in that case is not controlling here.

Appellant further alleges that the court erred in admitting additional checks prepared and passed in similar fashion by the appellant before proving the corpus delicti in the instant case. An examination of the record, however, shows that the testimony given by the witness Ronald Russell, upon whom the fictitious check was passed, amply set forth all the facts and circumstances showing the corpus delicti and the offense committed by the appellant, before similar checks passed by the appellant were offered and admitted in evidence.

The testimony in the case shows the preparation of the check by the appellant; the fact of its passing; that he received money from Ronald Russell thereon; that the check was fictitious; and this was followed by the introduction in testimony of a number of similar checks which appellant had passed upon other persons.

The record also contains testimony to the effect that at the time the appellant was passing fictitious checks he was more or less under the influence of liquor. The appellant in his testimony disclaimed all knowledge of passing the fictitious checks. Upon the trial of the case it appears that testimony of fingerprints of the defendant taken at the Multnomah county jail, and also photographs alleged to be of the appellant taken at the Multnomah county jail, were admitted in evidence.

[2] Upon his direct examination the appellant testified, in answer to questions propounded by his counsel, that he had never been in jail. To controvert this statement the prosecution offered, and succeeded in introducing in testimony, exemplars of fingerprinting, and also photographs alleged to be photographs of the appellant. The fingerprint exemplars and photographs do not appear to have been authenticated other than by letters sent therewith in reply to requests made by the district attorney. That they were not properly authenticated may be admitted, but, in view of the record showing absolutely that the defendant passed, not only the fictitious check upon which he was tried, but also a number of other checks of similar character, no prejudice could possibly be caused the appellant by any error of the court in permitting the introduction of the fingerprint copies or of the photographs.

[3] The appellant also complains of the refusal of the court to instruct the jury that it is incumbent upon the prosecution to establish by evidence beyond a reasonable doubt that there was no such person as R. V. Wing (this was the name signed to the fictitious check); that at the time the defendant knew there was no such person; that said check was passed by the defendant with intent to defraud. As we have shown, it is not necessary in the first place either to allege or prove that the name of the individual forged was real or fictitious. We add the additional case of People v. Jones, 12 Cal.App. 129, 106 P. 724.

[4] The appellant further contends that the court erred in refusing to give an instruction based upon the intoxication of the appellant at the time of the passing of

the check in question. A reference to the instructions given by the court shows that the jury was properly instructed that, whenever an intent is necessary to establish a crime, the jury may take into consideration such fact. Having given the substance of the instruction, the court was not required to repeat the same at the request of the appellant. We do not need to quote authorities in support of this statement. The record shows that the appellant's motion for a directed verdict was denied.

Finding no merit in the appeal, the order and judgment of the trial court are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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16 Cal.App.2d 645

BAILEY et al. v. WILSON.

Civ. 10971.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Negligence 🔑136(32)

Whether last clear chance doctrine applies depends entirely on existence of elements necessary to bring it into operation, existence of which is ordinarily fact question to be determined by fact finder.

2. Negligence 🔑136(32)

Question for court in determining applicability of last clear chance doctrine is whether there was any substantial evidence in facts and circumstances in evidence and in presumptions arising by law and inferences reasonably to be drawn therefrom, of each of the elements of the doctrine, and not whether defendant should have been held for damages under the doctrine.

3. Negligence 🔑83

Last clear chance doctrine cannot be invoked in favor of one who was aware of danger and able to escape it by exercising ordinary care, but failed to do so.

4. Automobiles 🔑245(72)

In action for death of pedestrian when struck from behind by automobile, question whether pedestrian whose hearing and eyesight were good saw lights of automobile and heard screech of tires when brakes were applied *held* for trier of facts.

5. Automobiles 🔑245(6)

Where evidence shows that pedestrian injured by automobile was standing or walking in highway with back turned toward oncoming automobile, whether danger of his being struck by automobile was obvious to motorist is for fact finder.

6. Automobiles 🔑246(58)

Where it appears that pedestrian was in path of automobile and plainly visible to driver, it may be concluded that driver must have seen pedestrian, and hence jury may be instructed as to last clear chance doctrine, though there is no direct evidence that driver actually knew of pedestrian's presence.

7. New trial 🔑39

On motion for new trial because of refusal to give requested instructions as to last clear chance doctrine, question was merely whether there was substantial evidence of each and all elements essential for application of doctrine.

8. Negligence 🔑83

Where defendant is able to avoid injuring negligent plaintiff and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to injury and is not proximate cause thereof, preventing application of last clear chance doctrine.

9. Automobiles 🔑245(91)

In action for death of pedestrian when struck from behind by automobile, question whether pedestrian was guilty of negligence, which continued up to time of collision, because of failure to step from path of automobile, lights of which were burning and tires of which screeched when motorist applied brakes, was for trier of facts.

10. New trial 🔑39

In action for death of pedestrian when struck from behind by automobile, court did not abuse discretion in granting new trial after having refused to give instructions concerning last clear chance doctrine, where pedestrian had given no indication that she was aware of approaching automobile, lights of which were burning and tires of which screeched when motorist applied brakes.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Thomas Bailey and others against Jerry Wilson. From an order granting plaintiffs a new trial, the defendant appeals.

Order affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

George L. Greer, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

A. G. Van Deventer, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal in a personal injury action from an order of the superior court granting a new trial on the ground of "errors of law" after a verdict in favor of the defendant. The defendant assigns as error the abuse of the court's discretion in granting the new trial. The court refused to give to the jury instructions, requested by the plaintiffs, covering the doctrine of last clear chance, and the sole question necessary for determination on this appeal is whether the court should have instructed the jury on this doctrine. If the court should have done so, the order must be affirmed.

The statement of facts set forth below is taken from the defendant's brief, although it is somewhat boiled down: The accident occurred at night upon a boulevard in South Pasadena which had been newly paved with asphalt and crushed rock, making the surface thereof black in color. Decedent, dressed in black, was going in a southerly direction across Pasadena avenue at a place where there was no intersection, crosswalk, or pedestrian crossing. Defendant was driving in a westerly direction on Pasadena avenue down a 5 per cent. grade. He testified that he was traveling not as fast as 30 miles an hour; that he became aware of something in the roadway in front of him but didn't identify it as a human being until he was within 12 or 15 feet; he then determined it was a woman walking slowly away from him and facing southwest; she gave no evidence of hearing the sound of the wheels, which were then screeching; he applied his brakes with full force and kept them so applied until his car came to a stop. He veered his car slightly to his right. When he applied his brakes and locked the wheels of his car, it began to skid and the tires screeched. The skid marks made by the tires were measured by a police officer and another witness for plaintiffs soon after the accident, and were found to extend back from the place of impact for a distance of 56 feet. The car stopped practically at the point of impact, moving not over a foot thereafter. Decedent was struck by the left front fender of defendant's car. Defendant testified that his car tripped the decedent rather than struck her; and that he believed that he would not reach her at all, but expected to stop short of her. The tires and lights of defendant's car were in good condition. The police officer examined defendant's car after the accident, and found no damage to it, not even a scratch. The inspection of the autopsy surgeon showed that, aside from a laceration on the inside of the right thumb, there were no injuries or marks on the body of decedent, except on the head, death being due to a brain concussion. The husband of the decedent testified that prior to the accident his wife was in good health; that she had no deformities of any sort; that her hearing and eyesight were good; and that her powers of locomotion and her ability to walk were pretty good for a woman of her weight.

[1, 2] Whether the doctrine of last clear chance is applicable depends entirely upon the existence or nonexistence of the elements necessary to bring it into operation, and whether such elements exist or do not exist is ordinarily a question of fact to be determined by the fact finder. We shall not encumber this opinion by attempting to restate the essential elements of the doctrine. For a statement of them see Girdner v. Union Oil Company, 216 Cal. 197, 13 P.(2d) 915, 918; also volume 2, Cal.Jur.Ten-Year Supp. p. 176. It should be remembered that the question for this court to determine is not whether defendant should have been held for damages under the doctrine, but whether there was any substantial evidence, in the facts and circumstances in evidence and in the presumptions arising by law and the inferences reasonably to be drawn therefrom, of each of the elements.

[3, 4] The defendant contends that the rule does not apply for the reason that decedent was aware of her danger and able to escape but neglected to do so. He says: "In the instant case, since there is no evidence whatever upon the point, it is to be presumed that before entering Pasadena

avenue at all, in the exercise of due care, the deceased looked in the direction from which traffic might be expected. * * * Having looked, she must have seen the lights of the approaching car, since, it is undisputed that her eyesight was good." He relies greatly upon Palmer v. Tschudy, 191 Cal. 696, 218 P. 36, 38, from which he quotes at length, but he particularly relies upon the following sentence: "If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party." Obviously, *if*, being aware of the danger and able to escape it by exercising ordinary care, the decedent neglected to do so, plaintiffs cannot invoke the rule. Plaintiffs contend that the decedent was wholly unaware of her danger, and in that regard the question before this court is whether there is any substantial evidence to sustain this element of unawareness. There is no direct evidence that decedent was aware of her danger and there are circumstances in evidence, including her conduct, to indicate that she was not aware of her danger. The defendant contends that, since the decedent's hearing was good and her eyesight was good, she must have seen the lights of the approaching car and that she must have heard the screeching of the brakes and tires of defendant's car and that the conclusion is inescapable that the decedent was abundantly aware of the approach and proximity of the defendant's car. This argument should be presented to the fact finder and might be persuasive. It is not for us to weigh the evidence and determine where the preponderance lies.

[5, 6] The defendant contends that there was no evidence that he knew, or in the exercise of ordinary care should have known, that decedent could not escape from her situation of danger. It has been said that, "where the evidence shows that the victim was standing or walking in the highway with his back turned toward the oncoming vehicle, the danger of his being struck by the car or truck may be held to have been obvious." Volume 2, Cal. Jur.Ten-Year Supp. p. 189. We do not go so far, but at least it is a question for the fact finder. "Where it appears that the victim was in the path of the vehicle and plainly visible to the driver, the trier of facts may properly conclude that the driver 'must have seen' him. Hence, the jury may be instructed as to the Doctrine of Last Clear Chance although there is no direct evidence that the defendant actually knew of the victim's presence in the roadway, and, indeed, although he may have testified that he did not see the victim in time to avert the collision." Volume 2, Cal.Jur.Ten-Year Supp. pp. 189, 190.

[7] As to the element of "a clear chance," the defendant in his closing brief says: "The gist of respondents' contentions here, the matter upon which they chiefly recur, is, that, if appellant had 'veered or swerved' his car a matter of 'a foot or less' to the right, the accident would not have happened (pp. 10, 13). True it is that the margin between safety and accident was as slight as that in this case. As has been seen, appellant's car only brushed and tripped the deceased. Upon this, respondents base their final contention that, not having made this swerve, the appellant is, thereby, and without more, guilty of negligence. * * * Now, in the face of that picture, the respondents attempt to contend that, because it subsequently transpired that the accident could have been averted by appellant swerving 'a foot or less' to his right, he is ipso facto chargeable with negligence, and established to have had 'a last clear chance.'" Again it should be borne in mind that the question of negligence is ordinarily one for the fact finder, and it is for the jury to weigh the defendant's oral testimony along with all the other facts and circumstances in evidence, including the defendant's testimony as to what he saw and what he believed, and thus determine the truth. On the motion for a new trial the question was merely, Was there any substantial evidence of each and all of the elements essential under the last clear chance rule?

[8, 9] It is also the contention of the defendant that, since the decedent was guilty of negligence which continued right up to the collision, the plaintiffs cannot recover. This contention is fully answered in the case of Girdner v. Union Oil Company, supra. In that case the court held that it was not a sufficient defense that decedent was guilty of "continual negligence," but that it was essential also that such negligence be a proximate cause of the injury. "If * * * defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof." Un-

der the circumstances of this case it is a question of fact for the jury.

[10] It is our conclusion that the instructions covering the doctrine of last clear chance should have been given, and that the trial court did not abuse its discretion in granting a new trial.

Order affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

16 Cal.App.2d 636

STILLWELL HOTEL CO. v. ANDERSON et al.

Civ. 10876.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1936.

Rehearing Denied Oct. 23, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. **Parties** 🔑38

Statute allowing intervention was enacted to enable any one having an interest in subject of litigation to interject himself in the case in timely season to protect rights (Code Civ.Proc. § 387).

2. **Parties** 🔑38

Statute allowing intervention should be liberally construed (Code Civ.Proc. § 387).

3. **Parties** 🔑42

Statute allowing intervention was not intended to permit intervention by a party to an action after trial and judgment against such party (Code Civ.Proc. § 387).

4. **Parties** 🔑42

Where judgment of dismissal as to lessor's assignee, in lessee's suit on covenant of quiet enjoyment, was reversed after default judgment had been rendered against lessor, lessor *held* not entitled to intervene as "third person" when case was at issue between lessee and assignee upon assignee's filing answer, since lessor had been party to suit and could have filed such pleading as might secure lessor's rights (Code Civ.Proc. § 387).

[Ed. Note.—For other definitions of "Third Person," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Stillwell Hotel Company against William H. Anderson and the Business District Development Company wherein the Business District Development Company, Incorporated, filed a motion to intervene. From an order denying its motion, the Business District Development Company, Incorporated, appeals.

Affirmed.

E. T. Grua, of South Pasadena, for appellant.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Business District Development Company, Inc., appeals from an order of the superior court denying its motion to intervene in an action which was filed July 21, 1933, in the superior court of Los Angeles county. The defendants therein named are William H. Anderson, also known as Wm. H. Anderson, and Business District Development Company, a corporation. It will be noted that Business District Development Company, as a defendant, has the suffix "a corporation," and as appellant here, the suffix "Inc.," but the two names describe the one organization, as appears from the allegations of the proposed complaint in intervention. It will be hereinafter referred to as the development company.

The suit was filed by Stillwell Hotel Company, a corporation, lessee of property at one time owned by the development company, upon which a large hotel had been constructed with funds raised by means of a first mortgage bond issue in the sum of $600,000. Default arose in the payment of principal and interest and foreclosure took place, with the result that the lessee was ousted from possession of the premises on December 8, 1932. The lease had been written in 1926 for a term of thirty years, and for the loss resulting from the premature termination of the lease and disposition of the furnishings therein at a sacrifice price, the plaintiff sought damages in the sum of $200,000. Title to the property, subject to the lien for $600,000 created by the bond issue, had passed on December 20, 1930, to Anderson upon his foreclosing a junior lien in the sum of $100,000, which in 1928 he had received from the successor in interest of the development company. The lease had been signed by Citizens Trust & Savings Bank, as lessor, acting as trustee for the development company, and when Anderson became the owner of the fee, the trustee assigned the lease to him on January 2, 1931, at which time he agreed in writing "to be bound as Lessor by all the obligations thereof." The development company had agreed in writing on October 20, 1926, the day its trustee signed as lessor to Stillwell Hotel Company, "to be bound by and to carry out and perform and to guarantee the faithful performance of each and all of the terms, covenants and conditions contained in said lease to be kept and performed by the Lessor." One of the conditions was the agreement by the lessor "not to permit any default to occur in the mortgage or trust deed securing said original bonded indebtedness." The lease was made binding by its terms not only upon the parties "but upon each and every one of the heirs, executors, administrators, successors, assigns and legal representatives of the respective parties hereto."

The complaint, setting out the above facts as the basis of the lessee's action, was served first upon the defendant Anderson. He filed a general demurrer which was sustained, and an order was made on September 25, 1933, dismissing the action as to him. Thereafter, on October 4, 1933, summons was served on the development company which claims to have given notice thereof to Anderson and to have invited him to join in the defense. This he did not do, and on June 7, 1934, a default judgment was rendered against the development company in the sum of $101,000, upon which on July 30, 1934, it paid to the plaintiff the sum of $5,000. Meanwhile, after judgment of dismissal had been entered upon Anderson's demurrer being sustained, an appeal had been prosecuted by the plaintiff resulting in a reversal of that judgment (Stillwell Hotel Co. v. Anderson, 4 Cal.(2d) 463, 50 P.(2d) 441), on October 17, 1935. On December 28, 1935, Anderson filed his answer and the case is now at issue between him and Stillwell Hotel Company. Shortly before this answer was entered, the development company filed its motion to intervene, and the order denying the motion was made on January 7, 1936.

[1-4] The appeal from this order is grounded upon section 387, Code of Civil Procedure, the development company claiming that its motion was made under circumstances justifying its appearance now as an intervener in a case in which it was formerly a defendant. In other words, the claim is that the development company is a "third person" within the meaning of the second sentence of section 387, Code of Civil Procedure, which provides "An intervention takes place when a third person is permitted to become a party to an action or proceedings between other persons," etc. In deciding adversely upon this claim, we consider that the statute was enacted to enable any one having an interest in a subject of litigation to interject himself in the case in timely season to protect his rights. In the instant case, the development company was not put to the necessity of making itself a party to this action; it was such by the action of the plaintiff on the very day the suit was filed, and later, after service of summons, had the opportunity extending over a period of several months to file an answer, cross-complaint or such other pleading as might serve its needs and secure its rights. Believing, as we do, that the statute should be liberally construed, we still do not feel that it was intended to permit intervention by one of the parties to an action after trial and judgment against such party. Section 387, Code of Civil Procedure, by its opening words provides "At any time before trial, any person * * * may intervene." And in this case there has been a trial as to a corporation which was an original party to the action. While counsel for appellant has cited us to numerous cases where decisions of trial courts refusing to permit intervention have been set aside, we have not come across a situation similar to that here presented. We are impressed with the language of Mr. Justice Day of the United States Supreme Court in Rocca v. Thompson, 223 U.S. 317, 32 S.Ct. 207, 210, 56 L.Ed. 453 (a hearing upon questions arising in Re Estate of Ghio, 157 Cal. 552, 108 P. 516, 37 L.R.A. [N.S.] 549, 137 Am.St.Rep. 145). There the learned justice discourses upon intervention, its derivation and accepted meanings, and says:

"Whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

" 'In English ecclesiastical law.—The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 3 Chitty, Commercial Law, 633; Dalrymple v. Dalrymple, 2 Hagg.Cons.R. 137, 17 Eng.Rul.Cas. 11; Donegal v. Donegal, 3 Phillim.Ecc.Rep. 586.

"'In the civil law.—The act by which a third party demands to be received as a party in a suit pending between other persons.'"

The order is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

In re CLARK'S ESTATE.*

Civ. 11191.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1936.

Rehearing Granted Oct. 21, 1936.

1. Wills 🔑657

Under will whereby testatrix bequeathed to beneficiary $15,000, provided beneficiary "shall at or prior to my decease fully pay and discharge all indebtedness owing by him to me," beneficiary *held* not entitled to bequest where indebtedness had not been paid at testatrix' death, as against contention that words "at or prior" were to be construed so as to permit discharge of indebtedness within reasonable time after testatrix' death.

[Ed. Note.—For other definitions of "At" and "Prior," see Words & Phrases.]

2. Wills 🔑470

Testatrix' obvious intention as the same appears from entire will must govern, and wherever possible, without doing violence to manifest intention of instrument, each word and phrase is to be given some meaning.

3. Wills 🔑462

Court cannot read into will words which change or add to plain intent of testatrix.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of Sarah Louise Clark, deceased, wherein Webster C. Clark and others filed petition for determination of a clause of the will of Sarah Louise Clark, deceased, which was opposed by Harriett C. Eckett and others. From an adverse decree, Webster C. Clark appeals.

Affirmed.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Robert F. Schwarz and Frederic H. Sturdy, both of Los Angeles, of counsel), for respondents.

GOULD, Justice pro tem.

[1] This appeal presents for determination the interpretation to be given to a clause of the will of Sarah Louise Clark, deceased, by which she bequeathed to Webster C. Clark, nephew of her deceased husband, "the sum of $15,000 provided said Webster C. Clark shall at or prior to my decease fully pay and discharge all indebtedness owing by him to me as beneficiary under or distributee of my late husband's estate or otherwise." The will also provided that, in event said beneficiary should "fail to fully pay and discharge said indebtedness at or prior to my decease," he should take nothing, and the amount bequeathed to him should pass to other named beneficiaries.

The pertinent facts in the case are not in dispute. The will was dated March 5, 1934, at which time Webster C. Clark was indebted to the testatrix for money loaned to him by her deceased husband in the sum of $57,000, and for which he gave his note March 31, 1934. Certain interest payments were made upon the indebtedness, and the principal was reduced by the sum of $3,000, so that at the date of the death of Sarah Louise Clark on September 8, 1934, Webster C. Clark was still indebted to her on account of the obligation in the sum of $54,000. Upon petition for ratable distribution and ratable payment of legacies the trial court held that the bequest to Webster C. Clark was conditioned upon his discharging his indebtedness to the testatrix within her lifetime, and that, not having done so, he was entitled to nothing. He appeals from the resultant order and decree which denied to him participation in the distribution of said estate.

Appellant urges that a literal interpretation of the words "at or prior to my decease" permitted him to discharge his obligation to the testatrix either at any time prior to her death or at the moment of her death, and that, inasmuch as payment at the very moment of death would be impossible, it must have been the intention of the testatrix to allow him a reasonable time after her decease to pay his indebtedness. He pleads for a liberal construction of the testamentary terminology, citing the well-established rules that wills are to be so construed as to give effect to all provisions thereof if possible, that intestacy is to be avoided, and that a liberal construction is to be favored to effectuate the intent of the testator. It is suggested that payment of appellant's obligation to deceased at any time during the period of the administration of her estate would be in reasonable compliance with the conditions imposed by the will.

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*For subsequent opinion see 61 P.2d 1221.

Appellant is urging a strained and labored construction of the disputed clause. Its simple and obvious meaning would appear to be that the testatrix imposed as a condition precedent to appellant's receiving his bequest that his obligation to her be discharged, paid, and at an end at the time of her death or prior thereto. The words "at or prior" are to be construed very much as the "on or before" clause in commercial instruments. If appellant's indebtedness had been paid at the time of or before the death of the testatrix, then her bequest to him would have been operative; otherwise he would receive nothing. Such interpretation is the only one that gives meaning to the condition imposed, for otherwise the bequest would automatically be set off against the indebtedness and the condition would be without any meaning whatsoever. To uphold appellant's argument, therefore, we would be obliged to assume that the testatrix inserted in her will a useless, meaningless, and unnecessary clause imposing a condition having no purpose. The condition would in effect be erased and the bequest made absolute.

[2] It is a cardinal rule of construction that the obvious intention of the testator, as the same appears from the entire will, must govern, and that wherever possible without doing violence to the manifest intention of the instrument, each word and phrase is to be given some meaning. In re Estate of Peabody, 154 Cal. 173, 97 P. 184. Measured by this rule, the trial court was correct in its interpretation of the document before it in this case.

[3] Furthermore, to give effect to appellant's contention the phrase "at or prior to my decease" would have to be given the enlarged meaning of "at or prior to my decease or within a reasonable time after my decease." It is not the province of the courts to read into a will words which change or add to the plain intent of the testator. The answer to two questions determines the disputed point: Was the indebtedness paid prior to the decease of testatrix? Was the indebtedness paid at the time of the decease of testatrix? To each query the answer is "No." The condition imposed by testatrix was not met by appellant, and therefore her conditional bequest to him lapsed.

Aside from the foregoing considerations, it appears from the record that almost one year had elapsed from the date of testatrix' death to the time of the hearing which resulted in the decree from which this appeal is taken. No payment of his indebtedness was made by appellant in that time, nor was there a valid tender of payment; nothing, in fact, further than a letter in which he offered to pay in due course of administration of the estate, provided the executors would agree that the $15,000 legacy vested in him instead of in the residuary legatees. Adopting appellant's own plea that he should be allowed a reasonable time after the death of testatrix to discharge his obligation, it is obvious that in the course of a year's time he did nothing to meet the conditions imposed in the will and with which he must necessarily comply before enjoying the fruits of testatrix' bounty.

Appellant makes the further contention that the court erred in excluding from evidence certain correspondence between him and the executors of the estate of deceased and of her husband's estate relative to the purposes and reasons for loaning the $57,000 and the uses to which it was applied. Such extrinsic evidence was wholly unnecessary to explain the intent of the testatrix, inasmuch as her intent was apparent from a reading of the document itself. It was therefore properly excluded. In re Estate of Wilson, 171 Cal. 449, 153 P. 927.

The order and decree appealed from is affirmed.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting).

I dissent. Of the residue of her estate the testatrix gave to seven persons various sums in cash. Then follows the eighth clause as follows: "(8) To said Webster C. Clark the sum of Fifteen Thousand Dollars ($15,000), provided said Webster C. Clark shall at or prior to my decease fully pay and discharge all indebtedness owing by him to me as beneficiary under or distributee of my late husband's estate or otherwise. Should the said Webster C. Clark fail to fully pay and discharge such indebtedness at or prior to my decease, then said Webster C. Clark shall take nothing under Paragraph Fourth of this, my last will and testament, and I hereby give, devise and bequeath said sum of Fifteen Thousand Dollars ($15,000) to Mrs. Jennie Knapp, Mrs. Harriett Eckett, Mabel Elston, Esther Louise Elston, Mrs. Maude Dunne, Virginia Dunne, and Margaret Dunne, in the same proportions that the amounts I have hereinabove given and bequeathed to them respectively in clauses (1) to (7) inclusive of this paragraph Fourth bear to the aggregate of such amounts." The interpretation of this clause must be made in the light of the rule that the intention of the testatrix must be followed and in view of section 102 of the Probate Code: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." To sustain the contention of respondents we must hold that the words "Should the said Webster C. Clark fail to fully pay and discharge such indebtedness at or prior to my decease" should be interpreted to mean: If the said Webster C. Clark shall have fully paid and discharged such indebtedness prior to my decease. The testatrix did not use such language, but provided that the debt could be paid "at or prior" to her decease. The words "at or" cannot be disregarded. The interpretation requested by respondents fails to "give to every expression some effect." The testatrix could not have intended that the debt be paid at the instant life would be departing from her body. Payment at such a time would be utterly impossible. In my opinion the only reasonable interpretation which gives "some effect" to the words "at or" is that Mr. Clark must pay the debt within a reasonable time after the decease of the testatrix in order to receive the legacy. An argument that the same result would be reached by operation of law and that the condition adds nothing to the testamentary provisions does not justify the court in disregarding any words contained in the will or in giving the will a meaning not intended by the testatrix. It is a matter of common knowledge that makers of wills very frequently include testamentary provisions which would be made effective by operation of law if they had been omitted.

Counsel have not cited cases in which the word "at" has been construed when used in testamentary dispositions, but many cases have been recorded in which the word has been construed when used in other situations. A general statement is found in Corpus Juris, volume 5, page 1422: "It is a word of great relativity and elasticity of meaning, and is somewhat indefinite, shaping itself easily to varying contexts and circumstances, and taking its color from the circumstances and situation under which it is necessary to apply it to surrounding objects. It is not a word of precise and accurate meaning, or of clean, clear-cut definition, and it has been said that the connection furnishes the best definition." And on page 1423: "The use of the word usually negatives the idea that precision or an exact coincidence is intended, either of place or time. As used to fix a time, it does not necessarily mean eo instanti, or 'punctum temporis,' or the identical time named, or even a fixed, definite moment. In short, the word expresses the relation of direction toward, presence, and nearness in either time or place, and does not demand an exact coincidence as to either." See Rogers v. Burr, 97 Ga. 10, 25 S.E. 339; Rice v. Kansas Pacific Ry., 63 Mo. 314.

I cannot share the view that appellant's legacy has lapsed for failure to pay the indebtedness within a reasonable time. This question is primarily for the determination of the trial court, and the record does not disclose that the trial court made a definite finding on the issue. Moreover, the circumstances before the court presented, in my opinion, sufficient justification for the delay. Mr. King, one of the executors, is a lawyer. Within a month from Mrs. Clark's death appellant wrote to Mr. King concerning the provisions in dispute and stated: "I would like very much to have an interpretation of this point from you." Under date of October 15, 1934, Mr. King wrote the appellant giving an interpretation adverse to appellant's contention. On October 19, 1934, appellant sent the following letter to Mr. King: "I acknowledge receipt of your letter of October 15th. Since its receipt I have consulted counsel regarding the construction of the will. It is the opinion of the attorney whom I have consulted that the correct construction is in accordance with my letter to you of October 6th. He advises me that his interpretation of the will is based in the main upon the following considerations: The language itself appears to be clear and definite. The privilege is by the will accorded to me to pay 'at or prior to my decease.' This would mean since it is impossible to pay money to a dead person, that the payments should be made in due course to the executor after the decease of the testator. The situation is not a complex one nor one difficult of expression, and it would have been, according to the advice of my attorney, a matter of the utmost simplicity were the purpose otherwise to have expressed it thus: 'shall have, at or prior to my decease, fully paid and discharged.' The latter language would have clearly expressed the purpose that the debt must have been paid in the lifetime of the deceased to make the legacy effective. Another consideration pointed out by my attorney is this: my indebtedness was large, was current, and was in process of gradual liquidation; the interest was always paid promptly. I was, therefore, proceeding in the matter in accordance with previously prevailing custom and in accordance with my legal position. There had been no disputes nor arguments about the indebtedness and there was nothing to lead me to suppose that the attitude of the parties toward it had experienced a change. Under these circumstances it is not reasonable to suppose that the testator intended to prepare a secret pitfall for my feet, leaving me in a position where all unknown to me valuable rights were to be lost to me if I did not do certain things that I was under neither legal nor moral compulsion to do under the circumstances. Such being the construction placed by my counsel upon the will, will you please construe this letter as a tender of payment of my indebtedness to the estate made pursuant to Section 1493 and following of the Civil Code of the State of California. I hereby offer to pay my entire indebtedness to the estate in due course of administration, conditioned, however, upon the construction of the will, and particularly the eighth subdivision of the fourth paragraph thereof to this effect:—that upon payment of my indebtedness to the estate in due course of administration I am entitled to the legacy provided by that subdivision of that paragraph." This letter was answered by letter dated April 15, 1935, in which Mr. King expressed the belief that the legacy had failed and further stated: "Mr. Macneil has suggested that an executor is not properly interested in a dispute between claimants as to the portions of the estate to which they are respectively entitled, and after a thorough examination of the authorities I find, I freely confess to my surprise, that he is correct. It is clear to me that a possible dispute as to the validity of your contention is solely between you on the one hand and Mrs. Knapp, Mrs. Ecket, the Elstons and the Dunnes on the other hand, and is not primarily my affair. I have written Mrs. Knapp, Mrs. Eckett, the Elstons and the Dunnes, sending them copies of our correspondence on this matter and asking them what positions they will take. As soon as I have heard from them I shall write you again. We have proceeded and are proceeding with the routine of administration on the theory that your contention as to the legacy may or may not be well founded, and we do not propose at any time to take any steps which will unfairly prejudice your collection of any sum legally due you." The petition for ratable distribution and to determine the persons entitled to the specific legacies was filed on July 20, 1935.

During the hearing before the trial court appellant offered to prove certain circumstances concerning his indebtedness. He offered to prove by the introduction of letters that he had borrowed approximately $70,000 from E. W. Clark, predeceased husband of the testatrix and uncle of appellant; that all of the loans were made with knowledge on the part of E. W. Clark that they were for use for capital investment in appellant's business to procure machinery and to enlarge his plant; that the loans were kept current and interest paid thereon; that after the death of E. W. Clark the executor of his will wrote to appellant stating that it was Mrs. Clark's idea "that the principal of the note should be gradually reduced commencing with the first of the year, if possible," and that a new note could best be given when the estate was distributed and the title to the note passed to her. The indebtedness had been reduced to $57,000 at the time of the execution of the will, and shortly before the death of the testatrix it had been reduced to $54,000. There had been no dispute as to the manner of liquidation. Section 105 of the Probate Code provides that, "when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made." In my opinion the court erred in rejecting the proffered evidence.

16 Cal.App.2d 632

BRADLEY CO. v. RIDGEWAY, City Treasurer, et al.

Civ. 1396.

District Court of Appeal, Fourth District, California.

Sept. 30, 1936.

1. Quieting title 🔑54

Action in which plaintiff sought not only declaration of rights, but also prayed that plaintiff be decreed to be owner of land affected with municipal improvement bonds, and that defendants be decreed to have no interest therein, *held* "action to quiet title," precluding recovery of costs from disclaiming defendant (Code Civ.Proc. § 739).

[Ed. Note.—For other definitions of "Action to Quiet Title," see Words & Phrases.]

2. Appeal and error 🔑1218

Where remittitur issued by clerk of appellate court in action to quiet title contained provision for recovery of costs against disclaiming defendant, motion to recall remittitur and strike provision regarding costs therefrom *held* proper procedure (Code Civ.Proc. § 739).

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Bradley Company against E. E. Ridgeway, Treasurer of the City of Porterville, Guy Knupp, and others. From an adverse judgment, plaintiff appeals. The judgment was reversed as to defendant Knupp. On motion to recall and amend remittitur.

Motion granted.

See, also, 58 P.(2d) 194.

J. A. Chase, of Visalia, Herbert Chamberlin, of San Francisco, and A. L. Wissburg, of San Bernardino, for appellant.

Gaylord N. Hubler, of Porterville, for respondent Guy Knupp.

Mathew Weber, of San Francisco, and Kirkbride & Wilson, of San Mateo, for respondents Federal Const. Co., Hanrahan Co., and E. E. Ridgeway, City Treasurer.

JENNINGS, Justice.

The Bradley Company was plaintiff in an action in which petitioner Guy Knupp and others were defendants. The amended complaint contained three causes of action. The action related to certain bonds issued by the city treasurer of the city of Porterville pursuant to contracts entered into between the board of trustees of said city and the defendant Federal Construction Company for the improvement of certain streets in said city. The contracts were executed, and the bonds representing assessments levied against real property to meet the expense of the improvement were issued under the provisions of the Improvement Act of 1911 (St.1911, p. 730, as amended). The bonds which formed the basis of plaintiff's complaint constituted a lien against certain described real property which plaintiff alleged that it owned. It was alleged in the amended complaint that prior to the issuance of the bonds the defendant Federal Construction Company had made a compromise agreement with certain owners of property in the city of Porterville whereby the company agreed to accept in full satisfaction and discharge of its claims for performing the street improvement work an amount which was 25 per cent. less than the original contract price, but that nevertheless bonds providing for payment of the full amount of the contract price were issued and that bonds representing 25 per cent. of said amount were delivered to Knupp. The third cause of action in particular alleged that no payments either of principal or interest had been made by plaintiff on the bonds and that the collection of any amount which had become due either as principal or interest on the bonds prior to January 1, 1930, was barred by the statute of limitations. The prayer of the amended complaint was, first, that the rights and duties of plaintiff and defendants with respect to the bonds be declared; second, that it be declared that the bonds constitute no lien against plaintiff's real property and may be avoided by plaintiff; third, that defendants be required to set forth the nature of their several claims and that all adverse claims of defendants be determined by decree of court whereby it shall be adjudged that plaintiff is the owner of the real property affected by the bonds and that defendants have no estate or interest in said property and that defendants be debarred from making any adverse claim to said property.

To this amended complaint the defendant Guy Knupp interposed a general demurrer which was sustained as to the first and second causes of action set out in the pleading and overruled as to the third. Knupp then filed an answer wherein he disclaimed any right, title, or interest of any character in the bonds or in the real property affected thereby, and expressly renounced any claim thereto. The action subsequently proceeded to trial. The defendant Guy Knupp was not present at the trial and was not there represented by counsel. Shortly after the trial had been commenced, a motion which was treated by the trial court as a motion for judgment on the pleadings was presented on behalf of those defendants who were represented by counsel at the trial. The motion was granted by the court, and judgment was entered whereby it was adjudged that plaintiff take nothing and that the bonds mentioned in the amended complaint constituted valid liens against the real property described in the pleading and that the various defendants including Guy Knupp should recover their costs of suit.

[1, 2] The plaintiff took an appeal from this judgment. On appeal the judgment was affirmed except as to the defendant Knupp. As to him the judgment was reversed on the ground that plaintiff's title to the land should have been quieted against this defendant who had expressly disclaimed any interest therein or any claim thereto and that the motion for judgment on the pleadings was not made by him or on his behalf. The clerk of this court issued a remittitur containing the provision: "Plaintiff and appellant Bradley Company to recover costs on appeal as against defendant and respondent Guy Knupp." The present motion is to recall the remittitur and to strike from it the above-quoted provision. The ground of the motion is that rule XXIII of the rules of this court which permits the insertion in the remittitur of a provision that appellant shall recover costs in all cases in which the judgment appealed from is reversed and the order of reversal contains no directions as to costs on appeal may not prevail against section 739 of the Code of Civil Procedure which expressly declares that a plaintiff in an action to quiet title cannot recover costs against a disclaiming defendant. In opposition to the motion plaintiff maintains that its action is not a suit to quiet title but that it is merely an action for declaratory relief and that therefore section 739 is not applicable and it was entitled on reversal of the judgment as to Knupp to recover costs on appeal against this defendant.

Plaintiff's contention is not persuasive. While it is true that the prayer of the amended complaint asked that the rights and duties of the plaintiff and defendants with respect to the bonds be declared, it did not stop with this request. The prayer went further and demanded that defendants be required to set forth the nature of their claims to the land and that all adverse claims thereto should be determined by a decree which should adjudge that plaintiff is the owner of the land affected by the bonds and that defendants have no estate or interest therein and that they be debarred from setting up any adverse claim thereto. It is apparent then that the action was one not only for declaratory relief but also to quiet plaintiff's title to the land. The above-mentioned section of the Code is therefore applicable and the remittitur was incorrect in containing a provision which permitted the recovery of costs from a defendant who had expressly disclaimed any interest in the real property or any claim to the bonds. The procedure here followed for correction of the remittitur is proper. In re Estate of Steehler, 197 Cal. 67, 239 P. 718; San Joaquin, etc., Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021.

The motion is granted. It is ordered that the remittitur be recalled for the purpose of striking therefrom the hereinabove quoted provision permitting recovery of costs on appeal from the defendant Guy Knupp, and as corrected is ordered to issue forthwith.

We concur: BARNARD, P. J.; MARKS, J.

16 Cal.App.2d 521

KECK v. SWEENEY et al.

Civ. 10019.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1936.

1. Insane persons ⚷45

Action against sureties on guardian's bond brought more than three years after decree restoring incompetent to mental competency and terminating guardianship proceeding and decree revoking powers of guardian were rendered *held* barred, since decrees operated as "discharge or removal of guardian," setting limitation in motion (Code Civ. Proc. §§ 1766, 1805; Civ.Code, § 253).

[Ed. Note.—For other definitions of "Discharge of Guardian," see Words & Phrases.]

2. Insane persons ⚷45

Incorporation, in decree revoking guardian's powers, of provision ordering an accounting and retaining jurisdiction over guardian until final settlement of her accounts, did not toll three-year limitation period against action on surety's bond, notwithstanding action could not be brought against surety on guardian's bond until settlement of guardian's accounts showing balance due ward, and time for appealing from order of settlement had elapsed (Code Civ.Proc. §§ 1766, 1774, 1805; Civ.Code § 253).

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Arthur W. Keck against James P. Sweeney and others. From a judgment for defendants James P. Sweeney and another, plaintiff appeals.

Affirmed.

William P. Hubbard, of San Francisco, for appellant.

James P. Sweeney, of San Francisco, in pro. per.

Dunne & Dunne, of San Francisco, for respondent Mary E. Bru.

KNIGHT, Justice.

The plaintiff, Arthur W. Keck, formerly an incompetent person, brought this action against his wife, Lizzie B. Keck, as guardian of his estate and person, and the sureties on her bond (one of whom has since died), to collect a sum of money shown to be due plaintiff upon the final settlement of the guardian's accounts. The guardian failed to appear or answer, and a default judgment was entered against her for the amount sued for, to wit, $1,896.26, plus interest. But the sureties, whose maximum liability was fixed by the bond in the sum of $1,000, contested the action, and the trial court held that as to them the action was barred by the three-year statute of limitations fixed by the provisions of section 1805 of the Code of Civil Procedure (now section 1487 of the Probate Code). Accordingly judgment was entered in favor of the sureties, from which plaintiff prosecutes this appeal.

[1] Section 1805 of the Code of Civil Procedure read as follows: "No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years *from the discharge or removal of the guardian;* but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed." (Italics ours.) In the present case all of the court proceedings leading up to the commencement of this action took place in the superior court in and for the city and county of San Francisco. They consisted of the following: In 1924 plaintiff was declared incompetent and his wife was appointed guardian of his person and estate in a guardianship proceeding instituted by his wife for such purpose; and in a separate proceeding plaintiff was adjudged insane and committed to the Napa State Hospital. Some two years after the appointment of the guardian and on April 19, 1926, in a proceeding instituted by plaintiff under the authority of section 1766 of the Code of Civil Procedure, he was restored to mental competency, and in the decree rendered therein it was "ordered, adjudged and decreed that the guardianship of the person and estate of Arthur W. Keck, as an incompetent is hereby terminated." Subsequently, and on December 22, 1926, plaintiff filed a petition in the guardianship proceedings for an accounting, wherein he again asked for the termination of the guardianship proceeding, and on January 18, 1927, an order and decree was made to that effect. Among other things, it was therein ordered and decreed that the order heretofore made appointing the said Lizzie B. Keck

guardian of the person and estate of said Arthur W. Keck "be, and said order is hereby revoked"; and it was further ordered that an accounting be had and that the court's jurisdiction over the guardian be retained until her accounts were settled. In response to such decree and order the guardian filed certain accounts, and on March 27, 1930, there was a final settlement thereof, showing she was indebted to plaintiff in the sum of $1,896.26. The present action was filed on December 3, 1930. Thus it affirmatively appears that the action was commenced more than four years after the rendition of the decree of April 19, 1926, terminating the guardianship proceedings, and more than three years after the entry of the decree of January 18, 1927, in the guardianship proceedings revoking the powers of the guardian. Manifestly these decrees, and especially the latter, operated as a removal of the guardian, and set in motion the statute of limitations prescribed in said section 1805. The trial court properly held, therefore, that the action against the sureties was barred by the provisions of said Code section.

The negative answer to plaintiff's contention that neither of said decrees amounted to a "discharge or removal of the guardian," within the meaning of said Code section 1805, is to be found in the case of Cook v. Ceas, 143 Cal. 221, 77 P. 65, 68, wherein, in considering the meaning of the expression "discharge or removal of the guardian" as used in said section 1805, the court said, in part: "The guardian of an insane person may be 'discharged' by order of court when it appears that the guardianship is no longer necessary. Code Civ.Proc. § 1802. Guardians of either sort may be 'removed' for incapacity or mismanagement, etc. (Id. § 1801), and so for the same and other causes executors and administrators may be 'removed.' It will thus be seen that the words 'remove' and 'discharge' are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office, without exonerating them from liability to account. To such orders section 1805 has a just and reasonable relation, and no doubt it is to them that it refers. As to the word 'removal,' there can be no doubt that the reference is to an order removing the guardian from office, and, as 'discharge' is sometimes used in the statute in the sense of 'removal,' it is here to be construed in that sense on the principle of noscitur a sociis." Furthermore, and aside from the provisions of section 1802 above referred to authorizing the "discharge" of the guardian when the guardianship is no longer necessary, section 253 of the Civil Code (now section 1580 of the Probate Code) provides that: "A guardian may be removed by the superior court for any of the following causes: * * * 8. When it is no longer proper that the ward should be under guardianship;" and in the present case the decree entered in the guardianship proceeding on January 18, 1927, contains two distinct findings to the effect that it was no longer proper that plaintiff should be under guardianship. The first was that by virtue of the decree in the restoration proceeding entered "on the 19th day of April, 1926, and recorded on said 19th day of April, 1926, in Book 244 of Judgments, page 78 thereof, said Arthur W. Keck was adjudged to be fully competent and fully restored to competency, and said order has become final"; and the second was that "* * * this court does hereby further order, adjudge and decree that said Arthur W. Keck is fully competent and qualified to manage and care for his person and estate." Clearly, therefore, in view of those findings it cannot be successfully maintained, as plaintiff argues, that the court's decree based thereon, revoking the guardianship, did not operate as a removal of the guardian within the meaning of section 1805 of the Code of Civil Procedure.

[2] Nor did the incorporation in said decree of the provision ordering an accounting and retaining jurisdiction over the guardian until the final settlement of her accounts add anything of value thereto, because, even without said provision, such jurisdiction was retained in the probate court by virtue of section 1774 of the Code of Civil Procedure (now section 1555 of the Probate Code). It is true, of course, that an adult ward may not commence his action against the sureties on his guardian's bond until there has been a settlement of the guardian's accounts showing a balance due the ward and the time for appealing from the order of settlement has elapsed. Cook v. Ceas, supra. But evidently the Legislature deemed a period of three years after the removal of the guardian as ample time within which an adult ward might secure such final accounting and commence his action; and, as pointed out in the above case, the delay on the part of the ward, following a removal of his guardian, in procuring a settlement of

the guardian's accounts, does not toll the statute of limitations governing the commencement of the action against the sureties. In the present case, as shown, the guardian was definitely removed, and an accounting was ordered by the decree of January 18, 1927, but plaintiff failed to procure a final settlement of his guardian's accounts until March 27, 1930, which, as will be noted, was more than three years subsequent to such removal; and no excuse whatever is suggested by the record or otherwise for the unreasonable delay. As stated by the court in Cook v. Ceas, supra, the sureties on a guardian's bond are not without protection against stale claims, but, on the contrary, are entitled to invoke in their behalf the provisions of the general statutes themselves as well as the rule requiring reasonable diligence from an adult ward in procuring a settlement of the guardian's accounts.

Plaintiff devotes much of his brief in furtherance of an effort to differentiate the case of Cook v. Ceas, supra, from the present one, and it may be conceded that in some respects which are not at all important here the facts are dissimilar. But he has utterly failed to demonstrate wherein the legal principles declared therein, and particularly the construction placed on said section 1805, are not controlling here.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

16 Cal.App.2d 532

In re COFFIN'S ESTATE.*

Civ. 10322.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1936.

Hearing Denied by Supreme Court Nov. 23, 1936.

1. Executors and administrators ⚷194(1)

What is reasonable family allowance to be made during settlement of estate is matter to be determined in probate court's sound discretion (Probate Code, § 680).

2. Executors and administrators ⚷194(6)

Probate court, asked to fix reasonable family allowance, may first determine reasonable time for settlement of estate and on that basis fix total sum which in its judgment it deems reasonable to be paid as family allowance, and court is not required to make allowance for periodic payments from date of decedent's death until settlement of estate (Probate Code, § 680).

3. Executors and administrators ⚷194(5)

Stipulation wherein widow agreed to accept family allowance of $300 a month for period not to exceed 10 months *held* sufficient evidence to support probate court order making such allowance and to justify refusal to modify order notwithstanding estate was not settled within such period (Probate Code, § 680).

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Albert Field Coffin, deceased, wherein Lulua Hannah Coffin filed petition for an order modifying order for family allowance, opposed by Edith L. Bruse and others. From an order denying the petition, Lulua Hannah Coffin appeals.

Affirmed.

Charles A. Bliss, of Sacramento, and Clark & Heafey, of Oakland, for appellant.

Leon French and Treat & Ogden, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

The appeal herein is from an order denying a petition of the widow to modify an order for family allowance. Two motions were made by respondents pending the appeal. Upon the ground that the order for family allowance was made in accordance with a stipulation of the parties, the respondents moved for a diminution of the record for the purpose of including such stipulation. This was granted. The respondents also moved for a dismissal of the appeal upon the ground that the appellant had accepted the benefits of the order of which she asked modification and that her appeal is therefore moot. Since we have found that the order appealed from must be affirmed upon its merits, the motion to dismiss is denied.

[1, 2] The appeal from the order presents the simple question of the power of the probate court in relation to the granting of a family allowance. Section 680 of the Probate Code declares that the widow and minor children are entitled to such rea-

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*For subsequent opinion see 71 P.2d 295.

sonable allowance out of the estate as shall be necessary for their maintenance during the progress of the settlement of the estate. It is the contention of the appellant that this section requires the periodical payment to the widow and minor children of a fixed sum from the date of the death of the decedent until the date of the settlement of the estate, no matter how long the latter date is delayed through the fault or neglect of those receiving the allowance. She predicates her argument upon disconnected expressions from earlier cases as to the mandatory character of the provisions of the Code section destined to maintain the status of the widow and the minor children in the condition which they had enjoyed prior to the death of the decedent. The error of the appellant's argument, and of some of the authorities upon which she relies, rests in the assumption that the Code section requires that this allowance be paid periodically from the date of death to the date of settlement of the estate. But the Code section does not require the payments to be made in that manner. It has declared that the widow and minor children are entitled to a reasonable allowance during the progress of the settlement of the estate, and all the authorities agree that what is a reasonable allowance is a matter to be determined in the sound discretion of the probate court. In making this determination it is competent for the court to determine what is a reasonable time within which the estate should be settled and to fix the amount of the allowance accordingly. This is the rule adopted in Re Estate of Clark, 96 Cal.App. 243, 246, 274 P. 76, and supported by authorities therein cited. We followed this rule in Re Estate of Broad, 134 Cal.App. 196, 199, 25 P.(2d) 31, and we have found no recent authority to the contrary. Hence, when the probate court is asked to fix "a reasonable allowance," we see no impropriety in its first determining the reasonable time for the settlement of the estate and upon that basis fixing the total sum which in its judgment it deems reasonable to be paid as a family allowance. The fact that these payments are usually made in monthly installments is merely a matter of convenience. The Code does not require that they be paid in that manner or that some allowance be paid for every month up to the date of settlement of the estate.

[3] In making the order of April 24, 1935, the probate court followed this practice. It was therein ordered that the widow be awarded the sum of $300 per month "continuing for a period not to exceed ten months, * * * or, until the final distribution of said estate, in the event that said estate is so finally distributed before the expiration of said ten months." The petition of the widow for modification of this order gave no good reason why the settlement of the estate had been delayed beyond the ten-month period. Upon the hearing of the petition, the court expressly inquired as to the reason for the delay and showed its dissatisfaction with the answer given. Upon this appeal the appellant has failed to show any abuse of discretion on the part of the probate court either in limiting the allowance to be paid to the widow or in limiting the period of payment.

In addition to this, the order of April 24, 1935, of which the appellant asked a modification, was based upon a stipulation of all the parties interested, made and filed in open court. By the terms of that stipulation the appellant herein agreed to accept an allowance of $300 a month for a period not to exceed ten months. This was in effect an agreement that an allowance of $3,000 be paid to the widow unless the estate was settled in less than ten months. The agreement was itself evidence that this sum was a reasonable allowance within the terms of section 680 of the Probate Code, and is all the evidence that is necessary to support the reasonableness of the order of the probate court.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

16 Cal.App.2d 611

MAYFIELD v. FIDELITY & CASUALTY CO. OF NEW YORK.

Civ. 1198.

District Court of Appeal, Fourth District, California.

Sept. 30, 1936.

1. Insurance 🔑646(1)

In action on accident policy, insurer had burden to prove affirmative defenses alleged by it.

2. Principal and agent 🔑21

Where fact of agency is in dispute, it may be established by testimony of agent.

3. Husband and wife 🔑23¾

In action on accident policy, wherein one issue was whether policy constituted contract between insurer and insured, or between insurer and beneficiary who was insured's wife at time policy was issued, evidence of beneficiary that she signed insured's name to application for policy as insured's agent, *held* admissible.

4. Principal and agent 🔑163(1)

Agency may be shown either by proof of direct authorization or by proof of subsequent ratification.

5. Husband and wife 🔑23½

In action on accident policy where important issue was whether beneficiary who was insured's wife at time policy was issued signed insured's name to application for policy as insured's agent, beneficiary's evidence that insured subsequent to issuance of policy made statements showing he knew of existence of policy *held* admissible as proof of ratification by insured of beneficiary's signing his name to application.

6. Evidence 🔑276

Exception to hearsay rule which permits admission of evidence of declarations of person against his interest applies to declarations of deceased persons as well as to those of the living.

7. Evidence 🔑276

In action on accident policy wherein one issue was insurable interest of beneficiary in insured's life, evidence of statements of insured that he was indebted to beneficiary *held* admissible as declarations against interest.

8. Appeal and error 🔑1051(1)

In action on accident policy, error, if any, in admission of evidence on question of whether beneficiary who signed insured's name to policy application did so as insured's agent *held* not prejudicial where such evidence was merely cumulative, and the issue was sufficiently proven by other evidence.

9. Appeal and error 🔑1052(5)

In action on accident policy, error, if any, in admission of evidence on issue of beneficiary's insurable interest in insured *held* not prejudicial where jury made special finding that insurance contract was between insurer and insured, thus eliminating question of insurable interest of beneficiary in life of insured.

10. Evidence 🔑424

In action on accident policy, beneficiary's evidence as to insured's indebtedness to her *held* admissible, even though such evidence showed that written property agreement between insured and beneficiary, who was insured's divorced wife, did not express full character of the transaction, since insurer was not a party to the property agreement, and neither it nor beneficiary could be bound thereby.

11. Insurance 🔑585(3)

Where accident policy expressly reserved to insured right to change beneficiary without named beneficiary's consent, named beneficiary's right under policy was not "property right," and was not proper subject of property settlement contract between insured and named beneficiary who was his wife at time policy was issued, and who obtained divorce before insured's death.

[Ed. Note.—For other definitions of "Property Rights," see Words & Phrases.]

12. Evidence 🔑471(29)

In action on accident policy, refusal to allow answer to question by insurer's counsel on cross-examination of beneficiary as to whether in property agreement between insured and beneficiary who was insured's wife at time policy was issued, which agreement was in evidence, it was agreed that neither party had any claim upon the other, *held* proper.

13. Insurance 🔑655(2)

In action on accident policy, evidence of conversation between witnesses and insurer's agent regarding answer to be given insurance application question as to whether insured's habits of life were temperate *held* admissible for purpose of explaining what was meant by word "temperate" by showing interpretation insurer placed upon that word, as explained by insurer's agent.

14. Insurance 🔑668(3)

In action on accident policy, denial of nonsuit at close of beneficiary's case on ground evidence showed insurance contract was between insurer and beneficiary named in policy, and that beneficiary had no insurable interest in insured's life, *held* proper, where beneficiary made prima facie showing that insurance contract was between insurer and insured, since question of insurable interest was at that time immaterial, every person having an insurable interest in his own life.

15. Insurance 🔑668(7)

Whether insured was temperate in use of intoxicating liquors as stated in application for accident policy *held* for jury (Civ. Code, § 106).

> The expression "temperance" is not synonymous with "abstinence," and, on the contrary, conveys the idea of indulgence.
>
> [Ed. Note.—For other definitions of "Temperance," see Words & Phrases.]

16. Insurance 🔑375(2)

In action on accident policy containing clause that no agent should have authority to change or waive provisions of policy, any waiver of provision or condition requiring insured to be temperate in use of intoxicants *held* binding on insurer where made by officer of insurer's general agent.

17. Insurance 🔑375(2)

A general agent vested with full authority to consummate a contract of insurance has power to waive conditions and forfeitures, although policy contains express limitation of authority of agent to bind insurer by waiver of conditions which are set out in policy.

18. Appeal and error 🔑974(1)
Trial 🔑349(2)

Submission of special interrogatories to jury rests in sound discretion of trial court, and interference with court's discretion is not warranted unless it is clearly made to appear that discretion has been abused (Code Civ. Proc. § 625).

19. Trial 🔑349(2)

In action on accident policy, submission of special interrogatories to jury to determine whether insurance contract was between insurer and insured or between insurer and beneficiary, and refusal of special interrogatories relating to matters of insurable interest, and misrepresentation and concealmen in policy application, *held* not abuse of discretion (Code Civ.Proc. § 625).

20. Trial 🔑295(4)

Erroneous use of disjunctive "or" for conjunctive "and," *held* not to require reversal where instruction, taken as a whole, was not misleading.

21. Trial 🔑295(1)

In examining instructions, a part of one instruction may not be separated from its context, and made the object of special criticism, if the instructions taken in their entirety correctly advised jury as to the law.

22. Trial 🔑295(9)

In action on accident policy, instruction declaring that proof of defense of bad faith or deception in obtaining policy should be "clear and satisfactory" *held* not prejudicial error, where instruction as a whole properly advised jury that burden rested upon insurer to establish such defense by preponderance of evidence, as against contention quoted words would mislead jury into believing burden of establishing such defense by more than preponderance of evidence was imposed upon insurer.

23. Appeal and error 🔑782

Attempted appeal from order denying motion for new trial was dismissed, since no appeal lies from such an order.

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Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Edith I. Mayfield against the Fidelity & Casualty Company of New York. From an adverse judgment, the defendant appeals.

Affirmed.

Sanders & Jacques, of San Diego, for appellant.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

JENNINGS, Justice.

Plaintiff, as beneficiary in a policy of accident insurance issued by defendant, instituted this action to recover the amount specified in the policy for the accidental death of the insured. The trial of the issues which were raised by the pleadings of the parties was had before the court and a jury selected for the purpose and resulted in the return of a verdict in plaintiff's favor for the amount demanded. Judgment in plaintiff's favor was thereafter duly rendered. From the judgment thus entered, the defendant has prosecuted the present appeal.

[1] Numerous specifications of error which are claimed to have been committed by the court during the progress of the trial are relied upon as warranting a reversal of the judgment. Before giving consideration to them it may properly be observed that the record demonstrates that plaintiff made out a prima facie case authorizing recovery by showing that the policy of insurance had been duly issued and once renewed by defendant, that the annual premiums due on the policy were paid, that the policy provided that in case of loss of life of the insured resulting from bodily injury sustained through specified accidental means the insurer would pay to the beneficiary named in the policy the sum of $5,000, that plaintiff was the beneficiary named in the policy, that the insured lost his life as a result of bodily injury sustained by him through accidental means as defined and limited by the terms of the policy during the time the policy was in force, that proof of loss was duly given as required by the terms of the policy, and that defendant refused to pay the sum stated in the policy for loss of life, but, on the contrary, gave notice that it rescinded the contract of insurance and tendered to plaintiff the sums paid as premiums on the policy, together with interest, which plaintiff declined to accept. Defendant's answer to plaintiff's complaint alleged as affirmative defenses, first, that the contract of insurance was not made with the person named in the policy as the insured, but was made with plaintiff; second, that at the time the insured lost his life plaintiff had no insurable interest in his life; third, that plaintiff in the application for the policy which was made a part thereof, made certain false, untrue, and misleading statements relative to the habits of life of the insured which were made with the intent of deceiving defendant and which did deceive defendant and caused defendant, believing said statements to be true, to agree to the issuance of the policy. With respect to such affirmative defenses thus alleged the burden of proof rested upon defendant to establish them. Mattson v. Maryland Casualty Co., 100 Cal.App. 96, 279 P. 1045; Davilla v. Liberty Life Ins. Co., 114 Cal.App. 308, 299 P. 831.

Appellant's first contention is that the trial court improperly permitted certain evidence to be introduced. The evidence which is claimed to have been inadmissible consists of the statements of the insured made to various persons. These statements fall into three classes. The first of them consists of statements made by him to respondent relative to his authorizing her to sign his name to the application for the policy. The second class consists of certain statements purportedly made to third persons wherein the insured recognized the existence of the policy and his approval of it. The third class consists of statements made to third persons wherein the insured admitted that he was indebted to respondent.

[2, 3] The first of the above-mentioned classes of declarations relates to certain testimony given by respondent herself. She was permitted to testify without objection that she signed the name of the insured to the application at his request and that at the time she did so she telephoned him with regard to taking out the insurance and he directed her to sign his name to the application and requested her to advance the initial premium. She was also permitted to testify without objection that prior to the renewal date of the policy the insured telephoned her and inquired as to the renewal date, and on being informed thereof requested her again to advance the amount required to renew the policy. Subsequently during the trial appellant moved the court to strike out the above-mentioned testimony, which motion was denied. It is maintained that the denial of the motion was erroneous and that the testimony should not have been permitted to stand for the reason that the statements attributed to the deceased were purely in support of his own interest and therefore inadmissible.

The evidence was properly admitted and the trial court's refusal to strike out the testimony was correct. One of the principal issues in the case was whether the policy of insurance was a contract between insurer and insured or between insurer and respondent. Respondent maintained that the former was the case, and that, although she signed the insured's name to the application, she did so as his agent under his authorization and direction. It is a settled principle of the law of agency that when the fact of agency is in dispute it may be established by the testimony of the agent who is a competent witness to prove the fact. 2 Amer. Jurisprudence, p. 353.

[4, 5] The second of the above-mentioned classes of evidence was also properly admitted. The fact of agency was, under the circumstances, an important feature of the case. Agency may be shown either by proof of direct authorization or by proof of subsequent ratification. Respondent was clearly entitled to prove not only that direct authorization was given her to sign the insured's name to the application, but also that subsequent to the issuance of the policy he made statements which showed that he knew of the issuance of the policy. Knowledge on his part of the existence of a policy of insurance in which he was named as the insured was a fact that pointed strongly to ratification by him of respondent's act of signing his name to the application.

[6, 7] The third class of evidence was likewise properly received. This class consisted of statements of the insured wherein he admitted that he was indebted to respondent. One of the recognized exceptions to the rule which prohibits the admission of hearsay evidence is that which permits evidence of the declarations of a person against his interest. The reason for the exception is that it is presumed that a declaration so made is truthful. The exception applies to declarations of deceased persons as well as to those of the living. Rulofson v. Billings, 140 Cal. 452, 458, 74 P. 35. The admission of a person that he is indebted to another is a declaration against interest and is clearly within the above-stated exception.

[8, 9] Furthermore, with respect to the second and third classes of evidence of whose admission appellant complains, certain observations are proper to be made. As to the second class, even if it be conceded that it was erroneous to permit its reception, the error is not sufficiently serious to warrant a reversal of the judgment. As above noted, evidence that the insured had admitted that he knew that the policy had been issued was directed to the issue that the contract of insurance was one between him and appellant and pointed particularly to a ratification by him of the contract which admittedly he had not himself executed. However, respondent had herself testified to the fact that she had been expressly authorized to execute the contract for the insured and in his name. The evidence of his subsequent recognition of the existence of the policy had a bearing on the question of agency alone. This evidence was merely cumulative with respect to the fact of agency and as the respondent's testimony was ample to establish this fact the reception of additional evidence tending to establish the same fact, even though erroneous, was not prejudicial to appellant. With regard to the third class, it is obvious that it had a bearing solely on the issue of insurable interest. However, the jury made a special finding that the contract of insurance was between appellant and the insured, which entirely eliminated the question of insurable interest of respondent in the life of the insured. Comegys v. National Union Assur. Soc., 3 Cal.App.(2d) 637, 639, 39 P.(2d) 861. Therefore, even if it be conceded that the third class of evidence was erroneously admitted, no possible prejudice could have resulted therefrom, and the error was harmless. Finally, it should be noted with respect to both classes under discussion that the evidence comprised within them was restricted to the two issues heretofore mentioned, and the jury was instructed that it was to be considered only with respect to said issues.

[10, 11] Appellant further complains that the respondent was herself permitted to testify that the insured was indebted to her in an amount in excess of the sum which the contract of insurance provided should be paid in the event of death. The ground of this objection is that she was thereby allowed to vary the terms of a written contract which she had herself executed. Proper consideration of this contention requires a brief recital of certain facts established by the evidence. At the time application for the insurance was made respondent was the wife of the insured. Approximately eight months thereafter an action for divorce was instituted by the insured against respondent. The latter filed an answer and cross-complaint in the action and later secured an interlocutory decree of divorce. On the date on which this decree was rendered a property settlement agreement was executed by the parties to the divorce suit. By the terms of this agreement respondent expressly waived and relinquished any right or claim she might have to any real or personal property which might thereafter be acquired by her husband. No mention was made of the insurance policy in the agreement.

It is perhaps a sufficient answer to appellant's contention in this regard to point to the fact that the jury by its special finding that the contract of insurance was made between respondent's husband and appellant effectually eliminated the question of insurable interest. If, therefore, it be conceded that the ground of appellant's objection is correct and that the evidence should not have been admitted for the reason stated, the error committed in its reception is harmless. However, it should also be observed that respondent did not base the present action on the property settlement agreement which she entered into with her husband. The instant action is on a policy of insurance issued by appellant, who is a stranger to the property agreement. Appellant could not therefore be bound by the agreement between respondent and her husband and would be at liberty to show that the written agreement did not express the full or true character of the transaction. Since appellant had the right thus to vary or contradict the written agreement by parol evidence, respondent, although a party to the agreement, had an equal right to do so. 22 Cor.Jur., p. 1292; Budd v. Hughes, 176 Cal. 687, 171 P. 287; Spraul v. Garliepp & Mack, 138 Cal.App. 491, 494, 32 P.(2d) 657. Finally, it may be observed that at the time the property settlement agreement was entered into between respondent and her husband the right of the former under the policy of insurance was no more than an expectancy. The policy of insurance expressly reserved to the insured the right to change the beneficiary without respondent's consent. Respondent's right under the policy was not a property right and not therefore a proper subject of a property settlement contract. Sandrosky v. Prudential Insurance Co., 217 Cal. 578, 20 P.(2d) 325.

[12] With regard to the property settlement contract, it is further contended that the trial court erroneously refused to permit appellant's counsel to cross-examine respondent with respect to what was included in said agreement. The particular inquiry which the court refused to allow answered was as follows: "When you came to get your divorce in December, 1932, you and he entered into a property settlement agreement, and in that agreement you agreed with each other that neither one of you had any claims upon the other; is that right?" The court thereupon remarked that the agreement was in evidence and that it spoke for itself. The trial court was correct. In the form in which the inquiry was framed it called for the conclusion of the witness and was clearly objectionable for this reason.

[13] Appellant further contends that the trial court erroneously overruled its objection to a certain inquiry propounded to the respondent on her direct examination. The question to which objection was interposed called for a recital of a conversation which occurred between respondent and the soliciting agent of appellant regarding the answer to be given to a certain question contained in the application for insurance. The question which provoked the discussion between respondent and the agent was as follows: "Are your habits of life correct and temperate?" In this connection it is also contended that the trial court committed reversible error in permitting another witness who stated that she was present at the time the application was signed to testify with respect to the discussion that ensued between respondent and appellant's agent regarding the answer to be given to the above-quoted question contained in the application.

In giving consideration to appellant's contentions in this regard, it should be borne in mind that appellant in its answer had set up the affirmative defense that the answer returned to the above-stated inquiry in the application was false and misleading and made with the intent to deceive appellant and that the false answer given in response to the inquiry did deceive appellant to its detriment. It should also be borne in mind that the inquiry was contained in a blank form of application prepared by appellant. It is our opinion that the correct meaning of the word "temperate" is not so clear as to render any explanation of the sense in which it was used by appellant unnecessary. The question of whether or not an individual is temperate calls for an answer in which the factor of opinion enters to some considerable degree. Appellant was responsible for the form of the inquiry and respondent was entitled to be advised as to what meaning appellant placed upon its own phraseology. It is our opinion that no error was committed by the court in overruling appellant's objections to the inquiries propounded and in permitting the witnesses to relate the substance of the conversation.

[14] It is further contended that the trial court erred in denying appellant's motion for a nonsuit which was presented at the close of respondent's case. The grounds of the motion were that the evidence showed that the contract of insurance was between respondent as the beneficiary named in the policy and appellant and that there was a

failure of proof that respondent had an insurable interest in the life of the insured. The court, in denying the motion, ruled that a prima facie showing had been made that the contract was between the insured named in the policy and appellant as insurer and that the question of insurable interest was therefore immaterial at that stage of the case since the law declares that every one has an insurable interest in his own life. In thus holding the court committed no error.

[15] An additional and third ground of the motion, however, deserves special consideration. This ground was that there was a concealment by respondent of a fact material to the issuance of the policy and a willful and fraudulent representation by her as to a fact that was material to the risk or hazard which was to be assumed by appellant in executing the contract of insurance. The fact which forms the basis for this third ground of the motion and which is now particularly urged by appellant in its attack upon the court's denial of the motion for nonsuit relates to the habits of life of the insured. As heretofore noted, the application contained the following question: "Are your habits of life correct and temperate?" An affirmative answer was returned to this question by respondent, acting as her husband's agent in making the application. It is urged that the evidence which was before the court when the motion for nonsuit was presented showed that respondent, in returning an affirmative answer to the question, willfully concealed from the insurer the highly material fact that her husband was habitually intemperate in his indulgence in alcoholic liquor and deliberately, intentionally, and fraudulently represented that he was temperate in his habits, whereas she knew to the contrary that he was habitually intemperate. It would be a sufficient answer to appellant's contention to point to the fact that this particular ground of the motion constituted an affirmative defense set up by appellant in its answer. It was an issue raised directly by appellant, and the burden of establishing it rested upon appellant. Respondent was not required to meet this issue in order to make out a prima facie case entitling her to recover. However, this matter was also urged by appellant as one of the chief grounds in support of its motion for a directed verdict which was presented at the close of the entire case and is here urged as a basis for the contention that the court erred in denying such motion. It is obviously one of the most important features of the entire case and may therefore with propriety be now examined. Its consideration requires a recital of the evidence bearing on the matter as the same appears in the record.

As heretofore noted, the trial court over appellant's objection permitted the respondent and another witness to testify regarding the discussion which ensued between respondent and the soliciting agent of appellant when the above-quoted question relating to the habits of life of the insured was encountered in the application. The respondent testified in substance that she explained to the agent who called on her to solicit the application for insurance that, although her husband indulged in the use of intoxicants, he did not drink to excess. She further testified that the agent asked her if the insured drank to such an extent that he could not carry on his business, to which she replied "absolutely not," and that while his indulgence in alcoholics made him quarrelsome and ugly, it did not prevent his carrying on his business affairs. She also stated that the agent said: "That is what the question means" and thereupon himself wrote the answer "Yes" to the question contained in the application. Another witness who was respondent's mother testified that she was present when the application was signed and that she heard respondent tell the agent that the insured "didn't get in a state from drinking that he couldn't carry on his business." The agent who solicited and procured the application for insurance was called as a witness for the appellant and testified that the respondent told him that the insured took an occasional drink and that he then asked her if he drank to excess, habitually, to which inquiry respondent returned a negative reply upon which he remarked: "We couldn't issue a policy in that case." This witness further testified that respondent did not state to him that her husband habitually partook of intoxicating liquor. It is apparent, therefore, that there was a sharp conflict in the evidence with respect to the disclosures that were made by respondent to the agent regarding the habits of life of the insured with reference to his use of intoxicating liquor. It must, however, be further observed that the complete record of the divorce action between respondent and her husband was offered in evidence by appellant and was admitted. The verified cross-complaint filed by respondent in said action forms a part of this record. In this pleading it was alleged as the single ground for divorce that from the date of marriage the husband had been habitually intemperate in the use of intoxicating liquors to such an extent that it inflicted great mental anguish upon the wife. It also appeared that an interlocutory decree of divorce was granted in respondent's favor and that findings were expressly waived by the parties. The interlocutory judgment, however, contains a recitation to the effect that it appeared to the trial court that each and all of the facts alleged in respondent's cross-complaint were true.

In giving consideration to appellant's contention that the evidence showed that the defense of misrepresentation was established, it may be assumed that the inquiry respecting the insured's habits of life related to a fact that was material to the risk which appellant was about to assume. We do not understand that it is otherwise contended by respondent.

It may also properly be observed that the form of the inquiry contained in the application was most general. It was not specific as, for example, it would have been if it had been in the following language: "Do you use intoxicating liquor?" The inquiry as to whether one's habits of life are temperate necessarily calls for the opinion of the person to whom the inquiry is directed. This must be true because the word "temperate" is not susceptible of exact definition. The expression "temperance" covers a broad field, and while it is here limited to the matter of indulgence in alcoholic beverages, its precise meaning is nevertheless not simple of expression. It may be conceded that it is not synonymous with abstinence. On the contrary, it conveys the idea of indulgence. Having bound up in it this idea, it is clear that the phrase calls for an expression of opinion and one as to which there is a wide diversity. In its reliance upon the record in the divorce action as furnishing conclusive evidence of respondent's misrepresentation and concealment, appellant contends that, since section 107 of the Civil Code definitely provides that habitual intemperance must continue for a period of one year before it becomes a ground for divorce, it is apparent that there was misrepresentation as to the fact of intemperance at the time the application was made. However, it must be noted that the allegations of respondent's cross-complaint were that the habitual intemperance of her husband was of such character that it inflicted upon her a course of great mental anguish. Habitual intemperance is defined in section 106 of the Civil Code as being that degree of intemperance which disqualifies the person for a great portion of the time from properly attending to business or which would reasonably inflict a course of great mental anguish upon the innocent party. It is evident, therefore, that respondent contended in her action for divorce that the habitual intemperance of which she complained was not such that it disqualified her husband from properly attending to his business, but that it was such that it caused her great mental anguish. It is also apparent that the decree of divorce followed the allegations of the cross-complaint. The documentary evidence consisting of the record in the divorce case may not then be said to conflict with respondent's version of the conversation which she had with appellant's agent for she testified that she informed the agent that her husband used intoxicants to the extent that it made him quarrelsome and ugly, but not to the extent that it disqualified him from attending to his business. Three other witnesses also testified as to the insured's indulgence in intoxicants, and it is significant that none of them stated that the insured used liquor to the extent that it interfered with the proper conduct of his business. On the contrary, each of these witnesses who had been acquainted with the insured for varying lengths of time testified that he had never seen him use intoxicating liquor to excess. These witnesses testified on behalf of respondent. Appellant produced no independent evidence other than the record of the divorce action, which tended affirmatively to show that the insured was not in fact temperate in his use of intoxicating liquor. Furthermore, appellant produced no evidence as to what it meant by the use of the word "temperate." Yet it must be remembered that misrepresentation of the fact of intemperance was set up as an affirmative defense in appellant's answer and it was further charged that the misrepresentation was made with the intent to deceive, and that it did deceive appellant.

[16] It is further urged that even though it be conceded that full disclosure of the facts relating to the insured's use of intoxicating liquor was made to the agent who took the application, nevertheless the agent was not authorized to change the policy or to waive any of its provisions, as the policy itself plainly prohibited any change in its terms or waiver of any provision by an agent. It is then contended that even

though the agent was fully advised as to the insured's use of intoxicants, he was not empowered to interpret the word "temperate" as the same was used with reference to the insured's habits of life, and he was not authorized to waive the condition of the policy which required the insured to be temperate in the use of intoxicants in order to be insurable.

With respect to this contention, the evidence which was produced with reference to the relationship which the person who received the application for insurance bore to appellant may properly be examined. It was shown that he was employed by and was a director of the Kettner-Stafford-Goldsmith Co., Limited, a corporation which was engaged in general insurance business in the city of San Diego. The concluding paragraph of the policy of insurance which was issued by appellant is in the following language: "In Witness Whereof the Company has caused this policy to be signed by its President and its Vice President-Secretary but the policy shall not be binding upon the Company until countersigned by a duly authorized representative of the company." The policy bore the signature of Wallace Fetzer, as president and Charles G. Newmiller as vice president-secretary. Immediately below the above-mentioned signatures appeared the following notation: "Countersigned by Kettner-Stafford-Goldsmith Co., Ltd., by Joe M. Elmer." It is undisputed that the name of the person who called on respondent and secured the application for insurance was Joe M. Elmer. This individual was called as a witness by the appellant and during the course of his cross-examination testified that the policy of insurance which formed the basis of the present action was written in the office of the Kettner-Stafford-Goldsmith Company in the city of San Diego by a policy writer employed by said company on a blank form of policy furnished by appellant on which the signatures of appellant's officers were printed, and that the only actual signing of the policy was done in the office of the Kettner-Stafford-Goldsmith Company in San Diego.

[17] It is apparent from the above-described evidence as to which there is no conflict that we have here something essentially different from a waiver of conditions by a mere soliciting agent. We have an interpretation of certain language used by the insurer in its printed form of application, which interpretation was given by an officer of a corporation that was the general agent of the insurer. Appellant points to the fact that the policy itself, which the undisputed evidence showed was delivered to respondent, provided as follows: "No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon." It is then further observed that no evidence was submitted which tended to show that any executive officer was ever apprised of the disclosures which respondent testified she made to the agent relative to her husband's use of intoxicants, and that the policy contains no indorsement of approval by any such officer of any change in the policy that would permit of its issuance in the face of such disclosures. The obvious answer to that part of the argument which pertains to the requirement of approval by an executive officer of the company is that it is not pretended that there was any change in the policy. It is contended that full disclosure of the insured's habits with respect to the use of intoxicants was made to the agent, who thereupon said that the information transmitted to him did not indicate that the insured was intemperate within the meaning of the language used in the inquiry. If, then, it may be properly said that there was a waiver of a provision or condition requiring the insured to be temperate in the use of intoxicants, there was evidence which tended to show that the waiver was accomplished by appellant's general agent. It may be regarded as settled in California that a general agent vested with full authority to consummate a contract of insurance has the power to waive conditions and forfeitures, although the policy contains an express limitation of the authority of agents to bind the insurer by waiver of conditions which are set out in the policy. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740; Sharman v. Continental Ins. Co., 167 Cal. 117, 124, 138 P. 708, 52 L.R.A.(N.S.) 670; Vierra v. New York Life Ins. Co., 119 Cal.App. 352, 6 P.(2d) 349.

With respect to the feature of waiver, it is proper further to observe that appellant's contention that no waiver of any provision of the policy could be accomplished by an agent of the insurer is based on the assumption that the fact of intemperance of the insured was established by the evidence. With this basic assumption we cannot agree. The jury returned a general verdict in favor of respondent. In support of this verdict and the judgment which followed it, a reviewing court is entitled to assume that the jury found that the affirmative defense of misrepresentation had not been established by appellant. As heretofore noted, the misrepresentation relied upon by appellant as sufficient to enable it to avoid its contract related not to a definite, readily definable fact, but to a matter which necessarily called for an expression of opinion. Appellant itself selected the language which formed the inquiry and is therefore responsible for any lack of clarity or ambiguity or difficulty of definition of the phraseology which it elected to employ. The meaning of the word "temperate" as used in the application for insurance is largely a matter of opinion depending upon the liberality of view entertained upon the subject by the individual. In the absence of any standard of measurement, the question was one of fact to be determined by the jurors, whose conclusion with respect thereto would depend largely upon their opinion as to what the word "temperate" means. The record is bare of any showing that the insured used intoxicants to the extent that his indulgence therein interfered with the conduct of the business in which he was engaged. There was evidence that he drank to an extent that made him quarrelsome and ugly and inflicted upon respondent a course of great mental anguish. Here again the factor of the opinion of an individual complicates the problem. Different individuals do not entertain the same opinion with respect to the use of intoxicating liquor. For all that appears, respondent may be so constituted that the consumption by her husband of a very moderate quantity of intoxicating liquor on one occasion or on a number of occasions widely separated in point of time may have caused her keen mental anguish. All of this simply serves to emphasize the fact that the question of whether an individual is temperate or intemperate in the use of alcoholic beverages depends largely on opinion and presents a problem which is eminently proper to be determined by the triers of fact. McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 183 P. 373. We think, therefore, that the trial court did not err in denying appellant's motion for a directed verdict.

Appellant further contends that the court committed reversible error in submitting to the jury a special interrogatory and in declining to submit four other special interrogatories which were specifically requested by appellant. The special interrogatory which was submitted by the court was as follows: "Was the contract of insurance a contract between the defendant, The Fidelity and Casualty Company of New York and Robert Frank Mayfield?" The interrogatories which appellant prepared and requested the court to submit related to the matters of insurable interest and misrepresentation and concealment by respondent.

[18, 19] With respect to this contention it may be observed that section 625 of the Code of Civil Procedure provides as follows: "In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." It is obvious from this language that the submission of special interrogatories to a jury rests in the sound discretion of the trial court and that interference with the court's discretion is not warranted unless it is clearly made to appear that the discretion has been abused. Olmstead v. Dauphiny, 104 Cal. 635, 641, 38 P. 505; Oberholzer v. Hubbell, 36 Cal. App. 16, 19, 171 P. 436; McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 147, 183 P. 373; Weintraub v. Soronow, 115 Cal.App. 145, 152, 1 P.(2d) 28. It does not appear that the court abused its discretion with respect to this feature of the case, and appellant's contention in this regard is entirely lacking in merit.

Appellant contends that the trial court erred in refusing to give to the jury certain instructions which were requested by it and in giving certain instructions which are criticized as containing incorrect and misleading advice with respect to the legal principles involved in the action. Two of the instructions which were given by the court deserve special mention and consideration.

[20, 21] In one of these instructions the court, in referring to the issue of whether or not the contract of insurance was made by the insured, stated that the uncontradicted evidence showed that respondent signed her husband's name to the application. The court then said: "She would have a right to do that if she were author-

ized by her husband to do that or if, after she had done it, he knew about it *or* acquiesced or agreed that it was all right." (Italics ours.) The obvious objection to this language is that the disjunctive "or" was used when it is apparent that the conjunctive "and" should have been employed.

Assuming that no typographical error has been committed and that the phonographic reporter correctly reported the court's language, we are nevertheless constrained to hold that the use of the improper disjunctive rather than the obviously proper conjunctive was harmless. It is fundamental that, in examining instructions, a part of one instruction may not be separated from its context and made the object of special criticism if the instructions taken in their entirety correctly advised the jury as to the law. Application of this rule to the above-quoted language produces the conviction that the error therein appearing was not sufficiently prejudicial to appellant to warrant reversal of the judgment. In the same paragraph in which the criticized language appears the jury was advised that if respondent was authorized by her husband to sign his name to the application or that if she was not authorized by him in the first instance he ratified her action by his subsequent approval the jury would be justified in finding that the contract was the husband's contract, but that if the jury found that the husband had not authorized the making of the contract and knew nothing about it and did not ratify it the jury would be relegated to finding that the contract was not the husband's contract but was the respondent's contract. It is, we think, manifest that the instruction as to the feature of ratification taken as a whole was not misleading. In arriving at this conclusion we are fortified by certain decisions of our own courts wherein it has been held that the employment of the improper article "a" in place of the proper article "the" was not so palpably misleading as to require reversal of the judgment. Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Freiburg v. Israel, 45 Cal.App. 138, 187 P. 130. We find further support for our conclusion in certain decisions of the courts of other states wherein misuse of the conjunctive and disjunctive has been held harmless error not warranting reversal of the judgment. Dickinson v. Davis (Mo.App.) 284 S.W. 815; Citizens' Gas-Light & Heating Co. v. O'Brien, 118 Ill. 174, 8 N.E. 310; O'Connor v. Langdon, 3 Idaho (Hasb.) 61, 26 P. 659; Wachovia Loan & Trust Co. v. Forbes, 120 N.C. 355, 27 S.E. 43.

[22] The second criticized instruction which is here selected for special mention is as follows: "To establish such evidentiary fact of bad faith or deception the evidence should be clear and satisfactory." This language was used by the court in advising the jury relative to the affirmative defense of misrepresentation respecting the insured's habits of life. In effect, the court told the jury that the defense thus presented amounted to a charge of fraud on the part of respondent entitling appellant to avoid its contract. The court clearly pointed out that the burden of proof rested upon appellant to establish the defense by a preponderance of the evidence. It is our opinion that taking the court's instruction relative to appellant's defense of fraud in its entirety the jury was properly advised with respect to such defense and that the criticized language is not susceptible of attack on the ground that it may have misled the jury into believing that the burden of establishing the defense by more than a preponderance of the evidence was imposed upon appellant. Hanscom v. Drullard, 79 Cal. 234, 238, 21 P. 736; Edmonds v. Wilcox, 178 Cal. 222, 224, 172 P. 1101.

With regard to other instructions given by the court which are attacked on this appeal and appellant's complaint that the court erroneously refused to give certain instructions which it offered, it is a sufficient answer thereto to remark that an examination of the instructions in their entirety impels the conclusion that the jury was fully, fairly, and correctly advised with respect to the law and that no reversible error was committed by the trial court in this regard.

It is finally contended that the judgment and the verdict upon which it is based are lacking in evidentiary support. The record fails to sustain the contention.

[23] Appellant has attempted to appeal from the trial court's order denying its motion for a new trial. Since no appeal lies from such an order, the attempted appeal therefrom is dismissed.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

7 Cal.2d 477

ROBERTS v. CITY OF LOS ANGELES et al.

L. A. 14323.

Supreme Court of California.

Sept. 29, 1936.

1. Statutes 🔑120(3)

Provision of statute authorizing municipalities to furnish electric current and assess costs and expenses thereof against benefited property *held* not beyond scope of title conferring power on municipalities to maintain lighting works and assess costs and expenses thereof against property benefited, where closing clause of title, specifically providing for repeal of former act, contained language necessary to conform with constitutional mandate (Gen.Laws 1931, Act 5215; Const. art. 4, § 24).

2. Appeal and error 🔑169

Questions not presented in lower court and raised for first time on appeal by brief of amicus curiæ could not be considered.

3. Municipal corporations 🔑454

Proceedings for assessment of property for establishment and maintenance of street lighting system and for furnishing of electric current are in invitum, and authority conferred by statute must be strictly pursued (Gen. Laws 1931, Act 5215).

4. Municipal corporations 🔑419

Cost of furnishing electric current could be assessed against benefited property, as against contention that electric current was an evanescent substance and did not have permanent nature which would permit assessment against property (Gen.Laws 1931, Act 5215).

5. Municipal corporations 🔑419

Fact that particular residence section of boulevard was heavily traveled thoroughfare *held* not to prevent municipality from making assessment against property benefited for electric current used in lighting boulevard (Gen.Laws 1931, Act 5215).

6. Municipal corporations 🔑454

Finding of municipal bodies charged with duty of determining question of benefits conferred on property within local district by reason of improvement is conclusive in absence of evidence that they exceeded or abused their authority.

7. Municipal corporations 🔑460

That board of public works in reporting street lighting improvement to city council included certain items as "incidental expenses" without defining such phrase, and that many component parts which entered into and formed designated items as a whole were not separately analyzed in report to council, *held* not to render assessment for street lighting purposes invalid (Gen.Laws 1931, Act 5215, § 2, subd. 2; § 16).

8. Municipal corporations 🔑511(1)

Property owner could not on appeal to Supreme Court raise objections to municipal assessment for street lighting purposes, where such objections had not been raised in property owner's protest against improvements (Gen.Laws 1931, Act 5215).

9. Municipal corporations 🔑460

Inclusion of estimates of costs of repairs and renewals and charges for collection of assessments and supervision of works in municipal assessment for street lighting purposes *held* proper (Gen.Laws 1931, Act 5215).

10. Municipal corporations 🔑469(1)

Where municipal assessment for street lighting purposes in respect to benefits was spread on property of district in proportion to frontage feet owned by respective owners, method of assessment *held* not improper (Gen. Laws 1931, Act 5215).

In Bank.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Charles H. Roberts against the City of Los Angeles and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

For prior opinion of the District Court of Appeal, Third District, see 49 P.(2d) 330.

Hewitt & Anderson, Hewitt, McCormick & Crump, Leslie R. Hewitt, and C. L. Price, all of Los Angeles, for appellant.

George W. Crouch, of Los Angeles, amicus curiæ.

Edwin P. Werner, former City Atty., Jerrell Babb, Deputy City Atty., Ray L. Chesebro, City Atty., Frederick Von Schrader and Leon Thomas David, Asst. City Attys., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

SEAWELL, Justice.

Plaintiff, the owner of lots Nos. 13, 14, and 15, all in Madeline tract, city of Los

Angeles, brought this action in the superior court of the county of Los Angeles, praying for judgment for the cancellation of assessments levied in the sums of $29.69 on lot No. 13 and $29.80 on each of the other two lots, respectively, for street lighting purposes. Said assessments were subsequently confirmed by the city council.

Ordinance No. 63060, declaring the city's intention to order the necessary electric current to be furnished for a period of fourteen months for lighting purposes, was approved February 26, 1929, and became effective March 9, 1929. Ordinance No. 63814, ordering the necessary lighting posts and appliances and furnishing the electric current as in said ordinance and resolution of intention provided and inviting sealed bids or proposals, was approved May 13, 1929. Judgment went against plaintiff and the cause is here on appeal. Plaintiff makes the contention that the assessments are void for the following reasons: That the furnishing of electric current for the lighting of a public street is not a subject embraced in the title of Act 5215 (Public Works and Utility Act) approved June 6, 1913, Deering's General Laws 1931, vol. 2, pp. 2679–2687, under which the city asserts its power to inaugurate and maintain its lighting system of said public street; that certain items which are not taxable against the lands in a proceeding under said lighting act are included in the assessment, and said items, not being segregated from those which may be properly included in said assessment and which appear to be inseparable from the former, render the entire assessment void; that the furnishing of electric current for lighting public streets, being an impermanent and evanescent thing, is a local improvement, if an improvement at all, for which an assessment against private property cannot be made; that almost all of the total assessment for said lighting improvements is for the lighting of a portion of a main traffic artery and the lighting of said main artery is primarily a benefit to the entire city and all of its inhabitants and that the lands fronting on said street receive no greater benefit by reason of said improvement than do other lands within said improvement district. Other objections made to the proceedings taken under the act will be noticed as their importance may require.

We will first consider the objections taken by virtue of article 4, § 24, State Constitution, which provides that "if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void * * * as to so much thereof as shall not be expressed in its title." The objection raised is that the title is deficient in that the power to furnish electric current and impose the charges therefor on private property is not expressed in the title of the act. The title in question (Gen.Laws 1931, pp. 2679–2687, Act 5215) reads as follows: "An act to provide for the acquisition, installation, construction, reconstruction, extension, repair and maintenance by municipalities of waterworks, electric power works, gas works, lighting works, and other public works and utilities; for the assessment of the cost and expenses thereof upon the property benefited; and for the issuance of improvement bonds * * * and to repeal an act entitled 'An act to provide for the lighting of public streets, lanes, alleys, courts and places in municipalities, and for the assessment of the costs and expenses thereof upon the property benefited thereby.'"

Section 1 of said act provides: "Whenever the public interest or convenience may require, the city council of any municipality in the state shall have full power and authority to order * * * lines, conduits, and other necessary works and appliances, for the purpose of providing electric power service; * * * poles, posts, wires, pipes, conduits, lamps and other necessary works and appliances, for lighting purposes; or any of said improvements, or any works, utility or appliances necessary or convenient for providing any other public service, to be installed, constructed, reconstructed, extended, repaired or maintained in and along the whole or any part of any one or more of the public streets, alleys, or other places in such municipality, or in and along any right of way owned or held by said municipality for the purpose; also to order any works or appliances already installed in or along the whole or any part of any one or more of the public streets * * * in such municipality, and which are necessary or convenient for the purpose of supplying such municipality or its inhabitants with water, electricity * * * or other means of heat, illumination or power or with any other public service * * * necessary or convenient for the use and operation thereof, to be acquired, or to order the use of any such works, appliances and other property to be acquired; also to *order electric current*, gas, or other illuminating agent, to be furnished for such power or lighting service, in the manner and under the proceedings hereinafter described." (Italics supplied.)

Said act provides that before any improvement is made, the city council shall adopt a resolution of intention to do the same, briefly describing the proposed improvement and specifying the exteriors of the boundaries of the district to be benefited and to pay the costs and expenses thereof. The city council may in its discretion (which was done in the instant case) order in said resolution of intention that a certain portion or percentage of the costs and expenses of said improvement, the amount of which shall be specified in said resolution (in the instant case the amount specified was $2,885), shall be paid out of the treasury of the municipality from such fund as the city council may designate. Said proposed improvement may include any or all of the different kinds of work mentioned in section 1 of said act, provided that the maintenance of appliances or the furnishing of electric current or other illuminating agent shall be for a period stated in the resolution of intention, but not exceeding two years. In the instant case it is for a period of fourteen months. The council in the resolution shall refer the proposed improvement to the board, commission or officer having charge and control of the public improvement described in the resolution to the city engineer, or to such board or officer or competent person employed by the city for such purpose as the council may name in said resolution and to direct such board, commission, or person to file with the clerk of the council a report in writing. The proposed improvement in the instant case was referred to the board of public works, which was required to report in writing the plans and specifications of the proposed improvement, excepting in so far as said improvement included the acquisition of works or appliances already installed and any other property necessary or convenient for the operation thereof or the acquisition of the use of such works, appliances and property, as provided for in section 1, as to which works, appliances and property such report shall contain a general description. It also provided a report as to the estimate of the cost of said improvement and of incidental expenses; also a diagram showing the assessment district and the boundaries and dimensions of the respective subdivisions of land within said district; amount paid out of the city treasury and the proposed assessment of the total amount of costs and expenses of the proposed improvement upon the several subdivisions of land in said district in proportion to the estimated benefits received by such subdivisions from said improvement and the manner and method of spreading the assessments.

Plaintiff appeared at the time fixed for hearing and filed a written protest based on the following grounds: That Act 5215, General Laws 1931, pages 2679–2687, (Deering), did not include or authorize any proceeding for furnishing electric current for lighting service and Ordinance No. 63060 derived no force or power therefrom, and therefore the assessment made thereunder is null and void; that the furnishing of electric current is not within the purposes or purview of said act; that the furnishing of electric current is not an improvement for which an assessment may be levied upon private property; that Sunset boulevard is an important highway artery of said city of Los Angeles and the lighting of said boulevard is for the benefit of said city and its inhabitants generally and is not of greater benefit to the lands fronting thereon than it is to the traveling public generally; that the proportion of the cost to the city for said improvement is but thirteen per cent of the entire cost, as against 87 per cent. assessed against the landowners; that the destruction of lighting posts is due to the negligence of automobile drivers, and lamps and globes are usually broken by mischievous or irresponsible persons and the cost of the repair or replacement of such property should not be assessed against the property; that the charges for supervising the furnishing of said electric current, or the making of repairs or renewals and the charges for collecting said assessments are illegal charges for the reason that there is no authority or warrant for assessing the property with any part of said costs and expenses; that said assessments were made on the basis of an arbitrary and uniform rate per front foot and they are not in proportion to the estimated benefits.

The foregoing constitute all the basic grounds upon which the assessments were protested.

When, upon a hearing, the said proposed assessments are confirmed, modified, or corrected, or in case no protests are filed, said report of the board of public works, with its corrections or changes, if any, shall be adopted as a whole and the council shall, by resolution, order said proposed improvements to be made and declare its action upon said report and assessment, which resolution shall be final and conclusive on all persons, and the assessments shall be accordingly levied upon the subdivision of lands in the assessment district.

Said act especially provides that the act of March 21, 1905, providing for the lighting of public streets and the assessment of the costs and expenses thereof upon the property benefited thereby, is expressly repealed, and it further provides that the proceedings commenced under said 1905 act prior to the day of the repeal may be continued to completion in the same manner and with the same force and effect as if said 1905 act had not been repealed. The above provision tends to strengthen the view that the Legislature itself construed the act of 1913 and intended that it should be a continuation of the act of 1905, but made such provisions as increasing growth and changes seemed to require, both acts pointing to the accomplishment of some of the same general purposes of legislation, to wit, public street lighting.

The fact that all improvements commenced under the 1905 act prior to the day of its repeal could be carried forward to completion under said repealed act is significant. The inference is irresistible that the act of 1913, with such changes as were deemed necessary, would afford municipalities every power which was conferred by the 1905 act. One or more other acts might be noted which clearly indicate that it was the policy and intention of successive Legislatures to give to municipalities the power to provide for the operation or maintenance of lighting systems along public streets, alleys, and other public places and the lighting thereof by electric current, gas, etc., and assess the costs thereof on the property benefited. Appellant points out that Act 5216, approved May 16, 1919, General Laws, Deering, page 2687, contains a title which would meet the objection of appellant as to the sufficiency of title, but which for some reason unknown to appellant the city council did not institute its proceedings under. It will be noted, however, that the 1919 act, approved six years after the 1913 act, recognizes said 1913 act (attacked here on the ground of insufficiency of title) and makes direct and full reference to it by quoting its title, and says: "This act [1919] shall in no wise affect an act * * * but it is intended to and does provide an *alternate* system of proceedings for making the improvements provided for by this act; and it shall be within the discretion of the city council of any municipality to proceed in making such improvements either under the provisions of this act, or under the provisions of such other acts." Section 17. Said act provides that when any proceedings are commenced under the 1919 act the procedure prescribed shall be followed throughout and any departure therefrom will render the proceedings null and void. By the foregoing we have the language of the Legislature to the effect that the system provided by the later act, 1919, for making the improvements provided in both acts as an *alternate* system and either act may be adopted as a means of accomplishing the same result.

[1] We now pass to the sufficiency of the title of the 1913 street lighting act, which is the source of all power exercised under Ordinance No. 63060. Appellant admits that the constitutional requirement as to the titles of acts is to be liberally construed, but insists that the furnishing of electric current and the assessment of the costs and expenses thereof is a subject embraced in the body of the act but not in its title. It is true that the exact language which appellant claims is necessary to a valid title does not appear in that part of the title which grants the power to the city to inaugurate the lighting system under which it has been operating. But it is also true that the portion of the title which repeals the act of March 21, 1905, is set forth in the precise language which appellant insists should be stated in order to conform with the constitutional mandate, and thereby confer the power which the city claims the right to exercise. Admittedly the repealing portion of the title fully expresses the subject embraced in the act. In Ex parte Liddell, 93 Cal. 633, 29 P. 251, 252, a leading case of this state construing the requirement of article 4, section 24, State Constitution, as to titles of legislative acts, the rule is

thus stated: "If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms, and with the fewest words, and the framers of the constitution doubtless intended the legislature to conform to that custom. * * * When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents; * * * and it is held in many cases that an act entitled, in general terms, an act to incorporate a certain town, may lawfully provide all means necessary for the government of the town, including taxation, courts, definition of misdemeanors, punishment of offenders, municipal improvements," etc., citing authorities. The constitutional provision must be given a liberal construction, because it does not itself "define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion" (citing cases). The title of the act in the instant case conferring power on municipalities clearly expresses as one of its subjects and purposes the maintenance by municipalities of electric power works, lighting works, and for the assessment of the costs and expenses thereof upon the property benefited. The closing clauses of said title specifically provide for the repeal of a former act which granted power to municipalities similar to that granted under the later act of 1913. When the title is read as a whole, can it be said that there is no intimation in the title as to the subject expressed in the body of the act? We think not. The only logical inference that can flow from the language of the title is that the production and furnishing of electric current was one of the main objects and purposes conferred on cities by the Legislature. The construction of an electric power works with no purpose or means of furnishing light would be as void of rationality as would the building of a reservoir storage system without providing any means of supplying it with water, or a locomotive without providing any means of generating steam. Reading the words "acquisition," "installation," "construction," "extension," "repair," and "maintenance," with the context of the title itself, it would seem that there can be no doubt but that the title of the act contemplated the operation of lighting works and the furnishing of electric current by that means. If this is not so, there would be no occasion to repair anything and there would be nothing of a useful character to maintain. Those words, construed with respect to their context, assume that the thing to be repaired or maintained is in operation. We are of the view that the Legislature, by the act of 1919, wherein it is specially provided that the act of 1919 shall in nowise affect said act of 1913, gave an expression of legislative intent which is entitled to more than passing consideration. In the case of In re City of Boston, 221 Mass. 468, 109 N.E. 389, it was contended that the city had no power to operate the draws in certain bridges. The statute conferred upon the city the power of "maintenance." The term was held to be broad enough to include the operation of the draws. There is no substantial difference between "maintenance" and "maintaining and operating." Saltonstall v. New York Central R. Co., 237 Mass. 391, 130 N.E. 185.

Where a statute authorized the establishment and maintenance of a detention home, the word "maintain" includes all things having to do with carrying on the business for which the home was built or established. People v. Atchsion, T. & S. F. R. R. Co., 300 Ill. 415, 133 N.E. 250. Maintaining an elevator includes the operation and not simply furnishing the elevator. Globe Ins. Co. v. Wayne, 75 Ohio St. 451, 80 N.E. 13.

It was said in Park v. Pacific Fire Extinguisher Co., 37 Cal.App. 112, 173 P. 615, that the proposition is so well settled as to need no citations that the Constitution does not require that the title of an act shall embrace an abstract or catalogue of its contents; and when the title of an act is not misleading, the act will not be held void simply because of the fact that its title does not so catalogue or schedule every item contained therein. For further authority, see In re Bear, 216 Cal. 536, 15 P.(2d) 489, 83 A.L.R. 1402; In re Marriott, 218 Cal. 179, 22 P.(2d) 692; People v. Jordan, 172 Cal. 391, 156 P. 451.

It cannot be said that either the members of the Legislature who passed said act of 1913 or the public were or have been deceived by its title.

The questions raised by appellant in this appeal are set forth in his closing brief as follows: "We make no point that the City Council did not observe in form all the detailed steps prescribed in the procedure for proceeding under the act under discussion, from ordinance of intention, notices, and all that, down to the purported confirmation of the assessment. But, since the question here is one of power—where, we contend, the council *has no power* to do the work proposed, we think that this case is not foreclosed by the summary statement that the council went through all the technical forms laid down by the law. We think we have shown that this case comes under that category and, hence, the plaintiff here is not within the rules referred to in respondents' brief. [Objections to the method of assessment.] * * * We contend that the assessment is invalid because the council had no power to assess appellant's property for the cost of electric current, nor to include in the assessment the items of collection and supervision fees and the costs of repairs and renewals."

[2] That was the theory, as stated by appellant, upon which the case was tried in the superior court, and as presented by appellant in the District Court of Appeal, Third District. An amicus curiæ brief was filed in the District Court of Appeal which raised questions not presented in the lower court and which were raised for the first time on appeal by the brief of amicus curiæ. Many of said questions were specifically eliminated from the cause by the appellant's statement of his case, and they cannot be considered on appeal under the well-established general rule. Supporting authorities of the above rule are collated in 2 California Jurisprudence, § 67, pp. 234, 235. See, also, collection of cases, 2 New California Digest, section 115, page 148. As said in Farmers' Union Ditch Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 P. 1042, 1045, "the court will not determine or pass upon other questions which might have been raised and which are suggested by the amici curiæ." See, also, State v. City of Albuquerque, 31 N.M. 576, 249 P. 242.

[3] Appellant invokes the rule that the proceedings herein are in invitum and the authority conferred by statute must be strictly pursued. While this is so, it is not to be taken that the same rules which apply to inferences, presumptions, rules of evidence, and construction of statutes should be differently applied to proceedings which involve a question of taxation. All that the law requires in any matter is a construction agreeable with reason and which gives force and effect to the intentions of statutes or ordinances as written.

[4] The lighting posts, installation of lamps, pipes or conduits for wires, and other appliances for lighting had been installed by the municipality before this proceeding was brought. All this, appellant concedes, was clearly within the terms of the act and was an improvement of a permanent character. But the appellant contends that with the above work or improvements the city's power ended. The operation of the lighting works, it is claimed, is not within the purview of the act. Electric current, it is insisted, is an evanescent substance or fluid, has no permanency, is not an appliance or a part of any work, or an improvement. As we understand the contentions of appellant, said city has the right to erect poles, equip them with lamps, string wires, install pipes and conduits, and construct electric power works, and do all things necessary to generate electric current in the exercise of its municipal power, but it cannot make the costs and expenses of supplying electric current a charge on the lands situate within the district according to the benefits received by reason of said improvements. We think there is no doubt that the furnishing of electric current comes within the classification of public improvements, in the same sense as does a permanent building or anything else of a permanent nature used in public utility construction. As a matter of fact, street lighting is a public improvement both by statute and decisions. The electric current is the main source of benefit to be derived from the improvement; it is the solar luminary, as it were, of a street lighting system, all other things being subsidiary to it. This question is elaborately discussed in Ankeny v. City of Spokane, 92 Wash. 549, 159 P. 806, 809, L.R.A.1917A, 1093, and it was there said: "No rule of law would justify their erection and maintenance in a street [lamp posts, etc.], were they not the necessary means to a desired end. It is difficult to understand, therefore, why the cost of this mechanical part of the improvement can be charged to abutting property specially benefited by the lighting of the street, while the cost of the electric energy, without which there can be no completed improvement, cannot be so charged. We think there is no room for such a distinction, that the mechanical contrivances and the electrical energy are but parts of a

complete whole, and that it is the whole, and not one of the parts, that confers the benefits." We are in accord with the reasoning of the Washington supreme court, which seems conclusive against the contention that electric current does not constitute any part of a public street lighting system or improvement and private property cannot be assessed for the costs of furnishing or supplying the same.

[5] The decision last above cited also disposes of another question raised by appellant herein to the effect that the particular residence section of Sunset boulevard, between North Broadway and Sanborn avenue, being a heavily traveled thoroughfare it is the general municipal duty to maintain said improvement rather than the duty of any particular locality. The decision observes that there are many public improvements from which private property receives an incidental advantage, but which are held to justify only general taxation. The rule, the decision continues, has been especially applied to public thoroughfares which, having been improved at the expense of local property and which have by use become out of repair; it being held that the local property could not be charged with the cost of keeping the street in repair. The improvement of a street usually increases travel thereon by the general public and consequently creates an increase of wear over normal conditions. "It is not just," continues the decision, "that the abutting property owners should be charged with the expense caused by this increase of travel, and the courts generally hold that the burden cannot be placed on them. But the situation with reference to an electric lighting system is in no way analogous. The system may have a local situs, benefiting only that part of the city wherein it is situated. It is of such a nature that increased use of the street by the public does not impair its efficiency, or add to the cost of its maintenance or operation. When, therefore, the system does not extend over the city at large, but is confined to a part of the city only, it is manifest that it may be almost wholly of local benefit, rendering it unjust to the general taxpayers of the city to be charged with the entire cost of its maintenance and operation."

[6] The city council and other bodies charged with the duty of determining the question of benefits conferred upon the property within the local district by reason of the improvement considered and determined that issue, and there being no evidence that they exceeded or abused their authority, the finding of said bodies is conclusive of the subject. Fraud or bad faith are not alleged in the complaint, nor was any attempt made to prove either.

[7] Objection is made to the assessment levied on the lands for the reason that the board of public works in its report to the council included certain items as "incidental expenses"; also, that certain costs and expenses were estimates and did not purport to represent the exact cost of said items or the exact cost of the services to be performed; further, that the act does not define "incidental expenses," and the matter being thus left to the unlimited discretion of the officers whose duty it was to prepare said estimates renders the entire assessment void. It is further claimed that there should be a segregation and itemization of appliances and incidental expenses.

It is the general rule that when the terms of a statute are complied with nothing further need be done. The estimated net cost to the property owners for furnishing electric current and maintaining said lighting system for said period of fourteen months, as admitted by the parties and found by the court, is, in words and figures, as follows:

Estimated cost of current	$18,652.00
Estimated cost of city clerk's fees	10.00
Estimated cost of repairs and renewals	1,607.18
Engineering fees	213.00
Collection fees	309.00
Supervision fees	426.00
	$21,217.18
Less city portion of costs	2,885.00
Net cost to property owners ...	$18,332.18

We think there is no merit in the contentions that the assessment is invalid for the reason that it does not define the phrase "incidental expenses," or because the many component parts which enter into and form the designated items as a whole are not separately analyzed in the report to the council and a cost price placed opposite each particle. The cost of repair work to poles, posts, wiring, conduits, lamps, and other necessary work and appliances, and the maintenance and replacements that would naturally be required, could only be arrived at by estimates based on the technical knowledge and experience of persons engaged in such work. There is scarcely a public improvement of any kind but that the cost of its construction and appliances is based upon estimates made by persons skilled in the particular lines of work or construction to be accomplished. The cost could not otherwise be determined. Besides, subdivision 2, section 2 of the act in question makes it the duty of the Board of Public Works to file with the council "an *estimate* of the cost of said improvement and of the *incidental expenses* in connection therewith," and section 16 provides that if the assessment shall realize a larger sum than is necessary therefor the excess shall be refunded pro rata to the parties by whom it was paid. The above method of estimating cost is not only approved by the act itself but it is also in harmony with the common method of arriving at the matter of costs in both public and private building enterprises.

[8] Appellant made no protest as to the failure to segregate the items in question; or because estimates of costs were made as to any part or all of the work; or complaint that "appliances" were not defined, or to the form of any of said items. Neither are any of these matters included in the "statement of questions involved." Had they been included in his protest, they could have been corrected to conform to his objections, if well taken, as far as it was possible to do so. Having failed to raise such objections, he cannot raise them now.

[9] Objections are made to the inclusion of estimates of the costs of repairs and renewals and charges for the collection of the assessments and supervision of the works. We see no reason why the district should not be required to bear the costs and expenses of its operation. Whether the service of collecting the assessments or supervision of the system is paid to employees of the city or to others is of no concern to appellant. If said services are reasonably necessary and are rendered for the benefit of the district, the question as to whether the city or the employees who actually perform the work are entitled to the compensation cannot affect the duty of the district to pay for services performed. It could not impose additional expenses upon the city without compensating it for value received. Supervision of a system implies that compensation will be paid for services so rendered. Surely both are included in the term "incidental expenses." Collection of assessments and supervision of the system are both duties resting with the district and are charges incidental to its existence. The cost of repairs and renewals are specifically provided for in the act.

Objection is made that no definition is given as to the word appliances used in conjunction with "works," etc. It would probably be impossible to define in advance every article that would be required to be used in the work. Appliances are things applied to or used as a means to an end. Webster's New International Dictionary. The word is relative to the subject described in the ordinance and there is no confusion as to the things it obviously applies to.

[10] The assessment in respect to benefits was spread upon the property of the district in proportion to the frontage feet owned by the respective owners. We cannot say that such a method is not proper in the circumstances of the case.

We have examined the procedure as provided by the Street Improvement Act and there appears to have been a substantial compliance with its provisions. The resolution of intention is full beyond the requirements of the act. No departure or failure to comply with the law appears in the record. Appellant was not misled to his prejudice in any respect. He appeared before the board of public works and presented in writing his protests. We have examined each one of them, as well as the record before us, and we find no grounds which would support an order of reversal.

Judgment affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.

16 Cal.App.2d 650

In re SCHIFFMANN'S ESTATE.

HEBBART v. SCHIFFMANN.

Civ. 11193.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1936.

1. Wills ⚷130

Instrument proposed having for its date "Tues., Aug. 20" and which contained in body thereof words "The 1935 La Salle which I now drive also belongs to me" *held* not sufficiently dated to qualify instrument as holographic will as against contention that absence of the year was supplied by such words in body of will where will could not have been made in 1936, since testator died in 1935, and could not have been made in 1934, since August 20 did not fall on Tuesday in that year (Probate Code, § 53).

2. Wills ⚷130

Recourse may not be had to date appearing in body of holographic will if such date was obviously not intended by testator to serve as date of instrument (Probate Code, § 53).

3. Wills ⚷130

Where it could be reasonably inferred that date in body of alleged holographic will was not intended as part of date of instrument and trial court adopted such inference, reviewing court must adopt such view in support of judgment, even if an inference might be drawn to contrary (Probate Code, § 53).

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge; Florence M. Bischoff, Judge pro tem.

Proceeding in the matter of the estate of Rudolph J. Schiffmann, Jr., deceased, wherein alleged will was proposed for probate by J. Le Roy Hebbart and was opposed by Rudolph J. Schiffmann. From an order denying admission of alleged will to probate, J. Le Roy Hebbart appeals.

Affirmed.

S. S. Hahn, W. O. Graf, and Phi O. Clough, all of Los Angeles, for appellant.

Harold Richardson, of Whittier, for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order denying the admission of an holographic will to probate on the ground that it was not entirely dated as required by the decisions interpreting section 53 of the Probate Code.

[1] At the top of the will appeared the words: "Tues., Aug. 20." In the body of the will appeared the words: "The 1935 La Salle which I now drive also belongs to me. * * *" It is the contention of the appellant that the year was thus supplied and the law was thus complied with. He states his contention in the following language: "It is apparent that the will could not have been made in 1936, since the testator herein died on or about the first day of September, 1935, at Beverly Hills, California. It is further apparent that the will could not have been made in 1934 because August 20th did not fall on Tuesday in the year 1934." It must be apparent, however, that it does not appear in the handwriting of the testator that the testator died in 1935 in Beverly Hills, and it is apparent also that the circumstance, that August 20th did not fall on Tuesday in the year 1935, is not in the handwriting of the testator.

Appellant's brief is very persuasive if the question were one of first impression and if it were still open for decision. This is another of those unfortunate cases which we referred to in Re Estate of Maguire (Cal.App.) 58 P.(2d) 209. We have set forth our view of the matter rather fully in that case and we should not lengthen this opinion by restating what we said there. It is the duty of this court to follow the law as it is interpreted by the Supreme Court, and it is for the Legislature to amend the law if it deems it wise to do so.

[2, 3] In the case of In re Estate of Martin, 58 Cal. 530, the court said: "The paper is not aided by the declaration contained in it, 'of the age of sixty years.' It does not appear in the paper when he was of the age of sixty years. It may have been one day before his decease; it may have been ten years." Recourse may not be had to a date appearing in the body of an holographic will if such date was obviously not intended by the testator to serve as the date of the instrument. Even if an inference might fairly be drawn from the language of the will herein that the date with reference to the La Salle was intended as a part of the date of the instrument, still it is reasonably susceptible to the inference that it was not so intend-

ed, and the trial court adopted the latter inference. "In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment." In re Estate of Brooks, 214 Cal. 138, 4 P.(2d) 148, 149.

Order affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

16 Cal.App.2d 584

CITY OF PASADENA v. FOX.

Civ. 10915.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1936.

Counties 🔑55

Although by terms of county building ordinance fee was chargeable for service of checking plans and issuing building permits, city desiring permit to make alterations and repairs on reservoir of city situated in unincorporated territory was not required to pay fee, in view of statute regarding fees chargeable for official services (Pol.Code, § 4295; Const. art. 11, § 11).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by the City of Pasadena against William J. Fox, as Chief Engineer of the Department of Building of Los Angeles County. From an adverse judgment, defendant appeals.

Affirmed.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for appellant.

Harold P. Huls, City Atty., and John W. Holmes, Asst. City Atty., both of Pasadena, for respondent.

SHINN, Justice pro tem.

The judgment appealed from directed appellant, as chief engineer of the department of building of the county of Los Angeles, to issue to the city of Pasadena, without payment of any fee for the service, a permit to make alterations and repairs upon a reservoir of the city of Pasadena situated in unincorporated territory.

The entire controversy arises out of the claim by the county that the city was not entitled to receive a permit without the payment of a fee therefor.

By the terms of an ordinance of the county a fee is charged for the service of checking plans and issuing building permits, no exception being made in the case of a municipality applying for the service. The county was entitled to collect the fee unless the exception declared in section 4295 of the Political Code is applicable. The section provides in part as follows: "State, county and township officers shall not, in any case, except in proceedings upon habeas corpus, perform any official services unless upon the payment of such fees as are prescribed by law, for the performance of such services; provided, that except where otherwise specifically provided the state or any county, city, city and county, district, or other political subdivision, or any public officer, or board or body, acting in his or its official capacity on behalf of the state, or any county, city, city and county, district, or other political subdivision, shall not be required to pay or deposit any fee for the filing of any document or paper, or for the performance of any official service."

It is insisted by appellant, whose interests are solely those of the county, that the general law has no application because the situation is one in which a county ordinance will prevail over the general law; and that, even though it be conceded that the general law would prevail over the county ordinance where the two are in conflict, yet there is no conflict because the state has not legislated specifically in the matter of the issuance of building permits by counties. It is further insisted that, inasmuch as the ordinance does not exempt municipalities from the payment of fees, the exemption declared by the general law does not apply because it has been "otherwise specifically provided" within the meaning of section 4295, and that therefore the terms of the ordinance bring the case within this exception stated in the Code section. The position of the county cannot be sustained.

Section 11, article 11, of the Constitution, provides that: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." It has been held that a city ordinance regulating the construction of buildings falls within this class of legislation and is subordinate to the general laws by virtue of the constitutional provision. May v. Craig, 13 Cal.App. 368, 109 P. 842. The same is true of a county building ordinance. The provision of the ordinance in question requiring a permit is an important feature of the scheme of regulation adopted by the county and may be given effect only to the extent that it is not in conflict with the general law.

It is true, as the county contends, that the state has not legislated in the matter of county regulation of building construction and the issuance of permits therefor, but the state has legislated upon the subject of fees to be charged for official services, and the provisions of the ordinance which attempt to exact fees from municipalities are in direct conflict with, and must give way to, the general law wherein such fees are dispensed with.

The reasonable interpretation of section 4295 is that the exemption from payment of fees applies in every case where the general law does not not otherwise specifically provide. We do not believe that the exemption can be done away with by a county ordinance which in terms requires the payment of fees by other political subdivisions. The restrictive provisions of the section apply only to laws and ordinances which prescribe fees to be paid for official services. If, therefore, the general law was intended not to operate in cases of county ordinances under which it was attempted to exact fees from municipalities for the performance of official services, it would not operate as to county ordinances at all, and the purpose of the law would to that extent be defeated. The provisions relate to charges for official services generally, and are not susceptible to a construction which would make them inapplicable to the performance of duties imposed upon county officers by ordinance.

The city of Pasadena, therefore, was not required to pay a fee to the department of building of the county for the checking of its plans and the issuance of the permit applied for.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

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16 Cal.App.2d 570

MARTIN v. POSTAL UNION LIFE INS. CO.

Civ. 5416.

District Court of Appeal, Third District, California.

Sept. 28, 1936.

1. Insurance 🔑662(1)

Where insurer set up release as absolute bar of insured's right of recovery on accident policy, excluding evidence that both proof of loss and release were executed by insured and that payment was made by insurer under mistaken idea as to extent of insured's injuries *held* error (Code Civ.Proc. § 462; § 448, as amended by St.1933, p. 2548).

2. Appeal and error 🔑882(11)

Where insured's evidence that proof of loss and release were executed by insured and that payment was made by insurer under mistaken idea as to extent of insured's injuries was excluded on insurer's objections, insurer was estopped on appeal from urging want of such testimony.

3. Appeal and error 🔑1140(1)

Where policy insured only against loss of time, but insured's cause of action was presented to jury on theory that insurer was liable for injury suffered by insured, irrespective of whether insured lost time, and jury assessed damages on that theory, error could be corrected without reversal of cause by making deduction for period during which insured received wages from employer.

4. Trial 🔑133(6)

Argument of plaintiff's counsel in referring to poverty of plaintiff *held* not prejudicial error, where on objection court stated that argument might be stricken out and not considered by jury "unless there is evidence in there" and there was no evidence in the case of the poverty of plaintiff.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Cabble C. Martin against the Postal Union Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Judgment affirmed on condition of remission.

J. F. Riley, of San Francisco, for appellant.

L. DeWitt Spark, of Roseville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action is based upon an insurance policy issued to the plaintiff by the Pacific States Life Assurance Company, and liability, if any, assumed by the defendant. The policy was issued to the plaintiff on the 13th day of June, 1933, the insuring clause of which reads as follows: "Loss of life, limb, sight or time, the cause of which originates and loss occurs while this policy is in full force and effect, which loss results directly and independently of all other causes, from accidental bodily injuries, hereinafter referred to as 'such injury.'"

For total disability, compensation was to be made at the rate of $100 per month. Part 3, subdivisions A and B of the policy, fixes the liability of the company, and is in the following words and figures:

"(A) If 'such injury' shall, within twenty (20) days from the date of the occurrence of the accident, totally and continuously disable the insured and during which time he shall be under the professional care and regular attendance of a legally qualified physician and surgeon, the Company will pay, for the period of such continuous total disability, Accident Indemnity at the rate per month provided in Part 1, subject to Aggregate Disability Indemnity, Part 7, Partial Disability.

"(B) Or, if 'such injury' shall not, within twenty (20) days from the date of the occurrence of the accident, cause total disability, but shall thereafter totally disable the insured; or, if 'such injury' shall, commencing on the date of the occurrence of the accident, or immediately following total loss of time, cause continuous partial disability, and during which time the insured shall be under the professional care and regular attendance of a legally qualified physician or surgeon, the Company will pay, for the period of such continuous disability, not to exceed three months, forty per cent (40%) of the Accident Indemnity at the rate per month provided in Part 1, subject to Aggregate Disability Indemnity, Part 7."

The complaint alleges that on or about the 16th day of September, 1933, the plaintiff was operating an automobile in the city of North Sacramento, and while so doing, was injured in the collision which occurred between the automobile in which the plaintiff was riding and a truck then and there on the same highway, and as a result of the collision the plaintiff received a severe blow upon his body, resulting in severe contusions, bruises, and a displaced vertebra. The testimony of Dr. Cook, to which we will hereinafter refer, who took an X-ray of the plaintiff's body, was to the effect that there was a break in the lower border of the third lumbar vertebra. Proof of injuries suffered by the plaintiff was made out by him on or about the 2d day of October, 1933, in which proof the statement appears that the plaintiff had suffered a wrenched back and other bodily bruises. Nothing is mentioned in the proof furnished by the plaintiff of the fact of injury to his spinal column. The plaintiff, after his injury on the 16th day of September, 1933, called a Dr. Jones, the company doctor for the corporation employing the plaintiff. It appears from the statement furnished by Dr. Jones, that only a cursory examination was made of the injuries suffered by the plaintiff. It contains nothing with reference to the injuries as shown by the X-rays and as testified to by Dr. Cook. The extent of the injury was not discovered by Dr. Jones, and of course was not disclosed to the plaintiff, and could not be included in his proof furnished to the appellant on the 2d day of October, 1933. Thereafter, on the 2d day of October, 1933, Dr. Jones having advised the plaintiff to return to work, the plaintiff did return to work for the P. F. & E. Company, where he had originally been employed as a car carpenter, it being his business to repair and restore to proper condition cars used by the P. F. & E. Company in its business. The record shows that the plaintiff continued in the employment of the P. F. & E. Company thereafter until up to and including the 17th day of November, 1933, when the extent of his injuries had become so aggravated that it was impossible for him to continue the employment in which he had previously been engaged. There is no contention in the record that the injury to the plaintiff was and is not serious; that during the time he was employed from October 2, 1933, to November 17, 1933, he suffered great pain and discomfort; that the injury he received was such as might very well have justified him in refraining from engaging in any employment whatsoever. The injury to the plaintiff having become so aggravated, on the 17th of November, 1933, or thereabouts, the X-ray examination heretofore referred to was had, and it was at that time discovered that the third lumbar vertebra in the plaintiff's backbone had been injured. Thereupon the plaintiff was sent to an hospital in San Francisco, where he remained for some weeks.

Upon the furnishing of the proofs by the plaintiff on the 2d day of October, 1933, indicating that he had lost fifteen days' time, the appellant forwarded to the plaintiff a check in the sum of $46.66. This check purported to cover the period of time lost by the plaintiff by reason of the injury referred to. On the reverse side of this check there appeared an acknowledgment of receipt and release which was signed by the plaintiff and also by the plaintiff's wife. This release is in the following words and figures, to wit: "Claim No. 78,328, received forty-six and 66/100 dollars from Postal Union Life Insurance Company in full payment, satisfaction, discharge and release of any and all claims myself, my heirs, executors, administrators or assigns may now have or hereafter have against said Company under its Policy No. 34,616 due to, or growing out of an accident sustained by me on or about September 16, 1933. I have read and understand the above release."

[1] This release was set up in the defendant's answer and pleaded as an absolute bar of the plaintiff's right of recovery.

What we have said sufficiently shows that this release was made in entire ignorance of the extent of the injuries suffered by the plaintiff, and was the result of a mistake as to the extent of such injuries, and that the appellant, in sending the check for $46.66, including the release, was likewise acting under a mistake as to the extent of the injuries suffered by the plaintiff. The record also shows that the plaintiff resumed his occupation at the direction of Dr. Jones, the company doctor.

In addition to what we have set forth, the plaintiff attempted to introduce testimony as to the circumstances under which the release was signed, and also as to the proof which was furnished to the company on the 2d day of October, 1933. This followed after the introduction of the release just set forth herein. The testimony as to this point in the record reads as follows:

"Q. Did you read all those releases before you signed them?

"Mr. Riley: To which I object.

"A. No sir, I didn't.

"Mr. Riley: Irrelevant, immaterial.

"The Court: There is nothing in the pleading about the release, is there?

"Mr. Riley: Only in the complaint, only in the answer I mean. There is nothing in the complaint about it at all.

"The Court: What is the purpose of this?

"Mr. Spark: For the purpose of showing that he didn't understand what he was signing.

"The Court: You haven't alleged any fraud or inability. Sustain the objection.

"Mr. Riley: I ask that the answer go out.

"The Court: It may go out.

"Mr. Spark: Q. Mr. Martin, at the time you presented your claim to the Company, did you think, did you know, were you of the opinion that you had recovered from your injury? A. No, sir, I wasn't.

"Q. I say, you knew that to be a fact? A. Yes, sir.

"Q. Did your doctor advise you you had recovered from your accident?

"Mr. Riley: We object, not within any of the issues of this pleading, therefore, not pertinent, not competent.

"The Court: I don't see anything to support that testimony. I will sustain the objection."

Upon the objection of the appellant, testimony along the above indicated lines was excluded by the court. The ruling of the court was and is clearly erroneous, the court seeming to labor under the impression that the plaintiff was under the necessity of alleging fraud, undue influence, mistake, etc., in order to introduce such testimony, overlooking the fact that section 462 of the Code of Civil Procedure provides that all new matter set up in the answer in avoidance or constituting a defense is deemed controverted, and that no additional pleading is required on the part of the plaintiff. Section 448 of the Code of Civil Procedure (as amended by St.1933, p. 2548) does not change the rule of testimony in this particular, save and except as to the genuineness of the signatures to a written instrument set up in the answer, and its execution, leaving open for the plaintiff to introduce any testimony that he may have in avoidance of the release and showing that it should not be given any force or effect.

As early as the case of Montgomery v. Rauer, 125 Cal. 227, 57 P. 894, 896, the Supreme Court used the following language: "Nor may the further objection of appellant be sustained that the plaintiffs, not having pleaded an avoidance of the release, should not have been permitted to prove it. They were not compelled to anticipate defenses. If the release and discharge had been set out in bar of the action, still, under our system of pleading, which permits no replication, the defense of fraud would have been open to the plaintiffs without special averment."

[2] In the case of Weger v. Rocha, 138 Cal.App. 109, 32 P.(2d) 417, 418, an exactly similar situation was presented to this court. The plaintiff filed a complaint seeking damages for injuries sustained. It appears that after the injury the plaintiff had signed a release, and this release was set up in the defendant's answer. This court there said: "As against the special defense, the plaintiff relied upon testimony to establish fraud, menace, duress, and undue influence, and specially that the signature of the plaintiff to the paper hereinafter referred to was obtained by fraud and undue influence on the part of an agent representing the Banker's Indemnity Insurance Company, insurance carrier for the defendant Rocha." The opinion further goes on to show that the finding of the court to the effect that the release had been procured by fraud and undue influence was sustained by the testimony. Under the circumstances just set forth, the appellant having blocked the plaintiff from introducing further testimony showing that both the proof and the release were executed under a mistaken idea as to the extent of the injuries received by him, and also, that the defendant in sending its check was not aware of the plaintiff's serious injuries, and obtained a release utterly incommensurate with the compensation to which the plaintiff was entitled, is now estopped from urging want of testimony excluded by its own objections.

By the appellant's computation, to which we will hereafter refer, it appears that the release was a trifle less than 10 per cent. of the compensation now shown to be due if the plaintiff was entitled to recover, which brings the case within the language which this court used in the case of Rocha, supra, to wit: "That the sum of $475.00 is glaringly inadequate as a settlement in this case where a judgment of $8,276.25 is not questioned as being excessive, appears to us an inescapable conclusion and sufficient to shock the conscience of a trial judge."

In the case of United Bank & Trust Co. v. Hunt, 1 Cal.(2d) 340, 34 P.(2d) 1001, 1004, the Supreme Court, in considering the question of the position which an appellant might take when it had blocked the introduction of testimony in the trial court, adopted the language of Presiding Justice Pullen of this court, which we think applicable here, and estops the appellant from urging as a cause for reversal, failure to introduce further testimony which it succeeded in excluding in the trial court. The language referred to is as follows: "We are of the opinion that the bank waived its right to raise the question of res judicata in the Yuba county case by its opposition to the motion to amend the Butte county case to include therein the various causes of action set forth in the Yuba county case, and by opposing a motion to try the two cases together. Where counsel by timely notice call to a court's attention the pendency of other proceedings covering kindred matters and strive to have the same embraced within the scope of the inquiry, and such attempt is successfully blocked by opposing counsel, and the trial proceeds to the investigation of the specific issue before the court, counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata. The course pursued by the court and counsel in the Butte county case was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication. Asher v. G. F. Stearns, etc., Co., 241 Ky. 292, 43 S.W.(2d) 1012. Litigants cannot successfully assume such inconsistent positions."

[3] Much time and attention has been given by counsel to a number of authorities cited, having to do with the word "continuous," referring to the disability of the insured. The testimony in the transcript shows conclusively that the injury suffered by the plaintiff was continuous in its effect upon his system, and was such that he might very properly have discontinued all employment. This, however, is not determinative of this cause. By reference to the insuring clause (A) of the policy it appears that the plaintiff was insured against loss of life, limb, sight, or time. He was not insured against injury; he was not insured against bodily pain; he was not insured against disability as disability; he was insured only against loss of time,

which means that he was insured against loss of wages by reason of the loss of time during which he would be precluded from engaging in his usual avocation and receiving compensation therefor. The record in this case shows without question that from the 2d day of October, 1933, to the 17th day of November, 1933, the plaintiff was in the employ of the P. F. & E. Company, and received his usual and customary wages. Whether he performed services for that company commensurate with the wages received is wholly immaterial. The insurance policy issued to the plaintiff insured him, as we have said, only against loss of time; that is, loss of wages which he would otherwise have earned during the period of lost time. Regardless of how serious the disability, if the plaintiff lost no time by reason thereof, the disability alone would furnish no basis upon which to predicate an action against the insurance company. The policy, as we have stated here, was for loss of time only, so far as this case is concerned, and covered nothing else. The record shows that the jury in this case awarded damages in the sum of $839.84, which covered compensation for the time intervening between the date of the accident and the date of the action, covering the period when the plaintiff did not lose time. As we have said, the plaintiff was paid by the company for time lost between September 16, 1933, and November 2, 1933, with the possible exception of one day. From November 2, 1933, to and including November 17, 1933, the plaintiff was on the payroll of the company by which he was employed, and received full pay for that period. This shows that there remained, beginning with November 18, 1933, to and including the time of the commencement of this action on March 10, 1934, the period of three months and twenty-two days. The policy which we have referred to entitled the plaintiff to payment for loss of time at the rate of $100 per month, with an extra $100 for time spent in an hospital. Computation shows that the total of this compensation for the time actually lost by the plaintiff entitled him to receive the sum of $473.33, and no more. It is urged by the appellant that this shows passion and prejudice on the part of the jury to such an extent that a new trial should be ordered. A careful scrutiny of the record, however, leads us to an opposite conclusion. The complaint in the action was drawn to cover the entire period between September 16, 1933, and March 10, 1934, giving no account of the time which was not lost by the plaintiff, that is, the time when he received his usual compensation, which, of course, went beyond the terms of the policy and did not charge the appellant with liability. We may further state that the record indicates that the plaintiff's cause of action presented to the jury was upon the theory that the appellant was liable simply on account of the injury suffered by the plaintiff, irrespective of whether the plaintiff did or did not lose time and fail to receive wages by reason thereof. This misconception of the insurance policy undoubtedly led the jury into error in awarding the sum not justified by either the policy or the proofs. This error may properly be corrected by the order hereinafter made, without reversal of the cause.

[4] The appellant further objects to language used by the attorney for the plaintiff in his address to the jury, assigning the same as prejudicial. It appears that counsel for the plaintiff in his address to the jury referred to the "poverty" of the plaintiff. Objection thereto was made by counsel for the appellant, and the court used the following language: "That may be stricken out, not considered by the jury, unless there is evidence in there." The criticism on the part of the appellant goes as to the words, "unless there is evidence in there." There being no evidence in the case of the poverty of the plaintiff, we do not very well see how any prejudicial error was caused thereby.

It follows from what we have said that, as there is nothing in the record supporting a judgment in favor of the plaintiff for any sum in excess of $473.33, the judgment of the trial court must stand reversed unless the plaintiff, within twenty days from the rendering of this opinion, file with the clerk of this court a remission of all the damages awarded in excess of the sum of $473.33. In the event such remission is filed, the judgment will stand affirmed for the sum of $473.33.

Costs on appeal are not awarded to either party.

We concur: PULLEN, P. J.; THOMPSON, J.

16 Cal.App.2d 676

LINDE et al. v. EMMICK.

Civ. 9944.

District Court of Appeal, First District, Division 1, California.

Oct. 3, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Appeal and error 🔑1011(1)

Whether overtaking motorist is negligent in striking automobile ahead which is in right half of roadway preparatory to making left turn is question of fact for trial court, and its decision on conflicting evidence is final.

2. Automobiles 🔑242(2)

Mere fact that following motorist collides with vehicle ahead furnishes some evidence that following motorist was negligent because traveling at too high rate of speed or following too closely.

3. Evidence 🔑588

Trial judge need not accept estimate of speed by motorist involved in accident, but may infer from length of skid marks and force of impact that motorist's actual speed exceeded such estimate.

4. Automobiles 🔑168(2)

Trial court may find that motorist's speed constituted negligence because under circumstances it was not careful and prudent as required under statute, even if such speed was five miles an hour less than 45 miles per hour permitted (St.1931, p. 2120, § 113(a), (b) 7).

5. Automobiles 🔑168(4), 170(1)

Motorist is bound to anticipate meeting vehicles at any point of highway, and must use ordinary care to keep automobile under such control as will enable him to avoid collision.

6. Automobiles 🔑244(12)

Evidence *held* to sustain finding that overtaking motorist who collided with automobile ahead which was preparing to turn off highway to left and who could have avoided accident by driving in outside traffic lane was negligent (St.1931, pp. 2124, 2125, §§ 122, 125).

7. Appeal and error 🔑1071(6)

Failure of trial court to find on defense of contributory negligence will constitute reversible error if there is any evidence which would support finding in favor of such defense.

8. Appeal and error 🔑1071(6)

Failure to find on defense of contributory negligence will not constitute prejudicial error if evidence fails to show any contributory negligence.

9. Automobiles 🔑149, 150, 157, 169

Violation of provisions of statutes relating to lights on automobiles, red rear lights, driving while under influence of liquor or drug, signals on turning and obstruction of driver's view or driving mechanism, will constitute negligence as matter of law (St.1929, p. 537, § 112; St.1925, p. 413, § 130(a); St. 1931, p. 2129, § 136½).

10. Evidence 🔑586(3, 4)

Testimony of overtaking motorist and his guest that they did not see headlights or rear light on automobile ahead with which motorist collided *held* to support finding that such lights were not burning, and hence that automobile driver ahead was negligent (St. 1923, pp. 546, 551, §§ 99, 106).

11. Negligence 🔑93(1)

Negligence of motorist in not having headlights and red rear light burning would be imputed to guest if guest knew of absence of such lights (St.1923, pp. 546, 551, §§ 99, 106).

12. Evidence 🔑265(2)

Admission of automobile driver that he had been drinking beer *held* insufficient to establish that driver was under influence of intoxicating liquor within prohibition of statute (St.1929, p. 537, § 112).

13. Automobiles 🔑244(31)

Testimony of bystander and two doctors that they smelled alcohol on breath of automobile driver involved in collision *held* insufficient to establish that driver was under influence of alcohol within statute prohibiting driving while under influence of liquor (St.1923, p. 553, as amended by St.1929, p. 537).

14. Automobiles 🔑244(31)

Evidence *held* insufficient to sustain finding that driver injured in automobile collision was under influence of intoxicating liquor while operating vehicle, in absence of showing that beer which driver had taken had affected him (St.1923, p. 553, as amended by St.1929, p. 537).

15. Automobiles 🔑168(6), 172(6)

Automobile driver preparing to make left turn off highway must not only signal his intention, but must first see if he could decrease speed with safety before so doing, and failure to look to rear is negligence (St. 1925, p. 413, § 130(a).

16. Negligence 🔑93(1)

Alleged contributory negligence of automobile driver in not looking to rear would not be imputed to passenger so as to preclude recovery from overtaking motorist who collided with automobile as driver was making left turn off highway, since passenger had no control over operation of vehicle notwithstanding both driver and guest were equally interested in taking injured friend to hospital (St.1923, p. 558, as amended by St.1925, p. 413).

17. Automobiles 🔑244(44, 56)

Evidence as to there being three persons in front seat of automobile with which motorist collided and that one of three was drunk and moved restlessly, requiring holding him in place, *held* to support finding of contributory negligence of driver and guest (St.1931, p. 2129, § 136½).

18. Appeal and error 🔑1071(6)

In action by automobile driver and guest against overtaking motorist who collided with automobile which was being turned off highway to left, failure to find on contributory negligence *held* reversible error where there was evidence sufficient to support finding thereon.

19. Automobiles 🔑243(17)

Testimony of automobile driver involved in collision that only effect of beer which he had taken was to quench his thirst *held* admissible in action by driver for injuries sustained in collision.

20. Damages 🔑191

In action for injuries sustained in automobile collision, unpaid bills for medical and hospital services produced by plaintiff while testifying *held* not to establish reasonable value of such services, and insufficient to support an award therefor.

21. Automobiles 🔑243(7)
Evidence 🔑123(10)

In action by automobile driver and his guest for injuries sustained in automobile collision, testimony of bystander that injured passenger in automobile was killed in collision *held* admissible as res gestæ, and relevant to issue of speed as showing force of impact.

22. Trial 🔑55

In action for injuries sustained in automobile collision, fact that testimony of bystander that injured passenger in automobile was killed in collision might create sympathy for plaintiff or prejudice against defendant furnished no ground for its rejection.

23. Automobiles 🔑243(4)

In action for injuries sustained in automobile collision, automobile driver's testimony that his knowledge of dangerous traffic conditions usually present at scene of accident would make him more cautious, and testimony of driver's witnesses that driver was careful driver *held* inadmissible as evidence of habit where driver had fully described his actual operation of automobile.

24. Evidence 🔑492

Opinion evidence of expert as to speed of automobile involved in accident based upon length of skid marks is admissible.

25. Appeal and error 🔑971(2)
Evidence 🔑546

Qualifications of witness to testify as expert are within discretion of trial judge, and his ruling thereon will not be disturbed in absence of abuse.

26. Evidence 🔑536

Witnesses who for over period of 30 years as to one, and 20 years as to the other, had driven practically every make of automobile under various traffic conditions, and had tested brakes of various automobiles, including automobile similar to that involved in collision, *held* qualified to express opinions of speed based upon length of skid marks.

27. Evidence 🔑553(1)

Evidence of expert as to speed of automobile based upon length of skid marks *held* inadmissible where hypothetical question erroneously assumed that length of skid marks was 150 feet instead of 140 feet, as shown by evidence, and also omitted condition of brakes.

28. Evidence 🔑514(2)

Evidence of witness qualified to testify as expert on speed of automobile based on length of skid marks, that following motorist struck automobile ahead which was making left turn at angle of 45 degrees and that impact would tend to throw overtaking motorist to left, which movement overtaking motorist could not have prevented, based on

damage to each automobile and its position when stopped, ***held*** **inadmissible.**

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Theodore C. Linde and another against Eugene H. Emmick. From an adverse judgment, the defendant appeals.

Reversed.

Edmund Scott, of Redwood City, for appellant.

John R. Tyrrell and W. L. A. Calder, both of San Francisco, for respondents.

GRAY, Justice pro tem.

The right front wheel and fender of a Cadillac sedan then being driven northerly by the appellant on the Bayshore Highway near Brisbane in the county of San Mateo struck a Pontiac coupé, also headed northerly, on its left side near the door and the junction of the front fender and running board. Respondent Linde, the driver of the Pontiac, and respondent Trafford, his passenger, each received injuries whose extent is not here questioned. To recover damages they filed a joint complaint, in which each, in a separate count, alleged that appellant's negligence proximately caused his injuries. Appellant's answer denied such negligence and affirmatively pleaded that each respondent was contributorily negligent. The court found that appellant was negligent, but failed to find on the defense of contributory negligence. Accordingly, judgment was entered against appellant and in favor of respondents for amounts which the former does not now dispute. However, in this appeal from the judgment he does assert that the evidence is insufficient to support the finding of negligence, and that reversible error was committed in the failure to find on his plea of contributory negligence and in the admission of certain testimony.

In stating the evidence, so as to pass upon his first two contentions, such testimony as he claims was inadmissible will be omitted and reserved for later and separate consideration. In the vicinity of the accident the Bayshore highway runs approximately north and south and consists of four traffic lanes. A filling station is located westerly of the highway. Immediately to the north of this station a county road to Brisbane enters the highway at an acute angle. The accident happened on the 4th of July at about 9:30 p. m. The holiday had been generally celebrated in Brisbane. Respondent Linde testified he had left Brisbane for San Francisco about noon and had returned about 6 p. m. While in San Francisco he had drunk two glasses of beer, and after his return to Brisbane he had drunk four or five glasses of beer. He denied he was intoxicated. A friend was injured in a drunken fight. Accompanied by respondent Trafford, he started, in his Pontiac, to take his friend to a hospital in South San Francisco. After going south about a quarter of a mile the friend wished to return to Brisbane, and so, making a U-turn, he drove northerly towards Brisbane in the outside or most easterly traffic lane. When about 100 yards south of the filling station he looked to his rear, saw no automobile following, signaled a left turn and turned into the inside traffic lane. He gave a slow signal and then a signal for a left turn for 50 to 75 feet, but did not look to his rear, and came practically to a stop opposite the filling station to let an approaching southbound automobile pass. The Pontiac then faced north with its left side parallel and close to the center line of the pavement and with its front wheels cramped to make a left turn into the county road when the on-coming automobile had passed. While in this position the Pontiac was struck by the Cadillac and he became unconscious.

Respondent Trafford testified that the friend was seated between Linde and himself, that the friend was drunk, fidgeted considerably, and had to be held by him to be kept from collapsing. He stated that although he smelled beer on Linde's breath he did not appear to him to be drunk. He remembered that Linde stopped in front of the filling station and that he saw the lights of the approaching southbound automobile and yelled to Linde to stop. He did not remember the ride down and back on the highway. Several witnesses for respondents testified that although they did not see the actual impact, they heard its crash, saw the Pontiac forced across and off the pavement, turned around and over, and observed the skid marks of the Cadillac astride the center line of the highway and 140 feet in length. Six witnesses who had seen Linde at various times within the two hours preceding the accident each expressed the opinion that he was sober.

According to appellant, before the accident he was traveling at a speed of 40 miles per hour on the right-hand side of the center of the highway in either of the two northbound lanes. His lights were in good condition and burning. Although he was looking straight ahead, he did not see any lights or standing car ahead of him. His right front wheel and fender came in contact with the other car. He put his brakes on automatically when he hit, and stopped his car within 25 or 30 feet from the point of collision. When stopped, the rear wheels of his car were on the center line of the highway, and the front wheels were in the first southbound lane. Appellant's companion stated that he was driving on the right-hand side of the highway at between 35 and 40 miles per hour, with his lights burning. When some distance from the point of collision she saw a car, without lights and facing north, parked opposite the filling station. Immediately before the impact she did not see any car or lights, although she was looking straight ahead. Appellant's automobile traveled about 20 feet after the collision and stopped about the center of the highway, facing to the left at an angle. Two traffic officers who arrived about 10 p. m. observed appellant's skid marks, which they estimated to be 30 to 35 feet in length. Each also testified that Trafford, when they saw him at the hospital, was intoxicated. Another witness, called by appellant, smelled alcohol on Linde's breath when he got into his car. Two physicians who observed Linde after his arrival at a hospital testified that his breath and vomit smelled very strongly of alcohol.

[1-6] As was said in Leo Ying v. Pickwick Stages System, 117 Cal.App. 312, 3 P.(2d) 597, of a similar accident, the question as to whether or not the driver of an overtaking automobile is negligent in striking an automobile which is ahead in the right half of the roadway, preparatory to making a left turn, presents a question of fact for the decision of the trial court and its decision on conflicting evidence is final and conclusive. In operating an automobile over a public highway, its driver, under ordinary circumstances, cannot run down a vehicle proceeding in the same direction without having been negligent in the operation of his automobile unless it appears that the collision was due to the negligent conduct of the driver of the other vehicle. The mere fact that he does run down the vehicle ahead of him furnishes some evidence that he was either traveling at too high a rate of speed or following too closely. Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396. The trial judge was not compelled to accept appellant's estimate of his speed, but was entitled to infer, from the length of his skid marks (Coughman v. Harman, 135 Cal.App. 49, 26 P.(2d) 851), and from the force of the impact (Bauman v. Edgar, 72 Cal.App. 448, 236 P. 943), that his actual speed exceeded such estimate. Even if the court believed that appellant's speed was 5 miles under the maximum of 45 miles per hour permitted in the locality of the accident by subdivision (b) 7 of section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120), yet it could have found that such speed was negligent because under the circumstances it was not careful and prudent as required by subdivision (a) of the same section. Appellant was bound to anticipate that he might meet vehicles at any point of the highway, and in order to avoid a charge of negligence he was bound to use ordinary care and keep his machine under such control as would enable him to avoid a collision. Boccalero v. Wadleigh, 113 Cal.App. 376, 298 P. 526. If appellant had driven in the most easterly lane, as required by section 122 of the act (St.1923, p. 557, as amended by St.1931, p. 2124), he could have passed to the right of the Pontiac as permitted by section 125 (c) St.1923, p. 557, as amended by St.1931, p. 2125, and thus avoided the accident. Therefore there is sufficient evidence to support the finding of negligence.

[7-14] Respondents seek to justify the failure to find on the defense of contributory negligence by arguing (1) that such defense was pleaded in a form which was insufficient to raise an issue, and (2) that under the evidence any finding thereon must have been adverse to appellant and therefore he was not injured by such failure. The defense was pleaded substantially in a form which has been held demurrable, but otherwise sufficient to tender an issue if the parties proceed to trial thereon. Griswold v. Pacific Electric R. Co., 45 Cal.App. 81, 187 P. 65; Salvo v. Market Street R. Co., 116 Cal.App. 339, 2 P.(2d) 585. If there is any evidence which would support a finding in favor of such defense it was reversible error to fail to find thereon. Maxwell v. Auto Stage Co., Inc., 46 Cal.App. 548, 189 P. 710. On the other hand, if the evidence fails to show any contributory negligence, appellant cannot complain of such failure. Platt v. Okamoto, 95 Cal.App. 297, 272 P. 613. Appellant contends that there is evidence which would support findings that the Pontiac was operated by respondent Linde in violation of sections 99, 106, 112, 130 (a) and 136½ of the California Vehicle Act Of course, a violation of any of these sec-

tions would constitute negligence as a matter of law. The only evidence as to whether or not the headlights, as required by section 99 (St.1923, p. 546) or the rear light, as required by section 106 (St.1923, p. 551) of the Pontiac were lighted, was given by appellant and his companion, who each testified that they did not see such lights burning. This negative testimony is sufficient to support a finding that they were not lighted (Keena v. United Railroads, 197 Cal. 148, 239 P. 1061; Rapolla v. Goulart, 105 Cal.App. 417, 287 P. 562), and if so, that Linde was negligent. Such negligence was imputable to his passenger, respondent Trafford, if he knew of the absence of such lights. Pope v. Halpern, 193 Cal. 168, 223 P. 470; Rapolla v. Goulart, supra. Respondent Linde's admission of drinking beer in itself alone is insufficient to prove that he was under the influence of intoxicating liquor when he drove the Pontiac, as prohibited by section 112 (St.1923, p. 553, as amended by St.1929, p. 537). State v. Noble, 119 Or. 674, 250 P. 833. Standing alone, the testimony of a bystander and two doctors that they smelled alcohol on his breath is not proof that Linde was under its influence. Critzer v. Donovan, 289 Pa. 381, 137 A. 665; State v. Wheelock, 218 Iowa, 178, 254 N.W. 313. In the absence of evidence showing that the beer affected him, a finding that he operated his automobile while under the influence of intoxicating liquor was unauthorized. People v. Dingle, 56 Cal.App. 445, 205 P. 705.

[15-18] According to his own testimony, respondent Linde, before slowing practically to a stop in the second lane, failed to look to his rear, although he gave both a slow and a left-turn signal. Under section 130 (a), St.1923, p. 558, as amended by St.1925, p. 413, it was his duty not only to give the signals, but also to first see if he could decrease his speed with safety before so doing, and he could have been held negligent in not looking to his rear. Peel v. California Belting Co., Inc., 108 Cal.App. 93, 291 P. 219. His negligence, however, could not be imputed to respondent Trafford because, although both were equally interested in taking their injured friend to a hospital, he had no control over the operation of the Pontiac. Morrissey v. Kirkelie, 5 Cal.App.(2d) 183, 42 P.(2d) 361. It is undisputed that the two respondents and the friend were seated in the single seat of the Pontiac and that the friend was drunk, moved restlessly, and had to be held in position. From testimony as to Linde's inquiries of his friend as to his condition it might be inferred that Linde's attention was thus distracted from his driving. The trial court could well have found that the presence of three persons in the driver's seat interfered with Linde's control over the driving mechanism of the vehicle and that therefore both respondents violated section 136½ (St.1923, p. 517, as added by St. 1931, p. 2129). It is apparent that appellant was entitled to a finding as to the truth or falsity of his defense of contributory negligence, and the judgment must be reversed for the failure so to do. Woodworth v. Morgan, 4 Cal.App.(2d) 488, 41 P.(2d) 186.

[19-23] Appellant assigns error in the admission over his objections of the following testimony: Linde's testimony that the only effect of the beer upon him was to quench his thirst was admissible. Bidwell v. Los Angeles, etc., R. Co., 169 Cal. 780, 148 P. 197. The unpaid bills for medical and hospital services produced by Linde while testifying did not prove the reasonable value of such services and were insufficient to support an award therefor. Latky v. Wolfe, 85 Cal.App. 332, 259 P. 470. The testimony of a bystander that the injured friend was killed in the collision was admissible as part of the res gestæ and was relevant on the issue of speed as showing the force of the impact. Anderson v. Matt, 223 Mich. 534, 194 N.W. 599; Judd v. Rudolph, 207 Iowa, 113, 222 N.W. 416, 62 A.L.R. 1174; Feltz v. Terminal Railroad Ass'n of St. Louis, 336 Mo. 790, 81 S.W.(2d) 616; Duprat v. Chesmore, 94 Vt. 218, 110 A. 305; State v. Ramos, 159 Wash. 599, 294 P. 223. The possibility that such evidence might create sympathy for respondents or prejudice against appellant furnished no ground for its rejection. Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246. Linde's testimony, that his knowledge of the dangerous traffic conditions usually present at the scene of the accident would make him more cautious, and that of his witnesses that he was a careful, cautious driver, was inadmissible as evidence of habit because Linde had fully described his actual operation of the Pontiac. Boone v. Bank of America N. T. & S. Ass'n, 220 Cal. 93, 29 P.(2d) 409; White v. Shepardson, 116 Cal.App. 716, 717, 3 P.(2d) 346.

[24] Two experts were permitted, over appellant's objections, to express their opinions that if a Cadillac of the type and weight of appellant's car, equipped with nonskid tires and occupied by two persons of average weight, skidded on dry, level concrete pavement for 150 feet after the application of its brakes, its speed at such application was 65 or 70 miles per hour. The objections were: (1) That the matter was not a subject of expert testimony; (2) that the witnesses were not qualified as experts; and (3) that the facts stated in the hypothetical question were incorrect and incomplete. Whether it is proper for an expert to express an opinion of speed, based upon the length of skid marks, seems not to have been decided in this state, although the propriety of such opinion was intimated in Coughman v. Harman, supra. In Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, it was held permissible for an expert to express an opinion as to the distance in which a car of designated make traveling at a specified speed could be stopped. This opinion would seem to be the converse of the present one. Although in Everart v. Fischer, 75 Or. 316, 145 P. 33, 147 P. 189 and in Nelson v. Hedin, 184 Iowa, 657, 169 N.W. 37, the opinion of an expert was held inadmissible, the weight of authority allows an expert to give his opinion as to speed based upon the length of skid marks. Jackson v. Vaughn, 204 Ala. 543, 86 So. 469; McKinney v. Wintersteen, 122 Neb. 679, 241 N.W. 112; Fannon v. Morton, 228 Ill.App. 415; Heidner v. Germschied, 41 S.D. 430, 171 N.W. 208; Stamper v. Scholtz (Tex.Civ.App.) 29 S.W.(2d) 883; Luethe v. Schmidt-Gaertner Co., 170 Wis. 590, 176 N.W. 63.

[25-28] As to his qualifications, each witness testified that, over a period of 30 years as to one and 20 years as to the other, he had driven practically every make of foreign and domestic automobile over all kinds of roads and under various traffic conditions, and had tested brakes of various cars, including Cadillacs similar to that of appellant, to ascertain the distance in which its brakes would stop an automobile on concrete pavement similar to that on which appellant was driving his Cadillac at the place of the accident. The qualifications of a witness to testify as an expert are a matter within the discretion of the trial judge, and his ruling thereon will not be disturbed in absence of abuse. Gaumnitz v. Indemnity Ins. Co., 2 Cal.App.(2d) 134, 37 P.(2d) 712. The above testimony appears to be sufficient to qualify the witnesses as experts. Heidner v. Germschied, supra. The hypothetical question erroneously assumed that the length of skid marks was 150 feet instead of 140 feet, as shown by the evidence, and also omitted the important factor of the condition of the brakes. One of these witnesses was also allowed to express his opinion, based on the damage to each car and its position when stopped, that the Cadillac struck the Pontiac at an angle of 45 degrees; that the impact would tend to throw the Cadillac to the left, which movement appellant could not have prevented. The fallacy and inadmissibility of such opinion is well pointed out in Fishman v. Silva, 116 Cal.App. 1, 2 P.(2d) 473, and in Johnston v. Peairs, 117 Cal.App. 208, 3 P.(2d) 617.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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17 Cal.App.2d 51

PEOPLE v. KIRTLEY.

Cr. 1524.

District Court of Appeal, Third District, California.
Oct. 13, 1936.

Criminal law 🔑1182

Appellant's failure to file brief on appeal or to appear when case was called for hearing *held* to require affirmance of conviction (Pen.Code, § 1253).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Ralston Kirtley was convicted of issuing a check without sufficient funds, with intent to defraud, and he appeals.

Affirmed.

James F. Gaffney and Horace Dunning, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of issuing check without sufficient funds with intent to defraud, a felony.

The transcript on appeal was filed in this court July 28, 1936. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on October 13, 1936. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

16 Cal.App.2d 593

KELLEY v. CORCORAN.

Civ. 5200.

District Court of Appeal, Third District, California.

Sept. 29, 1936.

1. **Appeal and error** 🔑**1072**

Failure because of clerical error of order granting new trial when originally entered to specify, as required by statute, that new trial was granted on ground of insufficiency of evidence to support verdict and judgment, which court on its own motion subsequently amended to correct clerical error, *held* not ground for reversal (Code Civ.Proc. § 657, and § 473, as amended by St.1933, p. 1851).

2. **New trial** 🔑**71**

In action for injuries sustained in automobile collision when defendant passed plaintiff as plaintiff made left turn, court did not abuse discretion in granting plaintiff new trial where there was substantial conflict of evidence whether plaintiff signaled for turn, or that defendant signaled to pass (St.1935, p. 185, § 544).

3. **Appeal and error** 🔑**977(1)**

Order of trial court granting or refusing new trial will not be disturbed unless it appears very clearly that trial court abused discretion in that regard.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Randall G. Kelley against C. J. Corcoran. From an order granting plaintiff a new trial, the defendant appeals.

Affirmed.

Clarence N. Riggins, of Napa, for appellant.

Rutherford, Rutherford & Rutherford, of Napa, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from an order granting a new trial on the ground of lack of evidence to support the judgment which was rendered in his favor pursuant to the verdict of a jury in a suit for personal injuries which were sustained by the plaintiff in an automobile collision.

The appellant contends that the order granting a new trial should be reversed for the reason that the court failed to specify therein, as required by section 657 of the Code of Civil Procedure, that it was allowed for the insufficiency of the evidence, and that the court abused its discretion in granting a new trial.

The record contains a substantial conflict of evidence regarding the circumstances surrounding the accident in question. About 7:30 to 8 o'clock on the evening of May 16, 1933, the plaintiff and defendant were traveling south along the state highway between St. Helena and Napa. It was dark, and their lights were burning. The defendant was driving alone at the rate of approximately 45 miles an hour. His home was situated several miles south of St. Helena, adjacent to the highway on the easterly side thereof. The roadway entered his premises by means of a narrow lane at a right angle to the state highway. The plaintiff's car was following that of the defendant's. A young man by the name of Ganter rode with the plaintiff. The plaintiff testified that he overtook the defendant's machine a short distance northerly of the lane leading to the defendant's premises. He did not know that the defendant lived there, and he had no intimation that the defendant was going to turn to his left into this lane. Both machines were traveling along the proper side of the highway. When the plaintiff reached a point 60 or 70 feet from the defendant's automobile, he sounded his horn and pulled to his left to pass the car. No other vehicles were in sight. He observed no arm signal on the part of the defendant and he saw no tail-light signal indicating that the defendant intended to turn to his left. The defendant testified that he plainly saw the plaintiff's machine approaching from the rear by looking into his mirror; that the plaintiff was 500 or 600 feet behind him when he began to turn; that he held out his left arm 200 feet before he turned the machine, but that he immediately withdrew his arm because the control of the machine required the use of both of his hands. His arm signal, therefore, did not conform to the requirements of section 544 of the Vehicle Code (St.1935, p. 185) which provides that the arm shall remain extended "continuously during the last fifty feet traveled by the vehicle before turning." The plaintiff said that his machine was running by the side of the defendant's car when he first observed his effort to turn across his pathway; that he instantly pulled his automobile to his left out upon the shoulder of the highway, but that he was then unable to avoid the collision, and the defendant's car struck his machine, overturning it. The plaintiff's car was badly damaged, and he received serious injuries, including a broken rib, from which he suffered greatly. The cause was tried before a jury which returned a verdict in favor of the defendant. A judgment was rendered accordingly. On motion therefor, the judgment was set aside and a new trial was granted. From that order, the defendant has appealed.

[1] We are of the opinion there is no merit in this appeal. The motion for new trial was made on the ground of the insufficiency of the evidence to support the verdict and judgment. It is true that the minute order which was originally entered April 2, 1934, failed to specify the fact that the new trial was granted on that ground. Under the provisions of section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851), the court, on its own motion, subsequently amended that order to correct the clerical error which occurred in the entry thereof, and specifically provided that the motion for new trial was granted "upon the ground of the insufficiency of the evidence to sustain the verdict." This amendment was entered nunc pro tunc as of the date of the original entry of the order. The court was authorized by section 473, supra, to amend the minute order granting the new trial to correct the clerical error omitting to specify therein that it was granted on the ground of the insufficiency of the evidence. That section provides in part:

[2, 3] "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed."

It does not appear that the court abused its discretion in granting a new trial under the circumstances of this case. There is a substantial conflict of evidence regarding the material facts of the case. The trial judge is in so much better position to judge of the weight and sufficiency of the evidence and the credibility of the witnesses than is the court of appeal that an order granting or refusing a new trial will not be disturbed unless it appears very clear that he abused his discretion in that regard. That is the invariable rule which is followed on appeal. Rosenberg v. Moore & Co., 194 Cal. 392, 229 P. 34; Collins v. Hodgson, 5 Cal.App.(2d) 366, 42 P.(2d) 700; Hollingsworth v. Pemberton, 138 Cal. App. 261, 265, 31 P.(2d) 1063; Boness v. Helphinstine, 132 Cal.App. 677, 23 P.(2d) 420; 2 Cal.Jur. 905, § 533.

The order granting a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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17 Cal.App.2d 42

PEOPLE v. LISENBA.

Cr. 2894.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1936.

Criminal law ⚷1182

Conviction for incest was affirmed where case on appeal was, at request of accused, continued six times, amounting to several months, and on date of termination of last continuance accused did not appear, and no brief was filed on his behalf (Pen.Code, § 1253).

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Major Raymond Lisenba was convicted of incest, and he appeals.

Affirmed.

R. E. Parsons and William J. Clark, both of Los Angeles, for appellant.

The Attorney-General, for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of incest, a felony. The clerk's transcript was filed on June 19, 1936. The reporter's transcript was filed July 3, 1936, and the case was ordered on the calendar for August 14, 1936, and due notice given. At the request of defendant the case has been continued six times, the last continuance being to October 9, 1936. The continuance to that date was at the request of the defendant and with full notice and knowledge on his part. At the hearing on that date the defendant did not appear. Neither has a brief been filed on behalf of appellant. Under authority of section 1253 of the Penal Code, the judgment is affirmed.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

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16 Cal.App.2d 697

MERTZ v. CITY OF LOS ANGELES et al.

Civ. 10955.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1936.

Municipal corporations ⚷211

Legally elected member of board of education *held* entitled to compensation provided therefor by city charter in attending meetings of board of education, notwithstanding charter provided for a local school system extending beyond the city limits with a board of seven members instead of three, and notwithstanding that member did not come within certain requirements of the charter as to qualifications for officers of the city, where city derived decided benefits from duties performed by members of board of education (Const. art. 11, § 8½, subd. 2, as amended in 1918).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Stewart O. Mertz against the City of Los Angeles and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for appellants.

Otto A. Gerth, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a judgment in favor of Stewart O. Mertz, decreeing that as a member of the board of education of the city of Los Angeles, he is entitled to receive the sum of $480 for attendance at board meetings, and ordering the city controller of Los Angeles to allocate from certain funds sufficient money to meet this obligation and to approve a warrant for the services rendered as certified by the board of education, which, in turn, is ordered to deliver the warrant to Mertz upon receiving it from the controller. The judgment also orders the mayor and city council of Los Angeles to co-operate with the controller in such action and directs the city treasurer to pay the warrant when presented.

Article 11, § 8½ of the California Constitution (amendment of 1918), states that charters for cities may provide "2. For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards." Section 255 of the charter of the city of Los Angeles reads as follows: "The government of the School Department of the City of Los Angeles shall be vested in a Board of Education, to consist of seven members, to be elected as in this charter provided, and to be called Members of the Board of Education." Section 256 of the charter provides: "Each Member of the Board of Education shall receive, in full compensation for all services of every kind rendered by him, five dollars for each regular meeting of said board attended by him, but not exceeding a total of fifty dollars ($50.00) in any one calendar month, the same to be paid out of the school fund."

A "special school fund" was carried on the books of the city and as a matter of fact one Allan E. Sedgwick was paid from city funds the sum of $480 for attending, as a member of the board of education, the ninety-six meetings for which respondent has claimed he should be paid. A contest having been filed against respondent's election in the latter part of June, 1933, and the superior court having ruled in favor of the contestant in October of that year, Sedgwick had been appointed by the board of education in the place of Mertz and over his objection, and had attended ninety-six board meetings before the judgment was reversed and Mertz again took his seat as a member of the board. Meanwhile Mertz also had attended all the meetings, had been able to act and had requested to be allowed to act.

Appellants contend that a member of the board of education of the city of Los Angeles is not a municipal officer, although section 5 of the charter provides as follows: "The officers of the city shall be: a Mayor * * * the Members of the Board of Education, a City School Superintendent, * * *" and section 6 provides: "The following officers of the city shall be elected * * * at large: * * * The members of the Board of Education."

Appellants also argue that respondent cannot be considered a municipal officer for the reason that while he resides within the territorial boundaries of the Los Angeles city school districts, his home is in a section beyond the city boundaries, and section 307 of the charter provides as follows: "No person shall be eligible to nomination or election to any office under this charter who at the time of his nomination or election is not a qualified elector of this city," and shall not have been "a resident of the city for at least two years next preceding his nomination or election."

The argument is also advanced that, as stated in Graham v. Mayor, etc., of Fresno, 151 Cal. 465, 473, 91 P. 147, 150, "the Legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer. Municipal funds can be appropriated, under our system, only for municipal purposes."

It does not appear in the instant case that the Legislature has made any order appropriating city funds, and it has been held in Law v. San Francisco, 144 Cal. 384, 77 P. 1014, and in Wetmore v. City of Oakland, 99 Cal. 146, 33 P. 769, that cities have the power to vote a bond issue for school purposes and thereby obligate the city. Commenting upon this point the court in Whitmore v. Brown, 207 Cal. 473, 479, 279 P. 447, 450, notes "distinct evidences of the trend of our judicial decisions toward sustaining the power of cities, which desire to supplement the efforts of the state, counties, and districts, to support, maintain, and strengthen the public school system functioning within their borders." Then follows a quotation from Los Angeles City School District v. Longden, 148 Cal. 380, 83 P. 246, leading to the following summation: "In short, the holding is that, notwithstanding the fact that the school system is of general concern and not strictly speaking a municipal affair, nevertheless it may be made such an affair by the city when acting in promotion and not in derogation of the legislative school plans and purposes of the state. For in said case of Los Angeles City School District v. Longden, supra, it is further said: 'Moreover, it should be finally emphasized that the power of a municipality in this regard can only run current with, and never counter to, the general laws of the state touching the common-school system. To such general laws, if conflict arises, all municipal charters must be subservient.'"

It appears from the reasoning of these cases that the decision of the people of Los Angeles as expressed in their charter, to provide the local school system, extending as it does beyond city limits, with a board of seven members instead of three, as in smaller communities, and further to pay them a sum, far from excessive, for performing important duties from which the city derives decided benefits clearly should be sustained. Since it has been definitely determined (People ex rel. Davidson v. Mertz, 2 Cal.(2d) 136, 138, 39 P.(2d) 422) that this respondent was elected legally a member of the board of education, notwithstanding certain disqualifying provisions of the city charter, it follows that he is entitled to receive the compensation provided for his services.

Judgment affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

16 Cal.App.2d 701

PEOPLE v. HARRIS.

Cr. 1501.

District Court of Appeal, Third District, California.

Oct. 5, 1936.

1. **Criminal law** ⚷662(6)

Reading prosecuting witness' testimony taken at preliminary examination to jury *held* authorized where witness, who was a horse trader with no fixed habitation, could not be found after issuing foreign subpœnas, tracing all information regarding his whereabouts, and making inquiry in every horse-trading place of business in several counties for about 18 days since due diligence was shown (Pen.Code, § 686(3).

2. **Criminal law** ⚷662(6)

Question as to what constitutes due diligence to secure presence of witness which will authorize reading to jury absent witness' testimony taken at preliminary hearing is largely within trial court's discretion and depends upon facts of each particular case (Pen.Code, § 686(3).

3. **Criminal law** ⚷1153(6)

Trial judge's decision upon question of whether due diligence was exercised to discover whereabouts of witness resulting in allowing or refusing testimony taken at preliminary hearing to be read will not be disturbed in absence of clear abuse of discretion (Pen. Code, § 686(3).

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Henry Harris was convicted of robbery of the first degree, and he appeals.

Affirmed.

James F. Gaffney and Horace E. Dunning, both of Sacramento, and Henry Harris, in pro. per., for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted of robbery of the first degree and sentenced to imprisonment in the state prison at Folsom for the term prescribed by law. He has appealed from the judgment. Only one question is presented on this appeal. It is contended the court erred in permitting the reading of testimony to the jury, of the prosecuting witness which was taken at the preliminary examination of the case, without first requiring adequate proof of due diligence on the part of the district attorney to secure the presence of the witness. It is asserted the admission of this evidence under the circumstances of this case, was a violation of the provisions of section 686 of the Penal Code, which entitles an accused person to be confronted with the witnesses against him. It is claimed the defendant was prejudiced by the absence of the prosecuting witness in this case.

[1] We are of the opinion the court did not err in permitting the reading to the jury of the testimony of the prosecuting witness which was taken at the preliminary hearing, under the circumstances of this case, since it appears that due diligence was exercised by the district attorney to procure the attendance of the witness, who could not be found.

The record shows that the prosecuting witness, John Hill, was a horse trader. He had no fixed habitation. The preliminary examination was twice continued before his presence was secured at that hearing. The defendant was present at that hearing represented by the same attorneys who appeared at the trial of the cause. The defendant was then confronted by the prosecuting witness, who was cross-examined at great length by his attorneys. Chiefly upon his evidence, the defendant was held for trial in the superior court. The cause was first set for trial in the superior court for March 31, 1936. Upon adequate showing therefor, the trial was continued to April 7, 1936, on account of the absence of the prosecuting witness. On what we deem to be adequate proof of diligence on the part of the district attorney to procure the presence of this witness, over the objection of the defendant, the testimony of Hill, which was taken at the preliminary hearing, was read at the trial of the case to the jury.

The showing of diligence consists of the following evidence: At the time of the preliminary examination the witness Hill gave his address as Rio Vista; eleven days before the day upon which the case was first set for trial, a subpœna was issued for the witness; it was placed in the hands of a county detective, who promptly went to his designated address at Rio Vista, but found that the witness had gone without leaving his address; since the man was a horse trader, inquiry was made to discover his whereabouts from all horsemen in that vicinity; the officer personally inquired for him at Isleton, Broderick, and up and down the Sacramento river from Sacramento to its mouth; it was ascertained he had been in a Portuguese horse-trading camp near Rio Vista, and that he had left with a man by the name of Claudia for either Yolo or Butte county; inquiry was promptly made for both Hill and Claudia in and about Oroville, Woodland, Dixon, Vacaville, and Fairfield; information that Hill had been seen in Butte county led to inquiry there which resulted in the discovery that the party in question was not the witness sought; assisted by the officers of these various counties, search was prosecuted for the witness in all those counties and inquiry for him was made in every horse-trading place of business; foreign subpœnas were issued for the witness to Solano, San Joaquin, Yolo, Butte, San Francisco, and Sonoma counties and returned unserved; search for him was renewed up and down the Sacramento river, at Courtland, Hood, Thornton, Franklin, and every place where it was thought he might be found; all information regarding his whereabouts was traced in vain; many officers searched for him over a period of about eighteen days; he could not be found. This is a sufficient showing of diligence to authorize the reading to the jury of the testimony of the prosecuting witness taken at the preliminary examination. This is a sufficient compliance with the requirements of section 686 of the Penal Code which provides that:

"In a criminal action the defendant is entitled: * * *

"3. To produce witnesses on his own behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness."

[2, 3] The preceding section authorizes the reading of the entire examination of a witness taken at a preliminary hearing of the case when it satisfactorily appears at the trial that after due diligence has been exercised for the discovery of his whereabouts the witness cannot be found in the state. 8 Cal.Jur. 125, §§ 214, 215. The question as to what constitutes due diligence to secure the presence of a witness which will authorize the reading to the jury of the testimony of an absent witness which was taken at the preliminary hearing of the case is largely within the discretion of the trial court, and depends upon the facts of each particular case. The decision of a trial judge upon the question of diligence resulting in either receiving or rejecting such evidence will not be disturbed on appeal unless it appears there was a clear abuse of discretion in that regard. 8 Cal.Jur. 129; People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v. Noone, 132 Cal.App. 89, 22 P.(2d) 284; People v. Fay, 82 Cal.App. 62, 255 P. 239. There is substantial evidence in the present case supporting the determination of the trial court that due diligence was exercised to secure the presence of the prosecuting witness at the trial.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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16 Cal.App.2d 736

MARINE et al. v. DECKER SCHOOL DIST. et al.

Civ. 10977.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1936.

Appeal and error 🔑110

Order denying motion for new trial sought on grounds enumerated in statute and not because of disability of reporter who participated as stenographic reporter at trial *held* not appealable (Code Civ.Proc. §§ 657, 953e and 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Helen Marine and husband against Decker School District and Atha Decker, and others, as and constituting the Board of Trustees of the Decker School District, and another. From an order denying a new trial, the plaintiffs appeal.

Appeal dismissed.

Richard A. Dunnigan, by Douglas M. Forsyth, both of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The notice of appeal, filed February 15, 1936, states that the plaintiffs appeal "from that certain order made and entered in the above entitled action on the 31st day of January, 1936, denying plaintiffs' motion for a new trial." The motion was made upon several of the grounds given as causes for a new trial in section 657 of the Code of Civil Procedure; reliance was not placed upon the provisions of section 953e of that Code.

The order denying a motion for a new trial, so grounded, is not an appealable order. Section 963, Code Civ.Proc., as amended by St.1933, p. 2472; 1 Cal.Jur. Ten-Year Supp. 296.

The appeal is dismissed.

We concur: HOUSER, P. J.; DORAN, J.

17 Cal.App.2d 68

GRIFFIN et ux. v. JACOBSEN et al.

Civ. No. 11028.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1936.

Rehearing Denied Nov. 5, 1936.

Hearing Denied by Supreme Court Dec. 10, 1936.

1. Evidence 🔑222(10)

In automobile collision case, matter contained in stenographic notes of testimony previously given by defendants in criminal action in which one of them was defendant, and which tended to establish that each of them was guilty of negligence in operation of automobile belonging to one, *held* admissible as an admission against interest as to defendant making statement (Code Civ.Proc. § 1870, subd. 2).

2. Appeal and error 🔑931(2)

Reviewing court would assume that trial court recognized existence of principles of law that under circumstances, admission against interest by one of defendants would not be admissible as against codefendant, and gave such principles proper application, since every legal intendment favors validity of judgment.

3. Automobiles 🔑192(12)

Owner riding in his automobile driven by another party at time of collision with plaintiffs' automobile *held* liable to plaintiffs for any negligence of driver under doctrine of respondeat superior.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Walter C. Griffin and wife against Tobias E. Jacobsen and Ole Hansen. Judgment for plaintiffs, and defendant Hansen appeals.

Affirmed.

Clarence Hansen, of Los Angeles, for appellant.

H. L. Breidenbach, of Los Angeles, for respondents.

HOUSER, Presiding Justice.

Plaintiffs brought an action against defendants for the purpose of recovering a judgment against them for damages that were alleged to have been sustained by plaintiffs as the result of a collision that occurred between an automobile that was owned and operated by them, and an automobile that was owned by defendant Hansen, in which he was then riding, but which at that time was not being driven by him. From a judgment that was rendered against both defendants, Hansen has appealed to this court.

[1] The principal criticism that appellant presents to the judgment is that, over the objection of defendants thereto, a court reporter, who had taken stenographic notes of testimony that theretofore had been given by each of the defendants in a criminal action in which Jacobsen was the defendant, was permitted to read a part of such notes in evidence in the instant action. As is shown by the bill of exceptions herein, the said testimony consisted of the following statements, to wit: "That he [Jacobsen] and Ole Hansen left Los Angeles on or about 7:00 p. m. of August 24th, 1935,

for the purpose of going to Mojave, California; that both Tobias Emanus Jacobsen and Ole Hansen had indulged in a few beers and that Ole Hansen had indulged in a few drinks of whiskey; that *Ole Hansen* was driving the automobile from the time it left Los Angeles until it had proceeded approximately three miles North of Saugus on Mint Canyon Road, headed for Palmdale, California; that at that point, Ole Hansen requested Tobias Emanus Jacobsen to drive the automobile because he, Ole Hansen, was dizzy, and that Tobias Emanus Jacobsen took the wheel of the automobile at that point and continued to drive and was driving at the time of the impact. That Ole Hansen testified in the same proceeding on said October 21st, 1935, that he was not driving the Chrysler automobile at the time of the collision with the Ford of the Griffins but that Jacobsen was driving. The Chrysler car belonged to him, Ole Hansen."

The bill of exceptions also shows that: "To the introduction of this evidence, objection was made on behalf of Ole Hansen and Tobias E. Jacobsen, on the grounds that it was hearsay and not the best of evidence, and did not tend to prove any of the issues before the Court, which objection was overruled, and a motion having been made to strike such testimony as being hearsay, and not the best of evidence, and being incompetent, irrelevant, and immaterial, was denied."

Neither of the defendants was present at the trial of the instant action.

From a consideration of the questioned evidence, it is apparent that, if properly admissible, it had a tendency to establish not only that each of the defendants was guilty of negligence in the operation of Hansen's automobile, but, as well, that although defendant Hansen was the owner thereof, at the time when the accident occurred, the automobile was being driven in the execution of his business and on his personal account; in other words, that defendant Hansen was the principal and that defendant Jacobsen was his agent; consequently, that if the negligence of defendant Jacobsen could be made to appear, the doctrine of respondeat superior should be given application as to defendant Hansen.

The several statements having been made by one party defendant, or the other, to the action, constituted an admission against interest as to such defendant; and therefore, as to him, could not be characterized as hearsay, as contended by appellant. Either the court reporter or any other person who had heard either of the defendants give his testimony in the other action was qualified to testify in the instant action regarding such admissions. Code Civ.Proc. § 1870, subd. 2; 10 Cal. Jur. 1057 et seq.

[2] Properly speaking, it may not be denied that, in the circumstances, an admission against interest made by one of the defendants to the instant action would not have been admissible as against his codefendant. But the objection made to the questioned evidence did not specifically include any such ground as a reason why the objection should be sustained. To the contrary, the objection was general in its terms, and was so expressed that if sustained by the trial court, the result would have been that admissions against interest made by one of the defendants could not have been considered by the court as against him only. In that connection, since every legal intendment favors the validity of the judgment, it must be assumed that the trial court recognized the existence of the principles of law and procedure hereinbefore indicated, and that such principles were given their proper application. In other words, that the admissions that were made by each of the defendants were applied to him only.

[3] Reverting to the admissions made by defendant Hansen, it appears that, in substance and effect, in the criminal action he had testified that although he was the owner of the automobile that collided with that of the plaintiffs, at the time when the accident herein concerned occurred he was not driving his automobile, but that it was then and there being driven by his codefendant. Other evidence disclosed the fact that at the same time and place defendant Hansen was an occupant of his automobile. In such circumstances, it would seem clear that it was properly inferable that the automobile which was the property of defendant Hansen was being operated by defendant Jacobsen in and about the execution of business or pleasure of said defendant Hansen, and consequently that the doctrine of respondeat superior was given proper application by the trial court.

No other points made by appellant require consideration by this court.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.

16 Cal.App.2d 606

PEOPLE v. BLANKENSHIP.

Cr. 196.

District Court of Appeal, Fourth District, California.

Sept. 29, 1936.

1. Criminal law 🔑1126

Revoking of order suspending execution of sentence imposed under conviction for felony *held* not erroneous on ground order of revocation was made in absence of defendant or his counsel, where record failed to show affirmatively that defendant was not present in court when order was made (Pen.Code, § 1043).

2. Criminal law 🔑1001

Provision of Penal Code requiring presence in court of defendant charged with felony *held* not to require presence of defendant at time of making order revoking prior order suspending execution of sentence, since hearing for revocation of probation is not a "trial" and established rules for conduct of trials are not applicable (Pen.Code, § 1043).

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

3. Criminal law 🔑1001

Granting or withholding of probation rests in discretion of trial court (Pen.Code, § 1203).

4. Criminal law 🔑1001

Granting of probation is not right given to defendant in criminal proceeding, but is an act of clemency (Pen.Code, § 1203).

5. Criminal law 🔑1001

Applicant for probation may require that his petition be considered by trial court, but may not demand clemency as matter of right (Pen.Code, § 1203).

6. Criminal law 🔑1001

Requirement as prerequisite to probation that 23 year old defendant afflicted with syphilis who had pleaded guilty to rape of 13 year old girl submit to an operation of vasectomy *held* not invalid as unreasonable (Pen.Code, § 1203).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Harley Blankenship pleaded guilty to rape of a 13 year old girl, applied for probation, and execution of judgment of conviction was suspended upon certain conditions. From an order denying defendant's motion to modify an order suspending execution of sentence and from an order revoking prior order of suspension, the defendant appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

Defendant was charged with the crime of statutory rape of which, upon arraignment, he entered a plea of guilty and made application for probation. The court appointed a date for hearing the application and referred the same to the probation officer for his report. On the appointed date the probation officer's report was submitted and evidence was presented which related to the circumstances surrounding the commission of the offense and the past history of the defendant. Among the facts which were exposed during this examination, it appeared that the defendant was then almost 23 years of age and the female upon whom the crime was perpetrated was 13. It also appeared that medical examination of the parties showed that both were afflicted with syphilis. There was, however, no positive evidence which showed that the defendant had communicated the disease to the girl. Upon the conclusion of the hearing, the court indicated that it was disposed to grant defendant's application upon conditions which the court characterized as "rather stringent." Judgment was thereupon pronounced whereby the defendant was sentenced to confinement in San Quentin prison. Execution of the judgment was suspended for a period of five years upon certain conditions, only one of which is material on this appeal. This condition was that within ten days from the date of the order suspending execution of the sentence the defendant should submit to an operation for sterilization. Thereafter and on the eleventh day succeeding the date of the aforesaid order the defendant, through his counsel, presented to the court a motion to modify the order by striking therefrom the above-mentioned condition. Upon the hearing of this motion evidence was produced which tended to show that the disease of syphilis is curable, and that defendant was willing and financially able to secure medical treatment for elimination of the disease from his system. The court took the motion under advisement for a period of two days, at which time it denied the motion and revoked its former order suspending execution of sentence on the ground that defendant had failed to comply with the conditions upon which the order was made within the time specified in the order. Defendant thereupon appealed from the order denying his motion for modification and from the order revoking the prior order of suspension.

It will here be assumed that the orders are appealable and that appellant gave notice of appeal in the manner and within the time specified in the Code.

[1, 2] Two contentions are advanced by appellant on this appeal. The first is that neither appellant nor his counsel was present in court at the time the order of revocation was made. It is urged that, since the offense charged is a felony, appellant was entitled to be present at every stage of the proceedings. Reliance is had upon section 1043 of the Penal Code, which provides that if a defendant is prosecuted for a felony he must be personally present at the trial. To this contention there are two answers, either of which is sufficient to demonstrate its lack of merit. First, the record fails to show affirmatively that appellant was not present in court when the order of revocation was made. Second, section 1043 of the Penal Code requiring a defendant's presence during a trial in which he is being prosecuted for the commission of a felony is not applicable to the situation here presented. A hearing for revocation of probation is not a trial, and the established rules for the conduct of trials are not applicable thereto. People v. Fields, 131 Cal.App. 56, 20 P.(2d) 988.

The second and chief contention advanced is that the condition requiring appellant to submit to an operation of vasectomy was an unreasonable condition to be imposed as a prerequisite for probation. It is frankly conceded that there is no precedent which may serve as a guide in the determination of this problem. Some fundamental principles relating to the matter of probation will, however, materially assist in its correct solution.

[3-5] It must, in the first place, be conceded that the granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court. Section 1203, Pen.Code; People v. Judson, 128 Cal.App. 768, 774, 18 P.(2d) 379. In the second place, probation is not a right which is given to a defendant in a criminal proceeding who has either pleaded guilty to the commission of an offense or has been duly convicted thereof. It is "an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." People v. Payne, 106 Cal.App. 609, 613, 289 P. 909, 911; People v. Hainline, 219 Cal. 532, 534, 28 P.(2d) 16. The only right which an applicant for probation possesses is that his petition shall receive consideration by the court. He may not demand clemency as a matter of right. People v. Roach, 139 Cal.App. 384, 387, 33 P.(2d) 895.

[6] We may now proceed to a consideration of appellant's contention of unreasonableness in the light of the peculiar circumstances which appear in this case. We have here a man 23 years of age who has pleaded guilty to the crime of statutory rape accomplished with a female approximately ten years his junior. We further have both of these parties afflicted with a communicable venereal disease. Under these circumstances, we are unable to conclude that the condition which was imposed by the trial court and which now claims our attention was an unreasonable or improper condition. The state is vitally interested in the health and welfare of its citizens. It is certainly interested in preventing contamination of them by venereal disease. It may be conceded that intelligent medical science has succeeded in producing a cure for syphilis which is efficacious in the great majority of cases. However, as the trial court very properly observed, it was not so much concerned with curing the disease with which appellant was afflicted as it was with preventing appellant from transmitting the disease to his possible posterity. If reproduction is desirable to the end that the race shall continue, it is equally desirable that the race shall be a healthy race and not one whose members are afflicted by a loathsome and debilitating disease.

In conclusion, it may be remarked that appellant was not compelled by the condition which the court imposed to submit to an operation whose effect would be to foreclose him from procreation. He was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline to submit to the operation and accept the penalty which the law provides as punishment for his offense. It is our conclusion that under the circumstances here presented the condition was neither unreasonable nor improper, and that the trial court committed no abuse of discretion in imposing it.

The orders from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

17 Cal.App.2d 37

MACAULEY et al. v. JAYBEN CORPORATION.

Civ. 1969.

District Court of Appeal, Fourth District, California.

Oct. 9, 1936.

New trial 🔑71

Where evidence in action to recover balance of rent under terms of lease was conflicting as to defendant's contention that rent had been reduced by oral agreement, and there was no evidence to justify inference that smaller amounts paid were tendered in full payment, court *held* not to have abused its discretion in granting new trial after verdict for defendant.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by T. C. Macauley and another against the Jayben Corporation. From an order granting a new trial, defendant appeals.

Affirmed.

F. F. Grant and Russell V. Grant, both of San Diego, for appellant.

Philip Storer Thacher, of El Cajon, and Lester J. Penry, of San Diego, for respondents.

BARNARD, Presiding Justice.

The defendant leased from the plaintiffs a theater building under a written lease running ten years and calling for a rental of $325 per month during the first two years, and $350 per month during the next two years. The rent was duly paid during the first year and thereafter the monthly payments ranged from $143 to $300, although in most of the months $275 was paid. This action was brought to recover the balance of the rent for a certain period in accordance with the terms of the lease. As an affirmative defense, the defendant alleged that an oral agreement was entered into shortly after the end of the first year, whereby it was agreed that the rent should be $275 per month in lieu of the amount set forth in the lease "or such amount as the defendant could pay per month." It was then alleged that the amounts subsequently paid were paid pursuant to such oral agreement, that the plaintiffs received these amounts over a period of two years and seven months without any objection, and that the said payments "were in full for all rents due to the plaintiffs."

A jury returned a verdict in favor of the defendant and the court granted a new trial, from which order this appeal was taken.

The appellant concedes that there was a conflict in the testimony on the issue as to whether there was an executed oral agreement to reduce the rent and that, in so far as that issue is concerned, the discretion exercised by the trial court in granting a new trial may not be disturbed on appeal. It is contended, however, that the court abused its discretion in making this order, since the evidence established, without conflict, that the respondents received without objection, from month to month, payments which were less than the amounts called for by the written lease.

The allegations that the respondent received the smaller payments without objection and that these were in full for all rents due were pleaded as a part of the defense of an executed oral agreement to reduce the amount of the rental. Whether the smaller amounts were accepted and received as full payment depends upon whether there was an agreement that they should be so accepted, on which point there is an admitted conflict in the evidence.

The appellant contends that the mere acceptance of the money from month to month, without objection, constitutes a full payment and discharge of the obligations of the lease, irrespective of whether or not there was any agreement that they should be accepted as such full payment. It is argued that under section 2076 of the Code of

Civil Procedure the respondents have lost all right to the balance claimed by failing to make timely objection to the amounts tendered, and that this case is governed by the rules laid down in Julian v. Gold, 214 Cal. 74, 3 P.(2d) 1009. In that case the court held that there had been an executed oral agreement to accept a reduced rental in lieu of that called for by a written lease, but nothing therein can be taken as authority for the proposition that the acceptance of mere payments on account of rental due discharges the obligation in the absence of an agreement that they shall be so accepted and where they are not tendered as full payment. Aside from the question of an oral agreement, with respect to which the evidence is conflicting, there is no evidence here justifying the inference that the smaller amounts were tendered in full payment of the rent due, and, on the other hand, in a letter written to the respondents nearly three years after the lease was entered into, the defendant expressed a desire to "catch up" with the payments due to them and promised to pay $800 within two months.

No abuse of discretion appears, and the order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

17 Cal.App.2d 9

LINSTEAD et al. v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY.

Civ. 5724.

District Court of Appeal, Third District, California.

Oct. 9, 1936

Hearing Denied by Supreme Court Dec. 7, 1936.

1. Courts 🔑202(5)

Order granting or denying motion to set aside decree of distribution of estate is not appealable, and hence writ of review is appropriate remedy to question validity of action of probate court (Code Civ.Proc. § 963, as amended by St.1933, p. 2472; Probate Code, § 1240, as amended by St.1935, p. 1972).

2. Appeal and error 🔑440

In civil matter, effect of appeal is to remove from jurisdiction of trial court all questions affecting validity of judgment or order appealed from, and, while appeal from judgment is pending, trial court has no power to amend or correct it.

3. Executors and administrators 🔑314(12)

Pending appeal by interested party from decree of final distribution in probate proceeding had effect of removing entire estate from jurisdiction of superior court, and operated on all parties affected by decree, and remedy sought by motion of parties to set aside decree of distribution affected directly matter embraced in decree, and hence superior court had no power to amend or correct decree pending appeal (Code Civ.Proc. § 946, and § 473, as amended by St.1933, p. 1851).

4. Judgment 🔑388

Order setting aside decree or judgment previously entered is void if no notice is given to adverse parties whose rights would be affected by order.

5. Executors and administrators 🔑315(4)

Superior court *held* without jurisdiction to set aside decree of final distribution of estate where only notice given to interested parties on motion to vacate decree was that given by clerk by posting (Probate Code, § 1200, as amended by St.1933, p. 2496; Code Civ.Proc. § 473, as amended by St.1933, p. 1851, and § 1010 as amended by St.1935, p. 1966).

◆

Petition for writ of review by W. J. Linstead and others against the Superior Court of the State of California in and for the County of Mendocino.

Order annulled.

Hale McCowen, Jr., of Ukiah, for petitioners.

Thomas & Thomas, of Ukiah, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In the estate of George Golden, deceased, a decree of final distribution was entered distributing a portion of the estate to the petitioners herein, and denying distribution to one E. T. Stoddard, the proponent of a will which has been denied probate. In due time an appeal was taken from this decree of final distribution by Stoddard, which appeal is still pending.

Thereafter, and on April 13, 1936, Charles Hewitt, together with other half-brothers and half-sisters of the predeceased wife of Golden, moved, under the provisions of section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851), to set aside the decree of distribution. On the same day a copy of the petition was served upon the attorney for the distributees named in the decree, but no time was set nor notice of hearing given.

On May 12, 1936, the clerk of the court fixed the 22d day of May as the time for the hearing of the motion and gave notice thereof by posting. The motion was then continued from time to time until June 22d, when the matter was called for hearing before a judge of an adjoining county duly assigned to sit for the judge of the county of Mendocino. At that time an attorney, appearing for the attorney of record for the distributees herein, objected to the hearing upon the ground that no notice of the hearing of the petition had been given as required by law and the court was without jurisdiction to hear the matter. This objection was overruled. The moving parties then filed and served an affidavit in support of the motion which, over the objection of the distributees, was admitted in evidence. A motion to strike the same from the files was then made and was likewise denied. Upon the matter being called for hearing, objection was made to any proceeding on the ground that an appeal was pending involving the decree of final distribution in the estate of Golden, deceased, and also that no notice had been given as required by law, and that the court was therefore without jurisdiction. This being overruled, the court proceeded to hear the matter, and the decree of distribution was vacated and set aside. A motion to set aside this order was again made upon the ground of want of jurisdiction, and again denied.

[1] Petitioners thereupon filed this writ of review to test the validity of this order setting aside the decree of distribution. Respondent questions the propriety of this method of inquiry by writ of review, but it is apparent from examination of section 963 of the Code of Civil Procedure (as amended by St.1933, p. 2472) and section 1240 of the Probate Code (as amended by St.1935, p. 1972) that an order granting or denying a motion to set aside a decree of distribution is an order from which no appeal may be taken (In re Estate of Mailhebuau, 201 Cal. 664, 258 P. 378), and a writ of review therefore is an appropriate remedy to question the validity of the action of the probate court.

There are therefore two questions presented by this writ. The first question challenges the jurisdiction of the court because an appeal from the final distribution was pending in the Supreme Court at the time the motion was made to annul or set aside the same. The second question challenges the jurisdiction of the court in that no notice of the motion to vacate was given to petitioners herein, they being parties beneficially interested in the decree.

[2] It has been frequently held that in a civil matter the effect of an appeal is to remove from the jurisdiction of the trial court all questions affecting the validity of the judgment or order appealed from, and while an appeal from a judgment is pending the trial court has no power to amend or correct the same. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 346, 139 P. 805; Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Field v. Hughes, 134 Cal.App. 325, 25 P.(2d) 241.

It is admitted by respondent that as a general rule a duly perfected appeal divests the trial court of further jurisdiction, but they contend the order under review arose in a proceeding independent of and collateral to the proceedings from which appeal was taken, and therefore the trial court had jurisdiction to pass upon such collateral matter pending the appeal on the decree of distribution. In re Estate of Waters, 181 Cal. 584, 185 P. 951. The question therefore is: Was the motion to set aside the decree and to relieve certain parties from default, a proceeding upon the judgment or order appealed from or upon a matter embraced therein? Section 946, Code Civ.Proc.

[3] We are here concerned with a matter in probate, and no direct citations are found involving precisely the question before us, but inasmuch as the res involved in a probate proceeding is the estate itself, any ruling that reopens the proceeding or permits new parties to enter the controversy, or tends to affect the rights of the distributees named in the decree of distribution, must of necessity relate to the decree itself. It seems evident also that an appeal by anyone interested in the estate is sufficient to remove the entire matter from the probate court to the court of review, and all parties interested in the estate, whether appellants or not, are bound and affected by the notice of appeal. Inasmuch, therefore, as Stoddard, a party interested in the estate, had perfected an appeal to the Supreme Court, which appeal is still pending, it had the effect of remov-

ing the entire estate from the jurisdiction of the superior court, and operated not only upon the interest of Stoddard but on all parties affected by the decree, and the remedy sought by the motion affected directly the matter embraced in the decree. We believe therefore the court had no power to amend or correct its decree pending the appeal.

Turning our attention now to the second point urged by petitioners herein, we find that the only notice given of the motion to vacate the decree was that given by the clerk by posting, in the form substantially required by section 1200 of the Probate Code (as amended by St.1933, p. 2496). The parties moving to attack the decree were proceeding under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851) in asking for an order vacating the decree of distribution.

This section reads in part as follows: "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

The petition of the Hewitts is in effect a motion or application for an order setting aside the decree, and to bring that application on for hearing, notice is essential. Section 1010 of the Code of Civil Procedure (as amended by St.1935, p. 1966) provides that notice must be in writing, and the notice of motion must state when, and grounds upon which it is made, and the papers, if any, upon which it is to be based. If any such paper has not been previously served upon the parties to be notified, a copy of such paper must accompany the notice.

[4, 5] The courts have ever been watchful that proper notice is given to those to be affected by these proceedings, and in Bohn v. Bohn, 164 Cal. 532, 129 P. 981, where the court was considering a motion for a change of venue, and the requirements of sections 1003 and 1010 of the Code of Civil Procedure, it was held that a motion and notice thereof was one of the necessary steps therein, and the decision then proceeded to lay down what was necessary where a notice is required, holding a court is without jurisdiction to set aside a judgment, where no notice of the application is given to the adverse parties whose rights would be affected by the order. A court also is without jurisdiction to set aside a judgment, and an order setting aside a decree or judgment previously entered is void if no notice is given to adverse parties whose rights would be affected by the order. Gill v. Peppin, 41 Cal.App. 487, 182 P. 815; Dolan v. Superior Court, 47 Cal.App. 235, 190 P. 469; McDonald v. Severy (Cal.Sup.) 59 P.(2d) 98.

From the foregoing it appears therefore that the order setting aside the decree of distribution having been made at a time when the decree was not properly before the court by reason of the inadequacy of the notice, and beyond the jurisdiction of the court by reason of a pending appeal from the decree of distribution, the order must be annulled, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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16 Cal.App.2d 745

COOK v. JUSTICE'S COURT OF SAN DIEGO TP. et al.

Civ. 1963.

District Court of Appeal, Fourth District, California.

Oct. 7, 1936.

1. Dismissal and nonsuit ⚷45

Provision of statute requiring dismissal of actions where summons has been served and no answer filed, and plaintiff has failed to have judgment entered within three years after service, is applicable to actions pending at time of enactment (Code Civ.Proc. § 581a, as amended by St.1933, p. 1869).

2. Prohibition ⚷5(2)

Trial court may be prevented by prohibition from proceeding further in action where summons has not been served and return thereon made within three years after commencement of action (Code Civ.Proc. § 581a, as amended by St.1933, p. 1869).

3. **Dismissal and nonsuit ⚷45**
Prohibition ⚷5(1)

Statute specifying contingencies in which action shall be dismissed is mandatory, and prohibition will lie to prevent trial court from proceeding further in action where act contemplated is not ministerial (Code Civ. Proc. § 581a, as amended by St.1933, p. 1869).

4. **Dismissal and nonsuit ⚷53(1), 57**

Trial court is deprived of jurisdiction other than to dismiss action after expiration of periods within which summons must have been issued or returned, or judgment entered (Code Civ.Proc. § 581a, as amended by St. 1933, p. 1869).

5. **Justices of the peace ⚷122(4)**

Action based upon stockholder's liability *held* action arising upon contract for recovery of money or damages only, requiring clerk of justice court, upon application, to enter stockholder's default, and immediately thereafter enter judgment, since stockholder empowers corporation to bind him and corporation's contract creates debt (Code Civ.Proc. § 585, subd. 1, as amended by St.1933, p. 1870; Const. art. 12, § 3).

6. **Justices of the peace ⚷122(4)**

Requirement that justice court clerk enter judgment immediately after entering default is directory and does not render void judgment subsequently entered upon such default, nor can defendant against whom judgment is entered invoke failure to enter judgment immediately to annul judgment to which he has no other defense (Code Civ. Proc. § 585, subd. 1, as amended by St.1933, p. 1870).

7. **Prohibition ⚷5(2)**

Defendant against whom justice court clerk entered default in action upon contract for recovery of money or damages only *held* not entitled to prohibition to prevent further action except dismissal, notwithstanding clerk had not entered judgment, since entry of judgment was clerk's ministerial act, and not court's judicial act, and failure to enter judgment immediately did not impair its effect (Code Civ.Proc. § 581a, as amended by St.1933, p. 1869; Code Civ.Proc. § 585, subd. 1, as amended by St.1933, p. 1870; Code Civ. Proc. § 1102).

8. **Prohibition ⚷1**

Prohibition will not lie against ministerial officer to prevent performance of ministerial act (Code Civ.Proc. § 1102).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceeding for a writ of prohibition by Ralph A. Cook against the Justice's Court of San Diego Township and Honorable Dean Sherry, Justice thereof. From an order and judgment granting the writ, defendants appeal.

Reversed.

Ed. P. Sample and William H. Wylie, both of San Diego, for appellants.

Herbert C. Kelly, of San Diego, for respondent.

GRIFFIN, Justice pro tem.

The undisputed facts, as disclosed by the record, reveal that on November 3, 1931, a complaint was filed and a summons issued in the justice's court of San Diego township, in an action entitled I. W. Randall et al., Plaintiffs, v. Isabelle C. Anthony, Ralph A. Cook et al., Defendants; that on November 6, 1931, service of summons and complaint was made on Ralph A. Cook personally, in San Diego township; that on March 29, 1934, the summons with proof of service indorsed thereon was duly returned and filed in the office of the clerk of the justice's court; that on March 29, 1934, Ralph A. Cook not having appeared or having made answer to the complaint within the time prescribed by law, upon request of plaintiff, the clerk of the justice's court entered a default against Cook for failure to answer; that no judgment by default was entered against Cook. On October 18, 1935, Cook, by his attorney, served upon plaintiffs a notice that he, at a time and place designated, would move the justice's court to dismiss the action against him upon the ground that the justice's court was "without jurisdiction to take any action therein" and that a dismissal of said action was mandatory under section 581a of the Code of Civil Procedure (as amended by St.1933, p. 1869). The motion came on for hearing before the justice who, after argument, rendered an oral decision denying the motion to dismiss; that formal entry of this decision was held in abeyance for a short time so that the defendant Cook might take such further steps as he deemed advisable in the premises.

On November 8, 1935, Ralph A. Cook filed his petition in the superior court, praying that a writ of prohibition be issued, directed to the justice's court, commanding him "to desist from any and all further proceedings in said action except a dismissal thereof." In addition to the facts above related, petitioner Cook alleged that at no time whatsoever had he ever been served with process in the justice's court action, even though an affidavit was made by the constable alleging service of the complaint and summons upon several defendants, including the petitioner, Ralph A. Cook. On December 30, 1935, the judge of the superior court made and entered an order that Ralph A. Cook was entitled to a writ of prohibition, and it was accordingly issued as prayed for in the petition. The appeal is from such order and judgment.

Appellants contends that the superior court has no jurisdiction to issue a writ of prohibition restraining the justice's court, or the justice thereof, from entering a judgment by default under the facts stated.

It will be noted that section 581a of the Code of Civil Procedure provides three contingencies for the dismissal of actions and that such actions must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein: (1) Unless summons is issued within one year; (2) unless return of service of summons is made within three years; (3) if summons has been served and no answer has been filed, if plaintiff fails or has failed to have judgment entered within three years after service of summons.

[1] The third contingency above mentioned was added by Statutes of 1933, c. 744, p. 1869, and is applicable to actions pending at the time of its enactment. Steinbauer v. Bondesen, 125 Cal.App. 419, 14 P.(2d) 106.

[2] Under section 581a of the Code of Civil Procedure the court is without jurisdiction to proceed further in an action where the summons has not been served and return thereon made within three years after the commencement of the action; and where it attempts to further proceed it may be prevented by writ of prohibition from doing so. Sauer v. Superior Court, 74 Cal.App. 580, 241 P. 570.

[3] It would appear from the reasoning and authorities cited in the above case that the provisions of section 581a of the Code of Civil Procedure are mandatory, and if the act contemplated is not a ministerial act, prohibition will lie to prevent the court from proceeding further. Additional authorities supporting this are to be found in Kelly v. Ferbrache, 119 Cal.App. 529–531, 6 P.(2d) 987; People, by Department of Public Works v. S. P. R. R. (Cal.App.) 57 P.(2d) 1004.

[4] It has been uniformly held that the provisions of section 581a, former subdivision 7 of section 581, §§ 582, 583, and 981a of the Code of Civil Procedure are mandatory, and that after the expiration of the periods therein mentioned, the trial court is deprived of jurisdiction to take any other action in the cause before it, except to dismiss the same. Davis v. Superior Court, 184 Cal. 691, 195 P. 390; Kelly v. Ferbrache, supra.

[5] The main question involved, briefly stated, is this: Is an action based on a stockholder's liability arising out of the former constitutional provision, section 3, article 12, an action upon contract for the recovery of money or damages only, where the clerk (or justice if there be no clerk) upon application of the plaintiff must enter the default of the defendant and immediately thereafter enter judgment for the amount demanded in the complaint, under subdivision 1, § 585, of the Code of Civil Procedure (as amended by St.1933, p. 1870).

San Diego township has a clerk for the justices of the peace.

It has been held that the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation *arising upon contract,* within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money, when the amount claimed is less than $300. Dennis v. Superior Court of Los Angeles County, 91 Cal. 548, 27 P. 1031.

And it has also been held to be an action arising upon contract under section 438 of the Code of Civil Procedure, subdivision 2, before its present amendment (St.1927, p. 1620). While it is true that it is the authority of the statute which creates the general liability of a stockholder on the corporation indebtedness, in a case like this, it is the contract of the corporation which creates the indebtedness. In assuming the status of a stockholder, each owner of shares of stock in effect empowers the corporation by its act to bind him by its obligations. It is a separate independent liability, but it is created by and arises on the contract. There is nothing we can discover in the creation of a stockholder's liability or in its enforcement, where it arises on a contract of the corporation, to differentiate it from a direct contract by the individual, so far as concerns the remedy of the parties.

The following decisions have held the liability to be contractual in its nature: Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Lininger v. Botsford, 32 Cal. App. 386, 163 P. 63; Miller & Lux v. Katz, 10 Cal.App. 576, 102 P. 946; Platt v. Wilmot, 193 U.S. 602, 24 S.Ct. 542, 48 L.Ed. 809.

Under this holding, the clerk, and not the court, was authorized to enter a judgment by default, and in so doing he acts in a mere ministerial capacity. Kelly v. Van Austin, 17 Cal. 564; Baird v. Smith, 216 Cal. 408, 14 P. 749.

[6] The provision of subdivision 1, § 585, of the Code of Civil Procedure that the clerk must enter the judgment *immediately* after entering the default is merely directory and does not render void a judgment subsequently entered upon such default, nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. Edwards v. Hellings, 103 Cal. 204, 37 P. 218.

In Brooks v. Nelson, 95 Cal.App. 144, 272 P. 610, it was held that where the defendant was personally served and his default was regularly entered and had not been vacated, a delay of more than six months in the entry of the judgment in no way prejudiced the rights of the plaintiff and conferred no rights upon the defendants.

[7, 8] The judgment by default was not actually entered by the clerk. The default was entered. The fact that judgment was not immediately entered is not important, and it must be considered as entered so far as this proceeding is concerned, as the clerk's failure to enter judgment upon the default can in no way prejudice the right of the plaintiff and can confer no right on the defendant whose default had been regularly entered. Marston Co. v. Kochritz, 80 Cal.App. 352, 251 P. 959. After default is entered, it is then, or thereafter, the ministerial duty of the clerk to enter and docket the judgment, and to prepare the judgment roll, and he could not by neglecting to perform that duty, destroy or impair the effect of the judgment. Baker v. Brickell, 102 Cal. 620, 36 P. 950; Hinds v. Superior Court, 65 Cal.App. 223, 223 P. 422; Edwards v. Hellings, 103 Cal. 204, 37 P. 218; Holt v. Holt, 107 Cal. 258, 40 P. 390.

It then being a ministerial act of the clerk and not a judicial act of the court to enter judgment after default, prohibition will not lie against a ministerial officer to prevent the performance of a ministerial act. Meserve v. Superior Court, 2 Cal.App.(2d) 468, 38 P.(2d) 453.

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Section 1102, Code Civ.Proc.; Dunn v. Justice's Court, 136 Cal.App. 269, 28 P. (2d) 690; Hobart v. Tillson, 66 Cal. 210, 5 P. 83; 21 Cal.Jur. 591, § 7; Clark v. Superior Court, 55 Cal. 199; Title Guarantee & Trust Co. v. Superior Court, 9 Cal. App.(2d) 257, 49 P.(2d) 318.

For the reasons stated the judgment and order of the trial court, of necessity must be, and is, reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

17 Cal.App.2d 1

PEOPLE v. RYAN.

Civ. 10032.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1936.

1. Nuisance 🔑81

In action to have livery stable abated as nuisance, fact that owner had made numerous efforts to obtain permit to conduct stable business and that municipal officers neglected and refused application was no bar to action, since, even if permit had been granted, it would not have authorized owner to conduct nuisance.

2. Nuisance 🔑82

Action to abate livery stable as nuisance was not improperly instituted because commenced in compliance with resolution of

county board of supervisors rather than by health department on ground charter of city and county prohibited one governmental department from interfering with another, since there was no interference with health department, and charter and statute gave board right to direct bringing of such action (Code Civ.Proc. § 731).

3. Nuisance ⚷81

Livery stable in residential section could not be repaired to remove objection that it was nuisance by reason of use and dilapidated condition, where zoning ordinance permitted such repair only if cost did not exceed 50 per cent. of assessed value, and assessed value of stable was $1,350, and estimate of owner was that repairs would cost from $1,000 to $3,000.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the People against James J. Ryan. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Eric Lyders, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for the People.

STURTEVANT, Justice.

The defendant has appealed from a judgment determining that his stable is a public nuisance and ordering it abated.

[1] As we understand him, he contends that at the time this action was commenced, and for a long time prior thereto, he had pending an application for a permit to maintain and operate said stable; that the respective municipal authorities refused to grant him a permit without stating their reasons for such refusal and giving him an opportunity to comply with any demands for repairs and alterations. Ryan v. Andriano, 91 Cal.App. 136, 266 P. 831. These statements are true. But the decision in that case was filed April 19, 1928. After the remittitur went down, each party from time to time served on the other certain notices and demands. However, no permit was issued. In 1932 the present charter took effect. New ordinances were enacted to carry it into effect. Certain powers formerly vested in the board of supervisors were, by the provisions of the new charter, vested in the director of health. Each party served more demands, notices, etc., but no permit was issued. On October 26, 1933, this defendant commenced a proceeding to obtain a writ of mandamus to compel the director of health to issue said permit. The plaintiff thereupon commenced this action. Having called to the trial court's attention his numerous efforts to obtain a permit to conduct a stable business and the numerous delays, refusals, and neglects of the municipal officers in and regarding the application for a permit, the defendant claimed the complaint in this action should be dismissed. He repeats that contention in this court. We find no merit in it. The proceedings in the application for a permit were in no manner a bar to this action. But the contention of the defendant is, in effect, to claim that the facts recited constituted a bar. If the permit had been issued, it will hardly be claimed that it would have authorized this defendant to conduct the stable in such a manner as would create a nuisance or that it would authorize him to conduct a stable business in a building which was so dilapidated as to be a nuisance.

[2] This action was commenced in compliance with a resolution adopted by the board of supervisors on October 31, 1933. The defendant cites section 22 of the charter which contains a provision to the effect that each department of the government of the city and county of San Francisco is prohibited from interfering with any other department. He then claims that said resolution was an interference within such prohibition. We think it was not. Nothing is contained in this record showing that the health department has been interfered with. Under the plain provisions of the charter the board of supervisors had the power to pass the resolution above mentioned, and the city attorney had the right to act under it. Moreover, the right to maintain this action is expressly conferred by section 731 of the Code of Civil Procedure, and the charter contains no provision which in any way tends to limit the right so given.

[3] The defendant then attacks the judgment. He contends that it is too broad. He asserts that "the grievances which are mainly flies, odors, and noises all arise * * *" from the conduct of the premises by the tenant. And he then contends that the judgment should be limited to an abatement of those objections and should not decree a demolition of the

building. The trial court made findings which found the building to be a nuisance by reason of its use and also because it was dilapidated. The plaintiff argues that the structural defects and the conduct and management of the building are so interrelated that they cannot be separated. The trial court heard the evidence and it visited the premises. The record shows that its findings above mentioned, and all of them, are sustained by the evidence. Moreover, the building is located in a residence zone. It is what is termed a nonconforming use. By the provisions of section 9 of the zoning ordinance it may be altered and repaired if the cost does not exceed 50 per cent. of its assessed value, which is $1,350. The evidence of the defendant, which was the lowest estimate, showed such cost would be from $1,000 to $3,000. The evidence offered by the plaintiff showed the cost would be much higher. It is clear, therefore, that, as seen by the trial court, the building has become so dilapidated that to repair it to such an extent as to remove the objections of the health authorities is prohibitive when measured by the provisions of the zoning ordinance.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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17 Cal.App.2d 4

RYAN v. GEIGER, Director of Health.

Civ. 10031.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1936.

Appeal and error 🔑790(3)

Livery stable keeper's appeal from adverse judgment in mandamus proceeding to compel issuance of permit to conduct livery stable business was dismissed on ground questions involved had become moot where judgment determining stable was public nuisance and abating it had been affirmed on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action for mandamus by James J. Ryan against J. C. Geiger, Director of Health of City and County of San Francisco, to compel the issuance of a permit to conduct a livery stable. From an adverse judgment, the plaintiff appeals.

Appeal dismissed.

Eric Lyders, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced a proceeding asking for a writ of mandamus directing the defendant as director of health to issue to the plaintiff a permit to conduct a stable. The court made findings in favor of the defendant. From the judgment entered thereon the plaintiff appealed. The judgment so appealed from was entered April 23, 1935. The judgment was entered March 20, 1935, in the case entitled People of the State of California v. Ryan (Cal. App.) 61 P.(2d) 360, this day filed. By reason of the conclusion which we have reached in the case cited, all questions involved in the instant case have become moot. Therefore the appeal should be dismissed. 2 Cal.Jur. 123.

It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

17 Cal.App.2d 5

ST. JOHN v. REID et al.

Civ. 11115.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1936.

Hearing Denied by Supreme Court Dec. 7, 1936.

Master and servant ⚿301(3)

Defendant who procured appointment of and paid wages to special police officer to protect defendant's messenger from robbery *held* not liable for injuries to pedestrian resulting from accidental discharge of officer's gun as officer was stepping out of automobile to continue his duties as messenger's guard.

◆

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Vernon R. St. John against S. F. Reid and another. Judgment for plaintiff, and defendants appeal.

Affirmed in part and reversed in part, with directions.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant E. F. Smith.

Nadia Williams, of Glendale, for respondent.

WOOD, Justice.

Defendants Reid and Smith appeal from a judgment entered against them upon the result of a jury's verdict awarding plaintiff damages for personal injuries suffered when he was struck by buckshot discharged from a shotgun carried by defendant Reid while acting as a special police officer guarding the funds of defendant Smith.

Defendant Smith operated ten markets in and about the city of Los Angeles and employed one Granholm as messenger to collect various sums of money from markets and deposit them at a bank. Having previously sustained a loss by robbery, Smith brought about the appointment of Reid as a special police officer and paid Reid for his services. Reid's sole duty was to accompany Granholm in an automobile owned by Smith and protect Granholm from robbery until the money was deposited in the bank. He wore a policeman's uniform with a badge of the type prescribed by the city for special policemen. He carried a sawed-off shotgun loaded with buckshot. When Granholm's automobile arrived at the bank, Granholm left the automobile by the front door. Reid started to leave by the rear door, and while he was in the act of getting out of the car the shotgun in some manner dropped from his hands and was discharged. Plaintiff was hit by some of the buckshot. Ordinances of the city of Los Angeles were introduced in evidence providing for the appointment of special police officers to serve without pay. One of the ordinances provided: "The Chief of Police shall have the power to issue special police officers' badges of the type, size and design approved at the meeting of the Board of Police Commissioners on November 12, 1929, to persons engaged to do special police work, such as bank guards, night watchmen, private patrol work, investigators for the various departments of the City government of the City of Los Angeles, and other special police work, but such special police officers' badges shall be issued only to persons having a commission or permit as a special police officer from the Board of Police Commissioners." The appointment of Reid as a special officer was made pursuant to the ordinance. Defendant Smith's motion for nonsuit was denied.

The jury was instructed that Smith was responsible for the negligence of Reid, and it is now contended that this instruction was erroneous. There is a sharp conflict of authority on the question of the application of the doctrine of respondeat superior to cases in which special policemen have been compensated by private citizens. In California the decisions have clearly held that the private citizen is not responsible for the acts of the special officer committed in the discharge of his police duties. Maggi v. Pompa, 105 Cal.App. 496, 287 P. 982, 983; Redgate v. Southern Pacific Company, 24 Cal.App. 573, 141 P. 1191; Squires v. Southern Pacific Company, 42 Cal.App. 459, 183 P. 695. In Maggi v. Pompa, supra, the question was decided adversely to the contention made by plaintiff. In that case one Cesena was appointed a special police officer by the police commissioners of San Francisco. The defendant Peter Pompa was conducting a special patrol and collected compensation from the property owners of certain territory which was patrolled. He paid a monthly salary to Cesena. While patrolling the beat assigned to him, Cesena attempted to make an arrest for a misdemeanor, and in doing so unlawfully discharged his gun, thereby injuring a bystander who sued Pompa, claiming that Pompa was responsible for the conduct of Cesena. In upholding the contention of the defendant the court said: "In harmony with the rule of the Redgate Case we find the text in 39 C.J. p. 1273, § 1461, which reads: 'Unless it is otherwise provided by statute, a private person or corporation is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private person or corporation, when the act complained of was performed in carrying out his duty as a public officer.' In support of the text many cases are cited, and then the writer follows with a statement of the contrary rule, to which he cites an equal number of cases. Thus the California rule is followed in Healey v. Lothrop, 171 Mass. 263, 50 N.E. 540; Buman v. Michigan Cent. R. Co., 168 Mich. 651, 134 N.W. 972, Ann.Cas1913D, 107; Pennsylvania R. Co. v. Kelly (C.C.A.) 177 F. 189, 30 L.R.A.(N.S.) 481; New York, etc., R. Co. v. Fieback, 87 Ohio St. 254, 100 N.E. 889, 43 L.R.A.(N.S.) 1164."

In the case before us the special officer was performing no duty except that pertaining to his work as a police officer. The only appreciable difference between the facts of this case and that of the Maggi v. Pompa Case is that the defendant in the last-mentioned case was in the business of supplying police protection, a circumstance which did not tend to lessen his liability. Reid performed no services in and about the business of Smith as salesman or in any capacity other than that of a policeman. Smith did not undertake to direct or control Reid in the discharge of his police duties. The only control which Smith exercised over Reid was to direct Reid as to the places to which he should accompany the messenger. In Maggi v. Pompa, supra, it was held in the following language that such control was not sufficient to make the defendant responsible for the conduct of the special officer: "As the cause must go back for a new trial, we should add that it is not sufficient, as contended by respondent, that the appellant paid the monthly wages to Cesena, or that he gave general directions to Cesena as to the streets which he was to patrol and the general conduct of his duties; these directions being nothing more than directions to follow the rules and regulations of the board of police commissioners."

Plaintiff points to the fact that Reid was not in the act of preventing the commission of a crime at the time the gun was negligently discharged and argues that for this reason he was not in the performance of his police duties. Certainly the responsibility of Smith for Reid's conduct does not depend upon the presence or absence of a robber at the time of the occurrence of the act of which complaint is made. Reid was leaving the automobile for the purpose of continuing his duties as guard for the messenger. He was on duty at all times during the trip and was in the discharge of his duties as a police officer while he was guarding Smith's money.

The motion for a nonsuit should have been granted. The judgment is affirmed as to defendant Reid and reversed as to defendant Smith, with directions to the superior court to enter judgment in favor of defendant Smith.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

16 Cal.App.2d 719

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. NEW YORK LIFE INS. CO. et al.

Civ. 10843.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1936.

Rehearing Denied Nov. 5, 1936.

Hearing Denied by Supreme Court Dec. 3, 1936.

1. **Fixtures** ⇐35(3)

Question as to what constitutes a "fixture" is a question of fact to be determined from evidence in particular case (Civ.Code, §§ 660, 1019).

2. **Appeal and error** ⇐989

Power of appellate court in passing upon question whether judgment is supported by evidence begins and ends with determination as to whether there is any substantial evidence which will support decision judgment.

3. **Appeal and error** ⇐1011(1)

Whether bank fixtures had been affixed to building leased and become part of realty so as not to entitle bank to remove them *held* for trial court under conflicting evidence (Civ. Code, §§ 660, 1019).

4. **Fixtures** ⇐27(2)

Bank's assignee *held* not entitled to remove bank fixtures from leased building on expiration of lease, where assignor had agreed not to remove fixtures, but to sell them to assignor's lessor for stipulated price.

5. **Appeal and error** ⟹1011(1)

In bank's action for conversion of bank fixtures by mortgagee which foreclosed mortgage on building which bank had leased, whether mortgagee, from conversations had by its representatives with officials of bank, had actual notice that fixtures belonged to bank, *held* for trial court under conflicting evidence.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Bank of America National Trust and Savings Association against the New York Life Insurance Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Banta, Cooper & Dulin, of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal from a judgment in favor of defendants in an action for conversion. The facts material to this litigation are that in 1925 Pacific National Building Corporation constructed a twelve-story bank and office building at 855 South Hill street in the city of Los Angeles. All of the stock of Pacific National Building Corporation was owned by a parent holding company known as Pacific National Company. Prior to the completion of the building, the ground floor and basement thereof were leased to Pacific National Bank, predecessor in interest of the plaintiff herein, and in which Pacific National Bank the Pacific National Company owned some stock. After execution of the lease, the tenant bank purchased and caused to be installed certain safety vault equipment, safety vault doors, time locks and burglar alarms. The original lease to the bank was made November 21, 1925, for a term of twenty-five years, and contained the following provision: "Six: The lessee may install such banking and other fixtures as in its judgment are desirable in connection with its business, including safety vault equipment, safety vault doors, time locks, burglar alarms and lighting fixtures; and may also maintain electric and other signs upon the exterior of said building, in compliance with the ordinances and regulations of the City of Los Angeles, and may, from time to time remove and substitute other fixtures, but not in such a manner, or of such character, as to affect the structure of the building or the stability of the same. At the expiration or termination of this lease, or of any extension or renewal thereof, the lessee shall have the privilege of removing any and all trade and other fixtures and equipment installed by it."

On July 22, 1929, Pacific National Bank assigned this lease to Pacific National Company, the holding company, in consideration of the assignee's assuming the obligations of the lease and giving back to Pacific National Bank a sublease for two years. The building company consented to the assignment, accepted the bank's assignee, Pacific National Company, as its tenant, and released the bank from the obligations of the lease. Contemporaneously therewith a sublease was made, as agreed, to Pacific National Bank for two years. In this sublease we find paragraph 5, reading as follows: "Five: The sublessee may maintain as now installed, its present banking and other fixtures, including safety vault equipment, safety vault doors, time locks, burglar alarms and lighting fixtures, and may from time to time, at its own expense, repair the same, and may enjoy the same privileges as it has heretofore enjoyed of maintaining electric and other signs upon the exterior of said Pacific National Bank Building in compliance with the ordinances and regulations of the City of Los Angeles. The sub-lessee shall not remove its fixtures, or safety vault equipment, or safety vault doors, time locks, burglar alarms, or lighting fixtures upon the expiration or termination of this sub-lease or any extension or renewal thereof, but the sub-lessee agrees to sell, and the sub-lessor agrees to purchase the same, as covered by separate agreement between the parties hereto, at and for the stipulated price mentioned in the said agreement."

On October 14, 1929, Pacific National Bank assigned the foregoing sublease to Bank of Italy National Trust & Savings Association, which was the former name of plaintiff bank herein. With the status of the parties thus fixed, on April 25, 1930, Pacific National Building Corporation, the owner of the premises, executed a mortgage in favor of the defendant New York Life Insurance Company, to secure a loan of $1,225,000 for ten years. On June 11, 1931, Pacific National Company sublet the premises to the plaintiff bank for a period of six months, beginning on July 22, 1931. Section 4 of this sublease provided that the plaintiff bank herein, as sublessee, could maintain "as now installed, its present banking and other fixtures, including safety vault equipment, safety vault doors, time locks, burglar alarms and lighting fixtures, and may from time to time, at its own expense, repair the same, and may enjoy the privilege of maintaining electric and other signs upon the exterior of said Pacific National Bank Building in compliance with the ordinances and regulations of the City of Los Angeles. The sub-lessee shall not remove its fixtures, or safety vault equipment, or safety vault doors, time locks, burglar alarms, or lighting fixtures upon the expiration or termination of this sublease or any extension or renewal thereof, but the sub-lessee agrees to sell, and the sub-lessor agrees to purchase the same for the sum of $326,059.69, as provided by separate agreement between the parties hereto, and by an agreement between the sublessor and Transamerica Company, a corporation, dated June 30, 1930, extending the guaranties in a former agreement between the same parties dated July 17, 1929."

On December 23, 1931, the tenant, Bank of America, with the written consent of the building corporation, entered into an agreement, called a lease and option, whereby the bank, as lessor, leased to Pacific National Company, as lessee, the property in controversy for a term of ten years beginning January 2, 1932, at $100 per month, with an option to buy the property at any time before January 1, 1934, for $10,000, plus interest. At the same time, Pacific National Company and Transamerica Corporation entered into an agreement, which was ratified by Bank of America, whereby Transamerica Corporation released Pacific National Company from its obligation to purchase the vault fixtures.

On September 20, 1933, defendant New York Life Insurance Company, in the superior court of Los Angeles county, obtained a decree of foreclosure of its said mortgage and an order for the sale of the property covered by the mortgage. Subsequently, on November 5, 1934, the sheriff of Los Angeles county caused to be executed and delivered to defendant insurance company his deed conveying to defendant insurance company the property which was the subject of said mortgage. When, therefore, in December, 1933, the lease and option agreement heretofore mentioned between Bank of America and Pacific National Company, dated December 23, 1931, had expired, the defendant New York Life Insurance Company had foreclosed its mortgage and obtained the sheriff's deed to the property encumbered by said mortgage. Thereafter the plaintiff bank demanded possession of the banking equipment which is the subject of this action; and the demand being refused by defendants, this action was commenced, resulting in a judgment for the defendants, from which plaintiff bank prosecutes this appeal.

Appellant urges a reversal of the judgment on several grounds; the first of which is based on the claim that the property involved in this action is established to be personal property both by its nature, history, use, and manner of affixation, and by agreement between the parties with respect thereto, of which agreement it is claimed respondent insurance company had actual and constructive notice and was bound thereby.

[1-3] The question as to what constitutes a fixture is a question of fact, to be determined from the evidence in the particular case. Alderman v. Baggett, 134 Cal.App. 501, 25 P.(2d) 532. Section 1019 of the Civil Code provides that a tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

The trial court, after hearing the evidence and viewing the premises, found that delivery of the property here in question could not be accomplished without injury to the building to which said property is attached; and further found that with the exception of the individual safe deposit boxes, each of the other articles had been affixed to the building and real property by means of one or more of the methods of affixation named in section 660 of the Civil Code, and were affixed in such a manner as to become a permanent and integral part of said building. Appellant contends that these findings lack support in the evidence. We have read the record, and have no hesitancy in saying that while a conflict appears, still the evidence in support of these findings possesses ample substantiality, consisting as it does of direct and positive testimony in support thereof, fortified with a view of the premises by the trial court. It requires no citation of authority for asserting the rule that when a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing upon this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the decision and judgment of the trial court. With reference to the conflicting testimony in the instant case concerning the character of the affixation of the bank fixtures, the trial court was within its rights in resolving that conflict in favor of respondent. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 708, 242 P. 703; Boland v. Gosser, 5 Cal.App.(2d) 700, 43 P.(2d) 559; MacDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616.

[4] It seems to us that the only other ground upon which appellant would have a right to remove the property in question from the premises would be by reason of an agreement between landlord and tenant, in full force and effect at the time respondent insurance company's rights under the mortgage attached, and of which agreement the mortgagee was charged with notice. When, as in the instant case, it appears that the property, by the manner of its affixation, became an integral part of the premises and could not be removed without affecting the structure or stability of the building, then the agreement between landlord and tenant alone must govern. It follows of necessity that even if an agreement was entered into between the landlord and tenant for such removal, that right of removal may also be surrendered by agreement. In the case now before us we are of the opinion, from a reading of the evidence, that the original bank tenant installed the fixtures here in question pursuant to the provisions of the original lease, whereby title to the fixtures remained in the tenant, where, in our opinion, it continued to remain until the execution of the aforesaid assignment of lease on July 22, 1929, at which time Pacific National Company, which owned all of the stock of Pacific National Building Corporation, which latter company held title to the land, executed to the bank a sublease for two years, under the terms of which Pacific National Bank, predecessor in interest of appellant herein, surrendered its right to remove the fixtures in question and covenanted with the company that the bank "shall not remove its fixtures, or safety vault equipment, or safety vault doors, time locks, burglar alarms, or lighting fixtures upon the expiration or termination of this sub-lease or any extension or renewal thereof, but the sub-lessee agrees to sell, and the sub-lessor agrees to purchase the same, as covered by separate agreement between the parties hereto, at and for the stipulated price mentioned in the said agreement."

When the original bank tenant assigned its lease, it became necessary to dispose of the fixtures. The record here discloses that the assignor chose to and did sell the fixtures to the assignee. Surely it cannot logically be contended that after the assignment of lease on July 22, 1929, the original tenant bank, which was the predecessor in interest of appellant, possessed or exercised, or had any right to exercise, dominion over the personal property, and that, after all, is of the essence of ownership of personal property. With reference to the fixtures, the tenant bank, under the indenture of sublease to it from Pacific National Company under date of July 22, 1929, specifically agreed not to remove the fixtures or safety vault equipment, or safety vault doors, time locks, burglar alarms, or lighting fixtures upon the expiration or termination of the so-called last-named sublease, but agreed to sell and deliver the same to the sublessor for a stipulated and agreed sum.

Appellant contends that the "open and notorious possession" of the premises in which the fixtures were installed by the tenant bank constituted constructive notice to respondent of the tenant bank's rights and should have put respondent on notice to make an inquiry. Assuming this to be true, yet if respondent had made inquiry, it seems to us it would only have learned that the bank was without title to the fixtures and had sold the same to Pacific National Company, and was, therefore, without power to remove the fixtures from the premises at any time.

[5] Appellant next contends that respondent mortgagee insurance company had actual notice that the vault equipment,

etc., belonged to the tenant bank. This claim is based upon conversations had by representatives of respondent insurance company with officials of the bank who were seeking the loan from the insurance company, and at least one of which bank officials was an officer of the company soliciting the loan. The evidence on this issue is in conflict, but there is sufficient in the record to sustain the finding of the trial court that the officers of Pacific National Bank, predecessor in interest of appellant bank, so conducted themselves as to lead the appraisers for respondent mortgagee insurance company to believe that the vault fixtures were a part of the security for the loan.

Other points raised do not require discussion.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

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16 Cal.App.2d 672

ROSS v. PACIFIC MORTG. GUARANTY CO.

Civ. 10836.

District Court of Appeal, Second District, Division 1, California.

Oct. 2, 1936.

1. Trover and conversion 🔑40(3)

Evidence *held* sufficient to support finding that plaintiff was owner and entitled to possession of property converted by defendant.

2. Evidence 🔑450(3½)

Where trust deed extension agreement provided for transfer by way of pledge of possession of furniture on mortgaged premises, oral evidence as to circumstances of execution of agreement *held* admissible in aid of interpretation, since the phrase "by way of pledge" created an ambiguity.

3. Chattel mortgages 🔑106

Evidence *held* to sustain finding that trust deed extension agreement transferring by way of pledge possession of personalty on premises merely entitled transferee to use personalty in connection with realty and did not secure payment of debt.

4. Appeal and error 🔑1008(1)

Findings of trial court on questions of fact relating to intentions of parties have same controlling force on appeal as though they were findings concerning acts of parties.

5. Appeal and error 🔑1008(1)

Construction of uncertain or ambiguous agreement by trial court after taking of oral evidence in aid of its interpretation must stand on appeal unless it is without support in evidence.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by William Edmiston Ross against the Pacific Mortgage Guaranty Company, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Shattuck, Davis & Story, of Los Angeles, for appellant.

Frank S. Hutton, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff had judgment in the amount of $3,524.75, as the value of certain furniture, furnishings, fixtures, and equipment of a hotel and café building.

[1] Defendant questions the sufficiency of the evidence to support the finding that plaintiff was the owner and entitled to the possession of the property which at the time of the conversion was situated in a building known as the Proctor Hotel. Plaintiff testified that he had furnished the building after it was completed; that he paid for the furniture himself; and that he had not transferred the same to his mother, who was the owner of the real property. In our opinion this testimony, in the absence of any qualifying statements of the plaintiff or of any conflicting testimony, was sufficient to support the inference that plaintiff was the owner of the property. It was scarcely necessary for him to amplify his testimony by the further statement that the money used in making the purchase was his own and not that of his mother. The reasonable inference is that he paid for the furniture with his own funds and purchased the property for himself. While the property so purchased was not specifically identified as the same property found to have been con-

verted by the defendant, yet it seems to have been so regarded at the trial both by counsel and the court. We cannot assume that more ample evidence on the subject would have resulted in a different finding.

There was sufficient evidence to establish the value of the property as equal to that placed upon it in the findings. It is quite true, as defendant contends, that it would not have been proper to value the property as some of the witnesses did, as though it was in use in the hotel as a going concern, since plaintiff was not in possession of the real property and was not using or entitled to use the furniture in the operation of the hotel business. The evidence which supports the judgment relates to the value the property would have had when removed from the hotel. A comparison of the values given on the basis that the property was in use in an operating business and those found by the court clearly demonstrates that the court wholly disregarded the testimony which took into consideration erroneous factors of value.

[2-5] Defendant justified its refusal to surrender possession of the property to plaintiff upon the ground that the same had been pledged to it by plaintiff's mother as additional security for the indebtedness secured by trust deed of the real property. In support of this claim defendant relies upon the terms of a written agreement by which payment of the trust deed debt was extended upon certain terms and conditions. Among the provisions of the extension agreement was one by which plaintiff's mother agreed to "assign, transfer and set over unto said Pacific Mortgage Guaranty Company, subject to existing leases (if any) thereon, the possession of said premises and by way of pledge the possession of all furniture, furnishings, fittings, attachments, appliances and appurtenances of every kind and description now upon or within said premises, all of which shall remain intact thereon available for the use of tenants." The debtor also agreed to keep the personal property insured for the benefit of the defendant as its interest might appear, and also surrendered to defendant the right to operate the hotel and café, to collect all rents and other income, and after paying the expenses of operation and maintenance, taxes, etc., to apply the remainder upon interest and principal of the trust deed debt. This agreement was carried into effect and the property was operated by the defendant for several years, but eventually title to the real property passed to the defendant by sale under the deed of trust. It is not urged that the rights of plaintiff as owner of the personal property were superior to those of his mother. It was conceded at the trial that his knowledge of and acquiescence in the dealings between his mother and the defendant bound plaintiff as though he had been a party to the agreement. The trial judge, over the objection of the defendant, admitted oral evidence as to the circumstances of the execution of the agreement in aid of its interpretation, and concluded that there was no pledge of the personal property as security for the debt. In receiving this evidence the court did not err. The words "by way of pledge" would imply that the property was to stand as security of some sort but the agreement is entirely destitute of any declaration that the property was pledged as security for the trust deed debt or for any part of it. Proof of an intention that the delivery of possession was for some restricted purpose would not have been in conflict with the terms of the writing. Therefore the phrase "by way of pledge," interpolated into the agreement and without any connection whatever with the remaining provisions, created an ambiguity which admitted of explanation. The evidence admitted for this purpose consisted of conversations between plaintiff and an officer of defendant corporation, and also writings which passed between the parties prior to the execution of the agreement. In the testimony as to the conversations we find no proof of an agreement that the personal property should be pledged as additional security for the debt. In the writings which preceded the final agreement we find a written offer by the owner of the real property to surrender possession thereof and to assign the rents, issues, and profits to the defendant in order that it might operate the hotel and café. No mention was made in this connection of any intention to pledge the furniture as security. The trial judge, after an analysis of this evidence, reached the conclusion that the parties intended only that the defendant should be secured in its possession of the personal property for use in connection with the hotel operation. The use of the word "pledge" is consistent with this construction for it does not necessarily imply the delivery of possession as security for the payment of the debt. The court pointed out that the use of the personal property by defendant was one of the principal objectives of the agreement and concluded that while the agreement adequately expressed an inten-

tion to make the possession of the defendant valid and secure in so far as its right to use the property was concerned, there was to be found in the agreement or in the several writings that preceded its execution no expressed intention to give additional security for the debt. The conclusions of the trial court were logical and fair deductions from the evidence. These conclusions were upon questions of fact and while they relate to the intentions of the parties they have the same controlling force upon this appeal as though they were findings concerning the acts of the parties. The construction of an uncertain or ambiguous agreement by the trial court after the taking of oral evidence in aid of its interpretation must stand unless it is without support in the evidence. Scott v. Sun-Maid Raisin Growers Association (Cal.App.) 57 P.(2d) 148.

Defendant therefore could not justify its retention of the personal property after the sale of the real property under trust deed foreclosure upon the theory that it held it in pledge as security for the payment of a deficiency that remained unpaid.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

16 Cal.App.2d 704

PEOPLE v. HOOPER.

Cr. 1911.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1936.

Rehearing Denied Oct. 21, 1936.

Hearing Denied by Supreme Court Nov. 5, 1936.

1. **Poisons** 🔑9

Evidence sustained conviction of possession of narcotics.

2. **Jury** 🔑29(7)

Denial of request to withdraw waiver of jury trial *held* not abuse of discretion where several continuances were had and attorney who replaced former counsel did not request withdrawal until after all evidence had been submitted.

3. **Stipulations** 🔑18(6)

In prosecution for possession of narcotics, attorney could not complain of stipulation made by former counsel that capsule involved contained morphine of content of more than quarter of a grain to the avoirdupois ounce, since parties may dispense with proof of facts through stipulation of counsel.

4. **Judges** 🔑49(1)

Trial judge who upon waiver of jury trial found accused guilty *held* not disqualified from passing upon motion for new trial, on ground that judge had formed opinion on merits of case (Code Civ.Proc. § 661, as amended by St.1933, p. 1881).

5. **Judges** 🔑51(4)

Trial judge who upon waiver of jury trial found accused guilty *held* not disqualified to rule upon application for his own disqualification to hear motion for new trial, on ground that he had formed opinion on the merits, since it is only where appropriate issue of fact is raised concerning disqualification of trial judge that he is prevented from passing "upon the question of his own disqualification" under statute (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Frank Hooper was convicted of possession of narcotics with four prior felony convictions, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was charged with the possession of narcotics and with four prior felony convictions. He entered a plea of not guilty to the charge of possession of narcotics, but admitted the prior convictions. A jury trial was waived in open court by defendant and his counsel, and, upon a trial before the court, he was found guilty. He appeals from the judgment of conviction and the order denying his motion for a new trial.

Appellant has failed to set forth any headings in his brief stating specifically the points relied upon for a reversal. The only headings found therein are "Statements of Facts" and "The Evidence." Such headings furnish no assistance to the court or opposing counsel in determining the points to be discussed. This being an appeal in a criminal case, we have endeavored to ascertain appellant's points as best we can from the body of the brief, but have found some difficulty in so doing.

[1] There appears to be no question concerning the sufficiency of the evidence to sustain the conviction. Appellant and one Ernie Smith were standing on a sidewalk when a police car approached and stopped. The officers called the two men over to the car. Smith walked directly to the car, but appellant walked around behind the car, and, as he did so, one of the officers saw him throw a white object on the street. The officers jumped out of the car and found a capsule of morphine on the street in back of the car. When searched, appellant stated, "That is the only one I have, I have it for my asthma." He admitted being a user, but denied being a peddler. As appears above, he was merely charged with possession and was found guilty of that offense. There were some conflicts in the evidence, but the foregoing evidence was clearly sufficient to show that appellant was guilty of the offense charged.

[2] Appellant apparently contends that the trial court erred in denying his request to withdraw his waiver of a jury trial. This contention is without merit. The record shows that appellant and his counsel had both waived a jury trial prior to the day on which the trial began and did so again on the first day on which the cause was tried. The evidence was thereafter fully presented and the cause was continued solely for argument. When called again, appellant's present counsel was substituted. Two days later appellant's present counsel asked leave to present additional testimony and this leave was granted. The cause was continued one week when evidence was taken and the cause was then continued for another twelve days. At that late date, appellant's present counsel first moved the trial court to set aside the waiver of a jury trial. The motion was denied. There was no error in this ruling. Appellant was not entitled to have the motion granted as a matter of right, and the trial court certainly did not abuse its discretion in denying said motion at a time when all the evidence had been submitted. It would seriously interfere with the orderly conduct of the business of the court if the accused could waive a jury trial and later, near the close of the trial by the court, could demand that the waiver be set aside without giving any good and sufficient reason for such action.

[3] Appellant seems to further complain of a stipulation made by his original counsel during the trial to the effect that the capsule in question contained morphine of a content of more than a quarter of a grain to the avoirdupois ounce. We do not understand the basis of appellant's complaint. Parties to criminal as well as civil actions may dispense with the proof of facts through stipulation of counsel. People v. Nolan, 33 Cal.App. 493, 165 P. 715; 23 Cal.Jur. 816. A clear stipulation was made by appellant's counsel, and appellant has made no claim that said stipulation was not wholly in accord with the fact.

[4, 5] Appellant also complains of the failure of the trial judge to disqualify himself from hearing the motion for a new trial. In the brief, it is stated that as the trial judge had tried the case without a jury and had formed an opinion as to the guilt of appellant as evidenced by his finding appellant guilty, appellant therefore filed his application to disqualify the trial judge from hearing his motion for a new trial. This was the sole ground stated for disqualification, and the trial judge denied the motion. We doubt whether the application could be made at the time that it was interposed (section 170, Code Civ.Proc. (as amended by St.1933, p. 1828) People v. Berman, 117 Cal. App. 334, 4 P.(2d) 226), but assuming that it could, we find no error in the ruling. Appellant seems to take the position that any trial judge who tries a case without a jury is automatically disqualified from passing upon a motion for a new trial, as such judge has formed an opinion on the merits of the case. The mere statement of the proposition seems to be a sufficient answer thereto, and particularly in the light of section 661 of the Code of Civil Procedure (as amended by St.1933, p. 1881) which requires that "The motion for a new trial shall be heard and determined by the judge who presided at the trial." Appellant seems to further claim that it was error for the trial judge to rule upon the application for his own disqualification. This would be true ordinarily whenever an application is filed "setting forth the fact or facts constituting the ground of the disqualification of such judge" and such judge files his answer thereto. Code Civ.Proc. § 170 (as amended by St.1933, p. 1828). But there were no

facts set forth in the application in the present case sufficient to show any ground for disqualification of the trial judge and there was no issue of fact to be determined. Said application was based entirely upon a misconception of the law relating to the right of the trial judge who had presided at the trial to pass upon the motion for a new trial. It was a frivolous application which presented only an issue of law as to its sufficiency, and the trial judge could properly rule thereon. In our opinion it is only where an appropriate issue of fact is raised concerning the disqualification of the trial judge, that he is prevented from passing "upon the question of his own disqualification" under the above-mentioned section.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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17 Cal.App.2d 52

CROWLEY v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 10340.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1936.

1. Appeal and error 🔑113(2)

Order finding husband in arrears for support money and imposing lien for sum in arrears *held* appealable, and hence order refusing to vacate order was not appealable, since order denying motion to set aside appealable order is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. Appeal and error 🔑82(1)

Order fixing amount of delinquent payments due from husband for support money previously awarded in divorce decree, and ordering execution in such sum, *held* appealable, since it was a special order made after judgment and for enforcement of judgment (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

3. Divorce 🔑263

Court followed proper practice in computing and determining amount of delinquent payments due from husband for support money previously awarded in divorce decree, when making order for execution in such sum, since such power is expressly vested in court by statute (Code Civ.Proc. § 681, and § 685 as amended by St.1933, p. 2499; Civ.Code, § 140).

4. Prohibition 🔑3(2)

Writ of prohibition did not lie to prevent punishment of petitioner for contempt for failure to make delinquent payments of support money awarded previously in divorce decree to petitioner's wife, though valid appeal of petitioner was pending from order fixing amount of delinquent payments and ordering execution in such sum, since appeal did not operate to stay judgment in divorce action directing payment of support money (Code Civ.Proc. §§ 942, 946).

◆

Proceedings for a writ of prohibition by David C. Crowley against the Superior Court in and for the County of Alameda.

Alternative writ discharged, and petition denied.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for petitioner.

James H. Boyer, of Oakland, for respondent.

STURTEVANT, Justice.

This is an application for a writ of prohibition. In answer to the pleading filed by the petitioner the respondent has filed a general demurrer. Among other things, the petitioner recites that Mrs. Crowley was awarded a decree of divorce from the petitioner. The decree also awarded to her the custody of the two minor children and $100 per month for their support. Later that sum was reduced to $75 per month. The interlocutory decree was entered March 12, 1924, and the final decree was entered June 8, 1925. It is not alleged that an appeal was taken from said judgment. On April 27, 1936, upon request of the wife, the trial court made an order finding that the husband was in arrears $2,332, and imposed a lien in said sum upon certain of the properties owned by the husband. From said order no appeal was taken, but thereafter the husband made a motion to set aside said order. That motion was denied, and the husband perfected an appeal from said order, filed a bond, and a bill of exceptions is ready for signature. On May 1, 1936, the trial court made an order fixing the amount of the delinquent payments in the sum of $2,332 and ordered that execution issue in said sum. From that order the husband appealed, filed a bond, and a bill of exceptions is ready to be engrossed. On July 24, 1936, the wife filed an affidavit in the form of a questionnaire asking for an order to show cause why the husband should not be punished for contempt in failing to pay $1,975, the balance of the instalments alleged to be due on that date. On the same date an order to show cause was issued returnable August 11, 1936. A hearing has been had but a continuance was taken until September 4, 1936, and the trial court has announced that on said date it will punish the husband as for contempt. To restrain the order last mentioned this application is made.

[1-4] The gist of the contention made by the petitioner is that the two appeals operate as a stay and that the trial court is acting in excess of its jurisdiction in proceeding while said appeals are still pending. The respondent contends, however, that the order imposing the lien was an appealable order, but no appeal was taken and it has become final. Respondent further contends that as said order was appealable, the order refusing to vacate that order was not appealable. Meis v. Collins, 1 Cal.App.(2d) 433, 435, 436, 36 P.(2d) 662. In these contentions the respondent is clearly correct. As to the order fixing the sum of the delinquent payments and ordering an execution to issue, the respondent contends it was not an appealable order. That it was a special order made after judgment will not be controverted. That said order was made for the enforcement of the judgment is also clear. Those propositions being true, it follows it was an appealable order. Code Civ.Proc. § 963 (as amended by St.1933, p. 2472); 2 Cal.Jur. 171; Parker v. Parker, 203 Cal. 787, 266 P. 283. But the respondent asserts the trial court was not required to make an order computing and determining the amount due and directing that a writ of execution issue. We think the trial court followed the proper practice. The statutes do not require the clerk to determine the disputed questions as to which installments of maintenance have accrued, which have been paid, and how much remains unpaid. Holtum v. Greif, 144 Cal. 521, 527, 78 P. 11. But under the express provisions of the statute such power is vested in the court. Civ.Code, § 140; Code Civ.Proc. § 681, and § 685 (as amended by St.1933, p. 2499); Shields v. Superior Court, 138 Cal.App. 151, 31 P.(2d) 1045. It follows that the order dated May 1, 1936, was an appealable order, and as an appeal therefrom was duly perfected, all proceedings in the trial court upon the matters embraced in said order were stayed. Code Civ.Proc. § 946. But the question remains: What was stayed in the instant case? The petitioner contends the payment of the said installments was stayed. But in making that contention he is mistaken. If he had appealed from the judgment of divorce, his contention would have merit. Code Civ.Proc. § 942. But he appealed from an order directing a writ of execution to issue and such appeal did not operate to stay the judgment in the divorce action which directed the payment of said installments. Macario v. Macario, 208 Cal. 601, 283 P. 291; Weldon v. Rogers, 154 Cal. 632, 98 P. 1070. It follows that the showing made by the petitioner does not disclose that the trial court is exceeding, or threatening to exceed, its jurisdiction in any respect.

The alternative writ of prohibition is discharged, and the petition for a peremptory writ is denied.

We concur: NOURSE, P. J.; SPENCE, J.

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16 Cal.App.2d 733

KEELING v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10739.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1936.

Master and servant 🔑405(2)

Evidence that trucking company leased a truck from its owner and engaged him to operate the truck on a regular schedule, and that the company retained 25 per cent. of the proceeds of each trip in addition to other expenses, *held* to justify compensation award against company for injuries to one engaged by truck owner with the consent of company to assist in making the trip, since such helper was an "employee" of the company, and owner of the truck was not an "independent contractor."

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by Jerry Atwood, alleged employee, opposed by Charles Keeling, doing business under the fictitious name and style of Apache Freight Lines. To review an award of the Industrial Accident Commission in favor of alleged employee, employer petitions for writ of review.

Award affirmed.

Bruce Murchison, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

DESMOND, Justice pro tem.

The question here is whether an award made by respondent commission against petitioner and in favor of one Jerry Atwood should be annulled.

Atwood, on June 12, 1935, fell from a truck moving along the highway in the neighborhood of Indio and suffered broken bones and a brain concussion. The referee of the Industrial Accident Commission who heard the case found that at the time of the accident Atwood was an employee of petitioner, and ordered payment of sums necessary to compensate him for loss of earnings and to meet his medical and hospital expenses.

One W. J. Carson owned the truck in question, but had leased it to petitioner under terms which provided: "That during the existence of this lease the motor vehicle above described shall be under the complete control of the Lessee." The petitioner chose to exercise this control by hiring Carson to operate the truck on approximately two roundtrips per week hauling freight between Los Angeles and Phœnix. Signs reading "Apache Freight Lines" were painted on both sides of the truck and across the front. Carson had no business other than hauling freight for petitioner with this one truck, the only one he owned. He testified: "When I come into town, I go into the dock (i. e., the loading station of Apache Freight Lines in Los Angeles) and if there is freight to go out immediately I naturally load up to go out, and if there isn't, I wait my turn to take it out." From the gross amount collected from Carson's hauls, petitioner retained 25 per cent., paying him the balance, minus insurance charges and other items of expense, which were charged against his account. It appeared from the testimony that two men made the trips between Los Angeles and Phœnix, a driver and a helper, the latter serving also as a driver. Merle White, Carson's helper, being unable to go with him on June 12, 1935, Atwood was engaged to take his place, having made one previous trip with White. As to Atwood's employment, the record discloses that a Mr. Hardie, general manager of Apache Freight Lines, had charge of hiring and firing men employed by that organization, Mr. Keeling having like authority, and that on the occasion when Atwood started on his first trip Carson, according to Atwood's testimony, asked Hardie "If it was O.K. for me to go as a driver." He was paid at the rate of $10 per trip and on the occasion of the first trip, "Mr. Carson paid me for half of the trip, that is, he paid me $5 when he left town, that Saturday night. * * * I received a check from Apache Freight Lines for $5 for the other half payment for the trip." Mr. Carson was asked at the hearing, "What arrangement, if any, is there as to payment of any helpers or other people sent on the trucks?" and answered, "They (i. e., Apache Freight Lines) give me so much money, to make the trip to Phœnix, to Tucson, and I pay the help out of that, and if there isn't enough to pay help out of that, they give me a check, and charge it to my account."

From this and other testimony the referee found that Atwood was the employee of petitioner. To support such a finding it must appear that Carson himself was an employee of petitioner and not an independent contractor; further, that in engaging the services of Atwood he did so not for himself but in behalf of petitioner. Reviewing the testimony, we cannot say that there was not sufficient evidence to sustain the finding.

In regard to a decision upon a question of mixed law and fact, the Supreme Court has said in Hillen v. Industrial Accident Commission, 199 Cal. 577, at page 580, 250 P. 570: "Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the Commission, the court is not empowered to set it aside." This is repeated in La Franchi v. Industrial Accident Commission, 213 Cal. 675, at page 676, 3 P.(2d) 305, where it is also said: "It is well settled that the Workmen's Compensation Act is to be given an application liberal to the workman."

The award is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

17 Cal.App.2d 14

CLOUGH et al. v. SUPERIOR COURT IN AND FOR TEHAMA COUNTY et al.

Civ. 5733.

District Court of Appeal, Third District, California.

Oct. 9, 1936.

1. Exceptions, bill of ⇨13

Only those portions of testimony should be set forth in bill of exceptions which are necessary to illustrate points upon which appellant relies (Code Civ.Proc. § 650, as amended by St.1935, p. 1956).

2. Appeal and error ⇨985

Whether bill of exceptions contains sufficient portion of the testimony to properly present exceptions and objections contained therein, which may be urged on appeal, is for trial court's determination (Code Civ.Proc. § 650, as amended by St.1935, p. 1956).

3. Exceptions, bill of ⇨51

Trial judge's refusal to settle bill of exceptions offered by defendants where plaintiff's counsel, although objecting thereto, did not offer amendment, and trial judge did not direct defendants to correct supposed errors or supply deficiencies, *held* improper (Code Civ.Proc. § 650, as amended by St.1935, p. 1956).

4. Exceptions, bill of ⇨53(3)

Mandamus will lie to direct trial judge to proceed with settlement of proposed bill of exceptions.

Proceedings for writ of mandate by George A. Clough and others against the Superior Court of the State of California, in and for the County of Tehama, and the Honorable H. S. Gans, Judge thereof, to compel the respondent judge to settle a certain bill of exceptions.

Writ granted.

Pugh & Pugh, of Red Bluff, and George A. Clough, of San Francisco, for petitioners.

Mr. Justice PLUMMER delivered the opinion of the court.

Application for a writ of mandate requiring Honorable H. S. Gans, as judge of the superior court of the state of California, in and for the county of Tehama, to settle a certain bill of exceptions. The basis of the present proceeding was an action brought to condemn for highway purposes a strip of land through property known as "Deer Creek Meadows" belonging to the defendants. The action was prosecuted by the people of the state of California to condemn the strip of land referred to, for highway purposes. A description of the premises is unnecessary. The trial was had before a jury, and the petitioners in this proceeding were, in the action tried before the jury, awarded judgment in the sum of $470, as the value of 14.09 acres sought to be condemned. From this judgment the respondents in the eminent domain proceedings appealed, and thereafter tendered to the judge of the trial court a proposed bill of exceptions to be used on appeal.

Instead of proceeding to settle the bill of exceptions, the court in the action referred to made and entered the following order, which (omitting title) is in the words and figures following, to wit:

"In this case, after the sixty-day period has elapsed, and the hearing was brought on pursuant to some stipulations and agreements between counsel apparently, the court is asked to settle a proposed bill of exceptions. The moving party claims that no amendments having been offered there is nothing for the court to do save sign and settle the documents as presented.

"The plaintiff claims that the bill is so defective that it does not present the true facts and is not a true record of the trial or of the several points raised. The moving party claims that he has given the substance of the matters and all that is required; and it is admitted that no transcript has been had and that the proposed bill was made up from notes of counsel at trial and some small quantity of testimony that was written up. In this case there was a stenographic report of the proceedings. I have never yet heard of a record made up without a transcript when one was available. It seems to me that the record as it is should be presented to the court on an appeal, and that this court should not be asked to assume the burden of preparing a complete transcript, which would seem necessary if the court is to act upon this one at all. The court does not have the record and it is apparent that the record is not fully presented. I dislike very much to refuse to sign a transcript, but feel that in this case I am justified in so doing.

"I have no objection to signing any bill that will present the record upon each point raised as it occurred and is shown by the record.

"Accordingly, I shall decline and do now decline to sign this proposed bill.

"Dated, May 12, 1936.

"H. L. Gans, Judge.

"Filed May 12, 1936.

"R. H. Holthe, County Clerk,
"By Milton Hull, Deputy."

In their petition for writ of mandate herein, only three grounds for appeal are mentioned, to wit:

1st. The right of the Pacific Electric Company to flood the lands belonging to the petitioners;

2d. That a certain deed was void for uncertainty;

3d. The admission in evidence of a list price of two four-acre tracts at the intersection of the highway with the Red Bluff-Chico highway.

The questions were asked of witnesses who testified as to the value of the lands proposed to be taken, as to whether those facts would lessen their estimates of value.

In the proposed bill of exceptions, in addition to what we have said, a number of exceptions to the ruling of the court are set forth, and also specifications as to the insufficiency of the evidence to sustain the decision.

[1, 2] Section 650 of the Code of Civil Procedure provides for the preparing and settling of bills of exception. The cases are practically unanimous to the effect that only those portions of the testimony should be set forth in the bill of exceptions necessary to illustrate the points upon which the appellant relies. The unanimity of the cases upon this point relieves us of the necessity of their citation. We have not examined the bill of exceptions to determine whether it does or does not contain sufficient of the testimony to properly present the exceptions and objections contained therein which may be urged before this court upon appeal; that is the province of the trial court.

[3] Upon the presentation of the bill of exceptions for settlement and presentation to the judge of the trial court for settlement, it appears that the attorneys for the plaintiff in the eminent domain proceedings appeared and objected to the settlement of the bill of exceptions on the grounds that it was not a full and fair statement of the case and the exceptions upon which the appellants relied. No amendments were proposed and offered by the plaintiff or its counsel to the proposed bill of exceptions. Thereupon, the court made the order which we have set forth herein. This case is almost on all fours with the case of Sansome v. Myers, 80 Cal. 483, 22 P. 212. There, the trial court, upon presentation of a statement, refused to settle the same, giving the following reasons: "The within bill of exceptions being this day finally submitted to me for settlement, I hereby refuse to settle the same upon the ground that it is inaccurate, and, in many respects, untrue, and contains but a meagre and partial statement of the facts and proceedings leading up to, and connected with, and upon which the rulings of the court therein were had that are complained of, and, also, a mere defective skeleton of the testimony and evidence submitted to the jury, and upon which they rendered their verdict of guilty." The Supreme Court held that the reasons set forth were not sufficient grounds for refusing to settle the statement. It was there held that if anything was omitted from the statement, it was the duty of the district attorney to propose such amendments as would correct the errors; that it was also the duty of the trial court to have directed and required the appellant to insert such matters as should be inserted therein, or if matters were incorrectly stated, the court should have required appellant to correct them, and if the petitioner, the appellant, had refused or neglected to so correct the proposed statement, as directed by the judge, the judge would no doubt have been justified in refusing to settle the same, but not otherwise.

In this case, just as in the Sansome Case, nothing of the kind was done. The record shows simply a refusal to settle the statement, without any direction to the appellants to correct what the judge considered errors or supply any deficiency therein.

[4] The cases are also unanimous that mandamus will lie to direct a trial judge to proceed with the settlement of a proposed bill of exceptions or statement on appeal.

Following the case of Sansome v. Myers, supra, it is ordered that the writ of mandate herein issue, commanding the Honorable H. S. Gans, as the judge of the superior court of the state of California, in and for the county of Tehama, to proceed with the proposed settlement of the bill of exceptions tendered by the petitioners in action No. 5860 entitled "The People of the State of California, acting by and through the Department of Public Works, plaintiff, v. Pacific Gas and Electric Company, a corporation, et als., defendants," directing the appellants in that action to correct any errors which the judge of said trial court shall find in said proposed bill of exceptions, and also to supply such portions of the proceedings had in the action referred to as may be necessary to supply any deficiencies in said proposed bill of exceptions.

For the purposes herein mentioned, let the writ issue as prayed for.

We concur: PULLEN, P. J.; THOMPSON, J.

7 Cal.2d 503

ROMERO v. LETTS et al.

L. A. 15915.

Supreme Court of California.

Oct. 16, 1936.

Appeal and error 🔑766

Where appellant's brief contained only statement that it was error to sustain general demurrer to his complaint without leave to amend and a quotation from another case, and did not indicate nature of relief sought or show affirmatively error claimed to have been committed by trial court, appeal was required to be dismissed for failure of brief to comply with rules (Code Civ.Proc. § 953c; Rules of the Supreme Court, rule 8, § 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Rodolfo R. Romero, administrator of the estate of Maria Dorotea Alanis de Romero, against Arthur Letts, Jr., and others. From an adverse judgment, the plaintiff appeals. On motion to dismiss appeal or affirm judgment.

Motion to dismiss appeal granted, and judgment affirmed.

Jones & Hoyt and Cressaty & Elstein, all of Los Angeles, for appellant.

MacFarlane, Schaeffer, Haun & Mulford, Gibson, Dunn & Crutcher, O'Melveny, Tuller & Myers, and Homer I. Mitchell, all of Los Angeles, for respondents.

PER CURIAM.

This is a motion to dismiss the appeal or affirm the judgment upon the grounds that the appeal is taken for the purpose of delay only; that the questions are so unsubstantial as to require no further argument; and that the brief does not comply with the requirements of the Code of Civil Procedure or rules of court.

There is nothing in the appellant's brief to indicate the nature of the action, the relief sought, or the error claimed to have been committed by the trial court. Aside from a statement that it was error to sustain a general demurrer to his complaint without leave to amend, the appellant's brief contains only a lengthy quotation from Carpentier v. Montgomery, 13 Wall. (80 U.S.) 480, 20 L.Ed. 698, to the effect that confirmation of a Spanish or Mexican grant by the government does not cut off equitable rights but merely establishes legal title in the confirmee.

The allegations of the complaint are not summarized, and there is no statement of the facts upon which the appellant bases his claim to an equitable title, if that is his claim. This brief shows a flagrant disregard of section 953c of the Code of Civil Procedure and of section 3 of rule 8 of the rules of this court. There is no affirmative showing of error and the judgment should be affirmed. Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290; Haines v. Commercial Mortgage Co., 205 Cal. 71, 269 P. 921.

The ruling on this motion was made on October 5, 1936, at which time the motion was granted, and the judgment affirmed.

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7 Cal.2d 510

SUPREME GRAND LODGE OF THE ANCIENT AND MYSTICAL ORDER ROSAE CRUCIS v. SMITH et al.

S. F. 15308.

Supreme Court of California.

Oct. 16, 1936.

1. Appeal and error 🔑660(2)

Motion of respondent for diminution of record was denied where affidavits showed exhibits sought to be added had been lost and there was enough other evidence in record to support material findings.

2. Appeal and error 🔑1071(5)

Where findings as to publishing of malicious and libelous statements and documents were amply supported by evidence, uncertainty as to immaterial findings was disregarded.

3. Appeal and error 🔑204(5)

Objection that letters introduced in evidence had not been sufficiently identified was not open on appeal where letters had been admitted without objection in trial court.

4. Appeal and error 🔑931(5)

Appellant who failed to include certain exhibits in record on appeal could not complain of parts of findings of trial court based

thereon, since Supreme Court must assume that lower court, in making findings, deemed evidence supplied by missing exhibits sufficient to support findings.

5. **Appeal and error ⚿662(2)**

Amended and supplemental complaint *held* properly filed where bill of exceptions recited that having prayed leave of court to file supplemental complaint and to amend pleadings to conform to proof, court granted leave to plaintiff as prayed for.

6. **Appeal and error ⚿1041(2)**

Failure to serve amended and supplemental pleadings was immaterial where amended and supplemental complaint merely included additional recitations of specific acts committed after action had been filed, but did not alter or add to cause of action.

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by the Supreme Grand Lodge of the Ancient and Mystical Order Rosae Crucis against George L. Smith and others to restrain them from publishing malicious and libelous statements and documents about plaintiff and its chief officer. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

See, also, 4 Cal.(2d) 594, 51 P.(2d) 89.

Ivan G. McDaniel, of Los Angeles, for appellants.

Bohnett, Hill & Cottrell and Bohnett, Hill, Cottrell & Boccardo, all of San Jose, for respondent.

WASTE, Chief Justice.

Plaintiff, a nonprofit educational, scientific, and fraternal organization, brought this action to restrain the defendant Smith, and others, former members of the order, from publishing malicious, libelous, and slanderous statements and documents about the organization and concerning one H. Spencer Lewis, its chief officer, known as the imperator. The trial court, sitting without a jury, entered judgment for plaintiff as prayed for. Defendant Smith has appealed.

[1] Respondent has made a motion for diminution of record. It desires that there be added to the bill of exceptions nearly 1,000 letters introduced by it and marked as one exhibit (No. 19), but which were not printed in the record on appeal and, after extensive search, it alleges, cannot now be found. These letters were taken by the sheriff, under search warrant proceedings, from the premises of defendant Smith, and, respondent claims, tend to support the finding that defendants were engaged in a conspiracy to damage plaintiff in a nation-wide scheme by circulating malicious statements concerning it. Respondent's own showing by affidavits seems sufficient to establish the loss and disappearance of the exhibits. It seems useless, therefore, to order something added to the record that does not exist. We are of the view, after examination, that enough is already in the record of 800 pages to support the material findings. For both these reasons, the motion for diminution of the record is denied.

The lower court found that the defendants, and others, associated themselves and effected a conspiracy "for the purpose of injuring plaintiff order, to diminish its revenues, and otherwise inflict loss and annoyance, all to the end and with the intent to coerce and induce the members of plaintiff order, and others who were likely to become members, to seek membership in the various and several societies and orders conducted by some of the conspirators, or in which they were interested." To effectuate their objects, and as part of the concerted plan, the court finds, the conspirators "uttered, published, and circularized false and defamatory and scurrilous statements concerning plaintiff order and its executive head, H. Spencer Lewis." The court further finds that the statements "were made and published maliciously and with knowledge of [their] falsity. * * * The court finds it impracticable (the findings continue) to enumerate and pass upon * * * each and every statement so made and circulated by the conspirators * * * [but] finds that each and every such statement is wholly untrue."

The court does, however, as to the false statements published by the conspirators, "take cognizance of and find upon" some fifteen statements, specifically finding each as "not true." There is also a finding that "in addition to the utterances and circulation of said false statements, said conspirators did, in pursuance of their scheme and conspiracy, attempt to give further currency to said false statements under the assumed guise of privilege by incorporating said false statements in the Answer" of certain defendants filed in bad faith, and designated as "further and additional defense." These pleadings were stricken from the records. Before that was done, however, and for the purpose of giving further currency to said statements, and under the guise of privilege in the publication of the records of a cause pending in court, the court finds, the conspirators printed, published, and circulated a booklet or pamphlet containing them.

[2-4] These essential findings having to do with whether or not the defendant Smith and others entered into a conspiracy to slander, defame, and injure plaintiff order, support the judgment and dispose of the appeal. Enough evidence is found in the bill of exceptions to support the findings. The letters sought to be introduced by diminution of the record would, if their purport be that claimed by the respondent, have some bearing on the wide extent to which the defendants carried their efforts, but they would be merely cumulative, and are not necessary to support the findings on which the judgment rests. Respondent admits that a number of immaterial findings lack support in the record, but these relate to matters so immaterial to the issues established that, even had the findings thereon been in favor of the defendants, they would not affect the judgment as entered. American Nat. Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, Ann.Cas.1917C, 744. Appellant's failure to incorporate in the bill of exceptions the constitutions, statutes, and laws of the supreme grand lodge and of the grand lodge of the order, and the omission of the nearly 1,000 letters, no doubt tends to weaken the support of some of the findings, so far as the record on appeal goes. These exhibits were admitted without objection by the defendants. Therefore, the objection that the letters were not sufficiently identified to entitle them to admission in evidence is not now open to appellant. If the appellant deemed it unnecessary or unwise to include these exhibits in the record on appeal, and has thereby left the record weakened to some extent, he should not now be heard to complain of parts of the findings made by the trial court based thereon. We must assume that, in making the findings, the lower court deemed the evidence supplied by the missing exhibits sufficient to support the findings attacked.

[5, 6] Appellant contends that the amended and supplemental complaint was erroneously filed. The bill of exceptions answers the point. It recites that respondent having "prayed leave of the court to file a supplemental complaint, and to amend the pleadings to conform to the proof * * * the court granted leave to plaintiff as prayed for." The fact, if it be a fact, that the amended and supplemental pleading was not served on the appellant is immaterial. 21 Cal.Jur., p. 225, and cases there cited. The amended and supplemental complaint merely included additional recitations of specific acts committed by defendants after the action was filed, but did not alter or add to the cause of action.

Appellant's allegation in his brief that the trial was conducted in a superficial manner, which was evidence of a fraudulent scheme between respondent and its counsel to gain judgment against defendant by trick and device finds no support in the record. Neither do we find support for appellant's statement that in the trial of this case "a fraud was worked on the court."

The judgment is affirmed.

We concur: THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

* * *

7 Cal.2d 495

MAGGART v. STATE BAR OF CALIFORNIA.

L. A. 15542.

Supreme Court of California.

Oct. 14, 1936.

Rehearing Denied Nov. 13, 1936.

1. Attorney and client 🔑57

Attorney charged with professional misconduct *held* not entitled to complain of refusal of board of governors to remand matter to local administrative committee where board elected to take additional evidence with consent of attorney and his counsel, and it was not contended that attorney was not fully heard, nor that more favorable showing would have been made on hearing de novo (St.1929, p. 1258, § 32).

2. Attorney and client 🔑54

Attorney charged with professional misconduct *held* not entitled as matter of right to have matter reheard before local administrative committee merely because attorney had made no appearance before it, in absence of any injustice suffered by attorney.

3. **Attorney and client** ⚷54

Board of governors of state bar *held* justified in concluding that full justice could be accorded attorney charged with professional misconduct and recommended to be disbarred by local administrative committee by taking additional evidence at hearing before board without remanding matter to local committee for hearing de novo (St.1929, p. 1258, § 32).

4. **Attorney and client** ⚷53(2)

Evidence *held* to justify conclusion that attorney charged with professional misconduct committed breach of trust, both by failure to keep terms of his employment and by retention of client's money claimed to have been earned by him and to justify disbarment.

5. **Attorney and client** ⚷46

Attorney charged with misappropriation of client's funds *held* not entitled to any indulgence by reason of restitution of moneys wrongfully retained, especially where such restitution was made merely as matter of expediency and under pressure.

6. **Attorney and client** ⚷44(2)

Creation of civil liability will not relieve attorney from amenability to disciplinary proceedings for misappropriating client's funds if attorney's conduct involve moral turpitude.

7. **Attorney and client** ⚷53(2)

Attorney charged with misappropriation of client's funds, and issuance to client, in attempted repayment, of checks when there were insufficient funds in attorney's account with which to meet such payments and who was recommended to be disbarred by the board of governors of the state bar *held* not to have met burden to show that recommendation of disbarment was erroneous or unwarranted by the evidence.

In Bank.

Original proceeding by Roy E. Maggart to review the recommendation of disbarment of petitioner by the Board of Governors.

Petitioner ordered disbarred.

Hickcox & O'Connor and William Hodges, all of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

On March 8, 1935, there was served on Roy E. Maggart, an attorney at law of this state, an order to show cause why he should not be disciplined for alleged acts of professional misconduct involving moral turpitude. The notice required the petitioner to appear before Local Administrative Committee No. 6 at Los Angeles on March 27, 1935, at 7 p. m. to be heard on charges of misappropriation of certain funds intrusted to him by May J. McGuire and the issuance to her, in attempted repayment, of checks in amounts ranging from $50 to $3,000 when there were insufficient funds in the attorney's account with which to meet such payments. The petitioner filed an answer to the charges admitting the receipt of the sums stated, but denying liability by reason of his claim to a portion thereof as attorney fees, and that liability to repay the balance was incurred by virtue of loans made to him and not in the relationship of attorney and client. He defended the charges respecting the issuance of checks returned "n. s. f." on the ground that they were postdated and taken by the complainant as such with the knowledge that there were insufficient funds on deposit at the time of issuance. The attorney also pleaded payment of six of said checks.

The attorney did not appear at the hearing noticed for March 27, 1935, but was represented by W. H. Hodges, Esq., as his counsel. Mr. Hodges reported the petitioner's inability to be in attendance by reason of professional engagements elsewhere, but stated that he could be present the following night. It was also stated to the committee that the petitioner had delivered to Mr. Hodges a check for $1,500 which he promised to pay on account of his indebtedness to Mrs. McGuire on the following Saturday. A request for continuance was denied, and the taking of testimony proceeded with the understanding that the petitioner could read the testimony and at a postponed hearing call in any witness he desired to cross-examine and offer evidence in his own behalf. Upon the written request of the petitioner the hearing was continued three times, to April 3, April 10, and April 17, 1935, but on none of said dates did the petitioner make any appearance. On

April 17, 1935, the matter was ordered submitted. The committee transmitted its report and recommendation of disbarment to the board of governors. A hearing was had before the board, which adopted the committee's recommendation. The petitioner thereupon instituted these proceedings for review.

[1-3] At the hearing before the board, held on the morning of July 22, 1935, the petitioner appeared with his counsel, August J. O'Connor, Esq. The petitioner presented to the board his application for a hearing de novo before the local administrative committee on the ground that he had not been able to be present at the hearing or postponed hearings before the committee; and on the further ground that he could produce evidence to prove a complete defense to all the charges. The affidavits filed with the application did not set forth the nature of the defense nor the substance of the additional evidence as required by the rules of the board. Nevertheless the board permitted the petitioner to state orally what he expected to prove and the witnesses who would testify in his behalf. The board denied the application for a hearing de novo before the local administrative committee, but granted leave to the petitioner to produce his witnesses or stipulate as to the substance of their testimony and proceed on the evening of the same day to the taking of evidence before the board to substantiate any defense he might have and to cross-examine witnesses theretofore examined by the committee. This course was consented to and was followed by the petitioner and his counsel without any objection. Any contention which the petitioner now makes that the board should have remanded the matter to the local committee for a hearing de novo is therefore unavailing. The board, pursuant to section 32 of the State Bar Act (Stats. 1927, p. 42, as amended by Stats.1929, p. 1258), "may either act upon the report [of the committee] or may take additional evidence, or set aside the report and hear the whole case de novo, as it may elect." The board elected, with the consent of the petitioner and his counsel, to take additional evidence. At the hearing thus had before the board, the petitioner testified on his own behalf, produced additional witnesses and evidence, and cross-examined the complainant, May J. McGuire. It is not contended that the petitioner was not fully and fairly heard on his defense, nor does the petitioner attempt to state that any different or more favorable showing would have been made on a hearing de novo either before the local committee or the board. In the absence of any injustice suffered by the petitioner, he was not entitled as a matter of right to have the case reheard before the local committee merely because he had made no appearance before it, especially where from the record it must be concluded that he was given every opportunity to make the appearance he requested. The record does not necessarily support the petitioner's statement made to the board that he was unable to be present at any of the dates to which the hearing before the local committee was postponed, and the board was justified in concluding that full justice and fairness could be accorded the petitioner by taking additional evidence at the hearing before it.

[4] It is our conclusion on these proceedings that the petitioner has not shown that the acts of professional misconduct found to have been committed by him are not based on sufficient evidence. The petitioner was admitted to practice law in this state in 1922. At the time he became attorney for May J. McGuire he was thirty-four years of age and had been in active practice for ten years. In 1932 he was substituted as the attorney for Mrs. McGuire in her divorce action against her husband. No agreement was made at that time for compensation for his services. Mrs. McGuire delivered to the petitioner the sum of $1,100 for the purpose of buying outstanding accounts of the McGuire Cabinet Company and for costs in the matter of a contemplated involuntary bankruptcy proceeding to be filed against it. The petitioner was also paid $75 to discharge incidental expenses in connection therewith. The petitioner was unable to purchase such accounts and the bankruptcy proceeding was never filed. The petitioner, however, retained the amounts received. Subsequently and in July of the same year the divorce action was tried and the court granted an interlocutory decree of divorce to the husband on his cross-complaint, and to the wife custody of the daughter and certain sums for their support. The petitioner did not try the case nor make any preparation personally for the trial thereof. About two weeks previous to the trial he turned the case over for preparation and trial to two junior assistants in his office.

After the judgment was rendered, the petitioner promised Mrs. McGuire that he personally would prosecute an appeal from the judgment. Upon this understanding, Mrs. McGuire consented to the application of the $1,100 theretofore received to the payment of his services on the appeal. On February 16, 1933, the District Court of Appeal dismissed the appeal because of the failure of the appellant to file a transcript within the time allowed by law and because of the acceptance by her of benefits awarded by the decree. McGuire v. McGuire, 129 Cal.App. 644, 19 P.(2d) 7. These facts justify the conclusion that the petitioner committed a breach of trust, both by his failure to keep the terms of his employment and by the retention of the $1,100 claimed to have been earned by him.

In December, 1933, Mrs. McGuire delivered to the petitioner the sum of $1,000 for the purpose of placing a bid on real property of her husband's which was about to be sold under foreclosure proceedings. The bidding proceeded beyond the sum authorized and the amount was not used for that purpose. Instead the petitioner induced Mrs. McGuire to permit the petitioner's use of said sum, together with $500 additional which she delivered to him, for the benefit of certain unnamed persons in the acquisition of oil leases at Huntington Beach, on the promise of the petitioner that she would be paid a bonus of $1,000 for the use of said sum of $1,500. The petitioner does not contend that the money was not used for said purpose nor that he was not repaid for its use in accordance with the agreement; but no accounting thereof was made to the complainant. Subsequently the complainant authorized the petitioner to place $500 of said sum in escrow in the matter of a trade of certain property on the complainant's behalf. The transaction, however, was never completed, and the petitioner withdrew the amount from escrow and retained it.

About June, 1934, the petitioner prevailed upon the complainant to lend him further funds and induced her to that end to mortgage the furniture in her home for the sum of $1,100, and promised to pay the cost of obtaining the loan. In lieu of interest on said sum he executed and delivered to her an assignment of 2 per cent. of an interest he expected to acquire in a certain oil lease at Huntington Beach. Such assignment was also designed to compensate her for interest on the total indebtedness then owing by the petitioner to the complainant which, exclusive of the initial $1,100 paid to him, amounted to $3,535. About this time he also executed and delivered to her his ninety-day noninterest bearing note for the latter amount.

Beginning on May 12, 1934, the petitioner commenced his efforts to repay his indebtedness to the complainant. About that time he gave the complainant a postdated check for $50, although at the time he had less than $10 in the bank, and the check was returned unpaid. On June 12, 1934, he gave her his postdated check for $50, although he had less than $5 on deposit, and the same was returned unpaid. Postdated checks of August 22, 1934, for $150, when his account was less than $110; September 7, 1934, for $50, when his account was less than $10; November 10, 1934, for $233.88, when his account was less than $10; and December 11, 1934, for $500, when his balance was $76.04, suffered the same fate. On September 28, 1934, he delivered to her a check dated the same day for $200 drawn on a bank with which he had no account, but in which he opened an account after the check had been returned unpaid. After subsequent attempts to collect the amounts some of the foregoing checks were paid, until on October 29, 1934, the petitioner in writing admitted a balance of indebtedness in the sum of $2,863.88. Mrs. McGuire complained to the state bar of California on October 30, 1934. At a preliminary hearing held on January 15, 1935, before Local Administrative Committee No. 2, Department B, for Los Angeles county, at which the petitioner appeared, the complainant reported to the committee that she had received the petitioner's check for $3,000 dated January 25, 1935, which, if it was paid, she would be willing to accept in full settlement of the petitioner's indebtedness. He had theretofore obtained from her a reassignment of the 2 per cent. oil lease interest. On the petitioner's representation that the check would be paid, the committee continued the hearing to February 5, 1935. In the meantime, however, the petitioner placed a stop-payment order with the bank and the check was returned unpaid for that reason, although the petitioner had a bank balance of not exceeding $108 during the month of January. On February 5th the petitioner upon his request was given a further opportunity to make the check good, and a continuance was ordered to February 19th. His failure in that behalf was followed by the service of the notice to appear before Local Administrative Committee No. 6 on March 27, 1935. At the hearing before the board in July, 1935, Mrs. McGuire stated that the petitioner had repaid to her all but $1,000 of her claims against him, with the exception also of the $1,175 originally advanced in the matter of her divorce action.

[5, 6] From the foregoing briefly stated and admitted facts, it is apparent that the petitioner was seeking to gain time to repay to the complainant what in his opinion was due her, viz., all moneys with the exception of the $1,000 bonus promised in lieu of interest, and exclusive of the amount advanced in connection with the divorce proceeding which he claims he has justly earned. We have not repeated herein all details of the conflicting evidence of the complainant and the petitioner respecting his conduct in relation to the various matters intrusted to him and in his purported attempts to repay amounts deposited with him or borrowed from Mrs. McGuire, or with reference to whether the latter was informed that the attorney had insufficient funds to meet payments of the checks issued to her. It is sufficient to say that on the record here presented the committee and the board are not shown to have been unjustified in rejecting the petitioner's version of the facts where it is contended they have done so. The petitioner is not entitled to any indulgence by reason of restitution of moneys wrongfully retained, especially where such restitution is made merely as a matter of expediency and under pressure. Herrscher v. State Bar of California, 4 Cal.(2d) 399, 49 P.(2d) 832. In the present case the attorney made no offer or attempt to return fees claimed by his client not to have been earned, nor may it be said here that the attorney performed services of great or any value to his client. Furthermore, the creation of the civil liability upon which the petitioner relies in the matter of the private loan transactions between him and his client, cannot relieve him from amenability to disciplinary proceedings if his conduct involve moral turpitude, dishonesty, or corruption. Jacobs v. State Bar, 219 Cal. 59, 64, 25 P.(2d) 401.

[7] The petitioner has failed to meet the burden reposing in him to show that the recommendation of disbarment is erroneous or unwarranted by the evidence. The record sufficiently discloses that the petitioner appears to be wanting in that attribute of common honesty which insures his integrity to the lay clientele. In such a case disbarment is not a too severe measure of discipline. State v. Mannix, 133 Or. 329, 288 P. 507, 290 P. 745.

It is ordered that the petitioner be disbarred from the practice of law in the courts of this state effective thirty days after the filing hereof.

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7 Cal.2d 504

HUGHES v. DE MUND.

L. A. 15491.

Supreme Court of California.

Oct. 16, 1936.

Rehearing Denied Nov. 2, 1936.

1. Appeal and error 🔑907(4)

Issues of fact involved in assignments of error were required to be resolved against appellant where bill of exceptions did not contain all of evidence, since presumption existed that omitted evidence supported findings.

2. Partnership 🔑340

In action in equity for dissolution of partnership and for accounting, trial court acted within its jurisdiction in foreclosing mortgages executed by plaintiff in favor of defendant and ordering sold plaintiff's interest in properties held by parties as tenants in common to pay to defendant indebtedness secured by mortgages.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Thomas A. Hughes against Mary C. De Mund. From an adverse judgment, plaintiff appeals.

Affirmed.

Thomas A. Hughes, of Los Angeles, in pro. per.

A. I. McCormick and Louis B. Stanton, both of Los Angeles, for respondent.

PER CURIAM.

On October 5, 1936, respondent's motion to affirm the judgment herein appealed from was granted from the bench. In making our order we were of the opinion, as urged in the motion, that the appeal lacked substantiality. The action is one in equity for dissolution of partnership and for an accounting. Various phases of the litigation have been before us on prior occasions.

The judgment presently appealed from decrees, in accordance with the findings, that several of the parcels of real property, alleged by plaintiff and appellant to have been partnership property, represent the sole and exclusive property of the defendant and respondent, whose title thereto was thereupon quieted. It was also found and decreed that certain other parcels were owned by the parties as tenants in common and not as partners. In addition, the court below foreclosed certain mortgages executed by the appellant in favor of the respondent and ordered sold appellant's interest in the properties held as tenants in common to pay to the respondent the indebtedness secured by the mortgages.

[1] In support of his appeal, the appellant, who appears in propria persona, urges seven grounds for a reversal of the judgment. Our examination of the same, together with a reading of the record, fails to disclose anything requiring a reversal. Any issues of fact involved in the several assignments of error must necessarily be resolved against the appellant for the bill of exceptions does not purport to contain all of the evidence and, under settled principles, it will be presumed that the omitted evidence supports the findings.

[2] Contrary to appellant's contentions, we are of the opinion that the court below acted well within its jurisdiction and the issues of the case in foreclosing the mortgages mentioned above and in decreeing a sale of appellant's interest in the properties held as tenants in common to pay off and discharge the same.

Other points urged by the appellant are likewise without merit.

In accordance with our order heretofore made, the judgment is affirmed.

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7 Cal.2d 506

MONSON v. RAHLMANN.

S. F. 15563.

Supreme Court of California.

Oct. 16, 1936.

Rehearing Denied Nov. 13, 1936.

Partnership ⚷311(5)

Member of partnership *held* not entitled to rescind agreement for dissolution of partnership on ground of mistake existing upon final liquidation due to accountant's having prepared account and balance sheets used on liquidation on basis that losses to capital were to be borne by partners in same ratio as their share in profits of firm where it was found that accountant was not mistaken in his belief and member knew how losses were computed (Civ.Code, § 2412(a).

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Olof Monson against Herman E. Rahlmann, wherein defendant filed a cross-complaint. Judgment for the plaintiff, and defendant appeals.

Affirmed.

Marvin C. Hix and Joseph T. Curley, both of San Francisco, for appellant.

Leicester & Leicester, of San Francisco, for respondent.

WASTE, Chief Justice.

Plaintiff recovered a judgment for $24,081.61 against defendant in an action on a renewed promissory note given by the defendant for an assumed balance due on a partnership accounting on dissolution, and for certain advances found to be unpaid.

The partnership was originally formed under a verbal agreement that plaintiff was to receive two-thirds of the profits and defendant one-third. The partners later entered into a written agreement of partnership for the purpose of "defining and fixing their respective rights and interests in the business and assets of said partnership." By this agreement, the amount of the investments of plaintiff and of defendant was fixed, and in the agreement it was expressly provided that "these respective investments may vary from time to time * * * but the investment account is to be kept up to date at all times so as to show the true amount which each partner has invested in the capital of the said firm." The agreement also provided that profits should be shared two-thirds by plaintiff and one-third by defendant, which was but a repetition of the former oral agreement.

Subsequently, it was agreed that the partnership should be dissolved, which agreement was consummated. In that connection, a certified public accountant was employed to write up and balance the books and accounts of the partnership, and to do other things necessary in and about the liquidation and settlement by the partners, and to prepare balance sheets and statements, and reports as to the contents of the firm's books and accounts. The accountant proceeded with such employment in accordance with his understanding and conception of the agreement of the partners for liquidation, and prepared a draft of such an agreement and furnished it to the parties, who accepted it, without signing, and with no objection as to its correctness. After making up this draft, the accountant "wrote up the books" of partnership. He assumed that capital losses were to be borne in the same ratio as profits were shared, and that the respective interests of the partners were in the same ratio. He therefore charged off the books of the firm as losses one-third of certain items to the defendant and two-thirds to the plaintiff. The accountant reported the defendant to be indebted to plaintiff in the sum of $24,578.96, which account the court found to be accurate and correct, that it had been properly made up and computed on correct principles, and that the accountant had no reason to believe it was otherwise. Subsequently, the accountant prepared certain balance sheets showing the accounts between the parties, and the firm's assets and liabilities. After the first report of the accountant, and prior to making up the books of the partnership, plaintiff and defendant made certain payments between themselves, and there were a number of transactions which we assume the trial court understood, although the court admitted that it had "an awful time with the figures."

The answer and cross-complaint interposed by the defendant set forth an action for rescission based on an alleged mistake existing upon final liquidation and settlement of the partnership affairs, due to the accounting having been made on an alleged wrong principle. Such mistake, according to the defendant, lies in the fact that, unknown to the defendant, the accountant who prepared the account and balance sheets used on liquidation, was ignorant of the true agreement between the parties as to the basis for such dissolution, and erroneously believed that losses to capital were to be borne by the partners in the same ratio as they were to and did share in the profits of the firm. The trial court found that it was not true that the accountant was mistaken in such belief, and it was not true that at the time of signing the note on which the action was brought the defendant had no knowledge or notice of the fact that the accountant, in writing up the books of account and in preparing and making his statements, had apportioned losses in the same ratio as the partners shared in the profits; that, on the contrary, the defendant had actual knowledge of the agreement and of its contents and knew how losses had been apportioned and entered on the books and in the accounts of the parties, and knew that the accountant had apportioned losses in the same ratio as profits were shared. The trial court further found that each and every allegation in the complaint and supplemental complaint was true, but modified the amount of certain items of account credited to the defendant. The trial court also found that certain "charge offs" to capital accounts of items designated "assumed for collection" should have been made one-third to the defendant and two-thirds to the plaintiff, on the theory that the partnership agreement was silent on the subject of losses, and therefore such losses should be borne in the same ratio as profits were shared and that, although the accountant knew nothing of the partnership agreement which fixed the respective rights and interests of the parties in the business and assets of the firm, he did not make a mistake in charging those items to the partners in such ratio.

Under the facts found, as above summarized, we are unable to find any mistake that would warrant the defendant in rescinding the agreement of dissolution. The only mistake relied upon was an alleged mistake by the accountant as to how the parties were to contribute toward the losses. The defendant could not plead, and did not prove, ignorance of the terms of the agreement. It having been expressly provided therein how profits were to be shared, defendant was required to "contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." Civ.Code, § 2412(a). Appellant alleged that after the commencement of this action he learned for the first time that the statement of the accountant was based on the alleged erroneous belief of the accountant as to the partnership affairs. In view of the trial court's findings and of all the facts appearing in the record, we are of the opinion that it is now too late for the defendant to attempt to rescind the agreement for dissolution.

While both appellant and respondent, in their statements of questions involved on appeal, have included certain points corollary to the main question in the cause, which we have just considered, we do not find it necessary to pursue the discussion further. We are of the view that, as found by the trial court, the accountant construed the partnership agreement correctly. The complicated array of figures submitted by appellant, and with which the lower court had "an awful time," presents a situation which we deem it best to leave with the determination of that court.

The judgment is affirmed.

We concur: THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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17 Cal.App.2d 72

COLLARD et al. v. LOVE et al.

Civ. 11107.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1936.

1. Automobiles ⚷20

Where transferee had indorsed his name on automobile ownership certificate as registered owner and allowed it to be forwarded to division of motor vehicles, evidence of ownership *held* sufficient to bring transferee within statute providing that every "owner" of motor vehicle shall be liable for negligence in its operation by person using it with owner's permission (Civ.Code, § 1714¼).

The word "owner" in Civ.Code, § 1714¼, providing that every owner of a motor vehicle shall be liable for negligence in the operation of the vehicle by person using it with the permission of the owner, refers to the registered owner.

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

2. Automobiles ⚷20

Transferee of automobile could not take advantage of his failure to have new registration certificate issued in order to escape liability for injury caused by negligent operation thereof by driver using automobile with owner's permission (Civ.Code, § 1714¼; St.1929, p. 514, § 45(e); St.1931, p. 2104, § 41 (3).

3. Automobiles ⚷20

As regards liability of transferee of automobile for another's negligent operation thereof, presumption existed that official duty had been regularly performed and that new certificate of registration had been issued, in absence of contrary evidence (Civ.Code, § 1714¼; Code Civ.Proc. § 1963, subd. 15).

4. Damages ⚷132(1)

$4,000 damages for injuries including deep laceration of forehead which left permanent scar approximately 2½ inches in length *held* not excessive.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Clyde V. Collard, Jr., a minor, by Clyde V. Collard, his guardian ad litem, and Clyde V. Collard, against Mason Love and Russell B. Coffman. Judgment for plaintiffs, and defendant Coffman appeals.

Affirmed.

Milo W. Horn, of Long Beach, for appellant.

Clock, McWhinney & Clock (by Henry H. Clock), of Long Beach, for respondents.

WOOD, Justice.

Plaintiff Clyde V. Collard, Jr., was struck and injured on July 1, 1935, by an automobile negligently operated by defendant Love. At the time of the accident California Funding Corporation was the legal owner of the car, and defendant Coffman, as transferee from defendant Love, was the registered owner according to the records of the division of motor vehicles (as it was then known). Coffman indorsed his name on the ownership certificate as registered owner, allowed it to be forwarded to Sacramento, and thereafter consented to the operation of the car by Love. The trial court, sitting without a jury, gave judgment to plaintiff against both Coffman and Love in the sum of $4,000. Defendant Coffman appeals.

[1-3] It is the contention of appellant that the evidence is insufficient to support the finding that he was the owner of the car and that the trial court erred in declining to permit him to prove that Love did not sell or transfer the car to him and that he "had an agreement with Love to make payments upon the automobile." The basis of respondent's claim for damages is section 1714¼ of the Civil Code as it was in force on the date of the accident. That section provided that "every owner" of a motor vehicle should be liable for negligence in the operation of the vehicle by a person using it with the permission of the owner. The section did not distinguish between the registered owner and the legal owner but merely used the expression "every owner." The use of the word "owner" has, however, been made definite in the case of Bunch v. Kin, 2 Cal.App.(2d) 81, 37 P.(2d) 744, where it is held that the word "owner" as used in this section refers to the "registered owner." The evidence of ownership was sufficient to bring appellant within the provisions of section 1714¼ of the Civil Code. Appellant did not offer proof attacking the registration in his name. The ruling of the court on the admission of evidence was proper. Bunch v. Kin, supra; Schmidt v. C. I. T. Corporation (Cal.App.) 57 P.(2d) 1016. Appellant refers to section 45 (e) of the California Vehicle Act (St.1923, p. 524, § 45 (e), as amended by St.1929, p. 514), wherein it is provided that until the division of motor vehicles shall have issued a new certificate of registration, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. No evidence was offered to establish the issuance of a new certificate of registration, and appellant argues that on this account he cannot be held liable. It was appellant's duty to procure the new certificate and "securely fasten the same in plain sight within the driver's compartment." St.1923, p. 523, § 41 (3), as amended by St.1931, p. 2104. He cannot now take advantage of his own failure to comply with the provisions of the Vehicle Act. Schmidt v. C. I. T. Corporation, supra; San Joaquin Valley Securities Company v. Prather, 123 Cal.App. 378, 11 P.(2d) 45. Moreover, in the absence of evidence to the contrary it is to be presumed that official duty has been regularly performed (Code Civ.Proc. § 1963, subd. 15) and that the new certificate was issued.

[4] Appellant makes the further contention that the damages are excessive. Among the injuries suffered by respondent was a deep laceration of the forehead which left a permanent scar approximately two and one-half inches in length. In view of the evidence disclosed by the record we cannot hold that the amount of the judgment is excessive. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Murphy v. Ludowici Gas Co., 96 Kan. 321, 150 P. 581; Levy v. Berner, 110 Cal.App. 65, 293 P. 896.

The judgment is affirmed.

We concur: CRAIL, P. J., McCOMB, J., pro tem.

17 Cal.App.2d 119

WESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10302.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1936.

1. **Master and servant 🔑405(6)**

Evidence *held* to sustain finding of Industrial Accident Commission as to length of period of temporary total disability and of temporary partial disability of injured employee.

2. **Master and servant 🔑416**

Industrial Commission's finding that claimant's injury might result in permanent disability, under which finding jurisdiction was reserved to provide for any permanent disability, *held* to relate merely to matters covered by statute so that absence of evidence to support finding of possible permanent disability would not affect award (St. 1917, pp. 850, 875, §§ 20(d), 67).

3. Master and servant ⚷417(9)

District Court of Appeal may annul or affirm the award of Industrial Accident Commission, but has no power merely to criticize it (St.1917, p. 875, § 67).

◆

Petition by the Western Pacific Railroad Company, employer, opposed by Armando Galli, claimant, to review portions of an award made by the Industrial Accident Commission, under the Workmen's Compensation Act.

Award affirmed.

Ernest I. Spiegl, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner has applied for a writ of review for the purpose of having annulled portions of the award made by the respondent board in favor of Armando Galli, a former employee of the petitioner. All of its attacks are addressed to disability.

[1] The petitioner attacks that portion of the second finding which was worded as follows: "Said injury caused temporary total disability continuing from September 4, 1935, to and including December 31, 1935. * * *" The petitioner claims there was evidence the disability commenced on September 4, 1935, but that the evidence showed it terminated October 5, 1935, the date claimant was discharged by the employer's physician. It may be stated that all of the medical testimony supports the claim of the petitioner, however, the claimant testified he did not do any work before January 1, 1936, because he "was not able to work." Therefore there was a conflict in the evidence and not an entire absence of evidence on the length of the period of temporary total disability.

The third finding made by the respondent board was in part, "Said injury also caused temporary partial disability continuing from December 31, 1935, to and including April 25, 1936. * * *" As we understand the petitioner, it makes the broad contention that there was no temporary partial disability. Again it may be stated the testimony of the physicians strongly tended to support the petitioner in its contention. But as recited above, the testimony of the claimant was that prior to January 1, 1936, he was not able to do any work, but after that date he was able to do "light work." Continuing, he testified that owing to the condition of his foot he could not prior to the date of the hearing, May 1, 1936, do anything but "light work." The record is not clear, but as we understand it the claimant testified that before working for the petitioner he worked in a grocery store. The nature of such work is not specified. Nevertheless, at the time of the hearing he testified he was able to do that kind of work. However, he testified he was not able to operate a truck in moving freight, which had been his occupation while employed by the petitioner. Under these circumstances, we think the second attack may not be sustained, and that there was some evidence to support the finding made by the respondent commission.

[2, 3] Finally the petitioner attacks the last finding, which reads as follows: "Said injury may result in some permanent disability, but has not yet become permanent. Jurisdiction is reserved to amend these Findings and the Award to provide for any permanent disability indemnity that may hereafter become due, provided an application is filed within the time provided for by law and provided the condition is permanent." The petitioner asserts there was not the slightest evidence that the injury could ever result in permanent disability. Assuming, without deciding, that such assertion is well founded, the fact remains that said finding was wholly immaterial. It merely recited matters which were covered by the statute (St.1917, p. 850, § 20 (d). However, it determined no factor in the award which was under attack. As shown above, the award was supported by the other findings. The power of this court, in this proceeding, is to annul or affirm the award as the record may appear (section 67, Workmen's Compensation Act, St.1917, p. 875); but, although it has the power, no duty rests on this court merely to criticize.

It follows that the award should be, and it is, affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

16 Cal.App.2d 652

LAHEY et al. v. SOUTHERN PAC. CO. et al.

Civ. 5631.

District Court of Appeal, Third District, California.

Oct. 1, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Evidence 🔑147

In action for death of motorist whose automobile was struck on foggy day by train on highway crossing, testimony of witnesses who were near scene of collision that they did not hear ringing of bell or sounding of whistle on engine *held* admissible (Civ.Code, § 486).

2. Evidence 🔑586(3, 4)

In action for death of motorist whose automobile was struck on foggy day by train on highway crossing, testimony of witnesses who were near scene of collision that they did not hear ringing of bell or sounding of whistle on engine *held* to sustain verdict for plaintiff on ground signals were not given by trainmen (Civ.Code, § 486).

3. Railroads 🔑346(5)

Instruction that presumption was that deceased motorist, whose death resulted from injuries received in automobile collision with train, did everything prudent man could for protection of his own safety and that burden of proving negligence of motorist was upon railroad, *held* proper.

4. Railroads 🔑330(3)

Instruction that one approaching railroad track may anticipate trainmen will exercise ordinary care and cause bell to be rung or whistle to be blown when approaching highway *held* proper (Civ.Code, § 486).

5. Railroads 🔑350(6)

In action for death of motorist whose automobile was struck on foggy day by train on highway crossing, whether oncoming train was at time of collision making considerably less noise than usual because engine was practically drifting, using slight amount of steam, *held* for jury.

6. Trial 🔑142

Where different minds may draw different conclusions from conditions presented for consideration, cause presents jury question and not a question of law for court.

7. Railroads 🔑350(13)

In action for death of motorist whose automobile was struck on foggy day by train on highway crossing, whether motorist was contributorily negligent *held* for jury.

8. Railroads 🔑316(4), 337(5)

Where no regulations existed regulating speed of train at time it approached highway crossing where it collided with automobile, only duty of railroad was to regulate speed so as not to add to hazard of others possessing right to use crossing, and if, in propelling train over crossing without giving necessary warning of its purpose to do so, motorist was proximately injured resulting in his death without contributory negligence on his part, railroad would be liable, irrespective of speed of train at that time (Civ.Code, § 486).

9. Railroads 🔑351(9)

In action for death of motorist whose automobile was struck on foggy day by a train on highway crossing, instruction relating to the giving of signals at highway crossing *held* not misleading (Civ.Code, § 486).

10. Railroads 🔑324(1)

One approaching a railroad crossing must exercise ordinary care for his own safety.

11. Death 🔑99(4)

$25,000 for death of married man with family who had life expectancy of 21 years, had earned as much as $250 per month, and because of economic depression was working on government project for $60 per month at time of death, *held* not excessive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Harold Lahey and others, minors, by and through their guardian ad litem, Marie Lahey, and another, against the Southern Pacific Company and another. From an adverse judgment, and from orders denying motions for directed verdict and for judgment notwithstanding the verdict, the defendants appeal.

Affirmed.

Devlin & Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellants.

Clifford A. Russell, A. M. Mull, Jr., and Henry & Bedeau, all of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Three appeals in this action are presented by the appellants upon one transcript and argued as one cause. The action was begun by the plaintiffs as the heirs and dependents of Henry F. Lahey, deceased, to recover damages by reason of his death suffered in a collision between an automobile driven by him and a train operated by the Southern Pacific Company, a corporation. The collision occurred at a point where a certain highway known as the "Power Line Highway" crosses the Southern Pacific railway track in the county of Sacramento, a few miles south of the town of Brighton. The line of the Southern Pacific Company runs northerly and southerly, and the Power Line highway runs northeasterly and southwesterly. The highway and the line of the Southern Pacific Company intersect at a point called the "Power Line crossing." The highway and the railroad line intersect in such a manner as to conform practically to the letter "X," so that one driving an automobile along the highway and over the Power Line crossing is within a danger zone for a period somewhat longer than in instances where the highway crosses the railroad line at right angles.

As we said, the collision occurred at the point called the "Power Line crossing," on the morning of the 28th of January, 1935. All the testimony in the record shows that the morning referred to was very foggy and visibility was very much limited.

The plaintiffs had judgment for $40,000, which was reduced by the trial judge to the sum of $25,000. Upon this appeal the appellants present six grounds for reversal:

1. That the deceased was guilty of contributory negligence as a matter of law in driving his automobile immediately in front of the train, when he had a vision of 270 feet through the fog, and could have seen the train at any time after he reached a point more than 100 feet from the crossing. (We may here state that the record discloses an abundance of testimony to warrant the jury in concluding that this alleged ground of reversal is not supported by the facts of the case.)

2. That the court erred in submitting to the jury the question of alleged negligence on the part of the defendants in failing to give the signals required by law.

3. That the court erred in instructing the jury that the law presumes the defendant exercised due care, etc., for his own safety.

4. That the court erred in instructing the jury that the deceased had a right to assume that the operators of the engine would give the required warning signals.

5. That the court erred in instructing the jury that its verdict must be for the plaintiffs if they found that the defendant failed to give the required signals, when the complaint charged negligence in operating the train at an excessive rate of speed, etc.

6. That the verdict as reduced by the trial court is excessive.

In addition to what we have said of the physical conditions surrounding the scene of the collision, we may state that the railroad track is built upon a fill approximately 6 feet higher than the level of the highway, and the highway grade, crossing the railroad begins at a point about 200 feet distant from the crossing. Adjacent to the highway are the usual signs indicating the presence of a railroad crossing, one of which signs was a disc with a white background and black cross with letters "R.R." thereon. A similar sign is on each side of the railroad crossing, each distant from the railroad 430 feet.

On the morning of January 28, 1935, a number of men, constituting a crew of SERA workers, had reported for work at a place on the west side of the right-of-way of the Southern Pacific Company at a point about 1,800 feet north of the crossing. The workers were being transferred from the project just mentioned to a project south of what is called the Davies road. A group of workers, including Lahey, left the place of meeting and drove in their respective automobiles to certain streets, and finally turned into the Power Line road and stopped in the vicinity of a brick plant which is a short distance from the Power Line crossing. There they looked about for additional men, and not finding them, went back to their cars and proceeded southerly from that point a distance of about 1,200 feet to the crossing. There is some uncertainty as to the number of cars in the caravan, appellants claiming that there were seven cars in the caravan; the respondents, that there were not so many. It appears, however, that the lead car was a brick truck driven by a man by the name of Waters, who appears to have had no connection with the SERA crew of employees. The appellants' statement is that the car driven by Waters was followed by one driven by a man by the name of Moore. This car was followed in turn by one driven by Abshire.

Abshire's car was followed by a car driven by a Mr. Murphy, in which a man by the name of Pritchard was riding. Following Murphy's car was a car driven by Lahey. Two cars were following the Lahey car, one driven by a man by the name of Asta, with whom a man by the name of Coray was riding. Another car following was alleged to have been driven by a witness by the name of Blanos. The testimony in the record given by Blanos is of such a nature that the jury was warranted in concluding that Blanos was not just where he said he was on the morning of January 28, 1935, at the time of the collision. He testified to the effect that Lahey, a short distance from the crossing, passed him, driving some twenty-five miles an hour, and that he watched Lahey's car until the rear light faded from view. He, however, failed to testify as to the presence of other cars, and as to the presence of cars which would intervene between his car and the one driven by Lahey, and also that no other cars in the caravan had passed him. The trial court and the jury evidently gave little heed to the testimony of Blanos by reason of the discrepancies which we have mentioned.

On a clear morning the crossing in question affords an unobstructed view for over a mile in the direction from which the train was proceeding. The fog, however, obstructed vision to such an extent that the approach of the train was visible only from a limited distance. There is considerable diversity in the testimony as to the distance the train could be seen on the morning of the collision. Practically all of the distances testified to were mere estimates. It also appears that the density of the fog varied, so that from different places and different times, the distance of visibility likewise varied.

The trial court, in denying one of the appellants' motions, stated that there was testimony in the case from which the jury could conclude that the distance of visibility available to Lahey at the time of the collision was not over 100 feet.

The testimony of the engineer is to the effect that some 1,500 feet from the crossing he had shut off steam down to what is called a "drifting" condition, and also had gently applied the brakes in order to lessen the speed of the train, in anticipation of a stop to be made some distance north of the point of the collision. His testimony and that of his fireman is to the effect that the bell was continuously ringing, and that the whistle was being sounded. We may here call attention to the fact that the approaching caravan of cars was made on the Power Line highway in such a direction, by reason of the acute angle of the crossing, that the headlights of the respective cars were facing the oncoming train. These headlights were on the easterly side of the track, and therefore, on the side of the engine occupied by the engineer. The engineer testified, however, that he did not see any of these lights, and that he did not see the Power Line crossing until his engine was immediately on the same, and that he did not know his engine had collided with the car driven by Lahey until his fireman called "hold her." The engineer also testified that the fog banked his headlight so that he could not see more than from 75 to 150 feet. The question and answer relating to this point is as follows:

"Mr. Negrich: Q. How close do you have to be to an object on the track, on a morning such as that morning, before you can see the object? A. Well, I probably might have seen 100 feet, might have seen 150 feet, might have seen 75 feet.

"Q. Did you see the Power Line Crossing? A. No, sir.

"Q. You did not see the Power Line Crossing until after your locomotive had gone by the cars? A. As I was going by it."

According to the record, the estimated speed of the engine as it passed over the crossing was between 30 and 35 miles per hour. The witness Waters, driving the truck which we have mentioned preceding the caravan, testified that the morning was very foggy; that he noticed that none of the automobile drivers had passed him; that he was driving in the neighborhood of 20 miles an hour; that when he was in the neighborhood of about 30 to 50 feet south of the crossing he first noticed the train; that he saw the light of the train; that the train was distant about 100 or 150 feet from him when he first noticed it; that he kept on going and finally stopped; that he stopped at a distance between 200 and 250 feet from the crossing; that he was driving a two and one-half ton truck; that he did not hear any signals; that his hearing was not very acute.

The testimony of Waters shows that he was across the railroad track and driving down approximately along the side of the track before he noticed the approach of the train. We quote from the testimony of the witness Clarence A. Moore, who was driving the car immediately following the truck, to wit: "I heard the crash between the train and Lahey's car, and at that time I was about 50 feet, approximately, from the crossing. There was one car behind me that I know of; it was Abshire's. I saw the train when I was practically on the tracks, or just over the tracks; it was about 100 feet away. I saw the outline of the engine and the headlight at the same time. I could not see the headlight much further than you could see the outline of the engine. There was a heavy fog; you could see about 100 feet in that fog at the particular time of the crash. I was going up on the incline right on the tracks before I realized that I was approaching a railroad crossing about 15 or 20 feet away. At that time I looked to see whether or not I could see a train, and could not, and did not hear any noise." On cross-examination this witness testified:

"Q. About how far from the cattle-guard? A. Well, less than 100 feet.

"Q. Can you give us any better idea than that, between 50 and 100 feet? A. No. I would not say that close to it.

"Q. Close to 100 feet behind the cattle-guard? A. The distance, from my view of it, it looked about 100 feet from the cattle-guard.

"Q. That is south of the cattle-guard? A. Now of course it is very foggy, yes sir.

"Q. It was hard to estimate distances, was it not? A. Yes, sir.

"Q. It may have been further or it may have been closer? A. Yes, sir."

The witness Abshire testified as follows: "I was maybe 75, 80, 90 or 60 feet, something like that, from the crossing at the time the crash occurred. The nature of the weather condition out there at the time of the crash was very foggy. I presume I could see maybe 100 feet, something like that. I think I was right on the track, just up crossing on the crossing when I first saw the train; it seemed to me just entering the cattle-guard, however far that may be. I had gone maybe 50 or 60 feet, something like that, before I heard the crash. I was 25 to 30 feet behind Mr. Moore's car that was ahead of me."

The witness Murphy testified as follows: "I do not recall any cars ahead of me. I do not know the position of the other cars or how close they were to me. I was traveling 15 or 20 miles an hour along the road. The weather was pretty foggy. There were times when I could not see very far, and there were other times when you might see 10 rods. There were times when you could not see 50 feet, hardly. I was coming close to the crossing; I knew I was going onto a railroad track; that was just as I got to the raise, or pretty close to the raise; there is a little sign there; it is about 30, 40 or 50 feet from the railroad track. When I first saw the train I was up on the tracks. When I first saw the train I saw a light to the left as I looked out of the window, kind of like a red ball. It looked like about 30 feet, I imagine 40 feet away, something like that. After the crash I stopped, perhaps, 75 or 100 feet somewhere along there." This witness further testified that he did not look back; that it was a damp fog; that he had the headlights lit; that he saw the sign as he was going up on the railroad track; from there on he looked and listened for an approaching train, but heard no bell nor whistle; that the window was out on the left-hand side of his car, which was the side on which the train was approaching; that he slowed down just as he came to the raise before going onto the railroad track. "The purpose of that was just a precautionary measure."

Glenn Pritchard, a witness for the plaintiffs, testified that he was riding with Murphy; that the Lahey car followed Murphy; that a car driven by a Mr. Asta was behind Lahey, and that Santino's car was behind Asta's; that they were driving possibly about 10 or 12 miles an hour; that the lights of Lahey's car were lit; that they almost stopped at the culvert; that the windows of the car were down; that after passing the culvert they kept going at a slow rate of speed; that he saw the locomotive and light when they were on the track, or 4 or 5 feet past the center. "I knew that we were going onto the railroad track, and when I looked toward Murphy to say something, I saw the locomotive headlight; we could not have been more than 4 or 5 feet past the center." That the first time he saw the train it was right on them; he judged that it was about 75 feet away; that when he saw the train he just said, "the train"; that Murphy stepped on the gas; that he looked back through the rear window and saw Mr. Lahey's headlights going up like a beacon; Lahey's car must have been traveling about 20 feet behind Murphy's car; that it was real foggy; possibly in places you could see 30 or 35 feet; that headlights could be seen probably 40 or 50 feet; that you could not see a man over 35 or 40 feet away.

Jasper Asta (a Mexican), testified as follows:

"Lahey was ahead of me 200 or 300 feet, something like that; hardly can see; and all at once I see him way up in the track; and all at once I see the machine, the engine coming, you know, and all of a sudden, in a few seconds I see altogether, and then I heard the crash, and then everything was done; I can see the shadow of the machine, and I can see the shadow of the engine; I see the shadow coming both together at once; I was around 200 or 300 feet away; I was traveling 10 to 15 miles an hour in my truck.

"Q. Where was the train when you first saw it? A. It was on the railroad track.

"Q. How far from the crossing? A. Well, I cannot say; I saw the shadow; it looked like all coming together; I did not see the train very far from the engine.

"Q. At the time it hit? A. I never see; very few seconds they went together; that is all I can say."

Manual Coray (also a Mexican) testified that he was riding with Asta in a Ford truck; that they were about 100 feet behind Lahey; that he saw the crash when he heard the noise when it hit, and could see the shadow of the engine; that it was pretty foggy; that you could not see 50 feet ahead in some places and in some places you could see pretty good; that all the gang had lights lit. The record further shows that Asta stopped his car at the time of the crash, and the measured distance from the crossing was testified to by the conductor of the train as being 280 feet.

Our attention has not been called to, and we have not found in the record, any testimony as to the conduct of Lahey just preceding his approach to the railroad crossing. Whether he did or did not take any precautionary measures is absolutely undisclosed. The question of visibility, as shown by the testimony, we think amply supports the statement of the trial court as to the conclusion on that question which might properly be drawn by the jury, to wit, that visibility did not exceed over 100 feet.

The appellants' argument is that Lahey blindly followed the immediately preceding car, without exercising any precautionary measures to insure his own safety. This, of course, is simply argument, and a conclusion at which the jury might have arrived, but the result discloses that this view was not accepted by the jury.

As to whether signals were given of the approaching engine, there was much negative testimony given by witnesses who heard the crash. Six witnesses, who were somewhat in excess of 1,800 feet away, heard no signals, no bell nor whistle, but did hear the crash. Of the drivers of the caravan, two testified that they heard whistle signals practically at the time of the collision. Others testified that they heard no whistles or bell signals. One witness testified that he did not hear the crash. The fact that the witnesses were in close enough proximity to hear the crash, we think justified the conclusion of the jury that if a whistle had been blown or a bell rung, they would have heard such signals.

An examination of the testimony of the witness Blanos, for the defendant, shows that the whistle which he testified to having heard, was blown at the instant of the crash. The record does show that very shortly after the crash, signals were blown to give warning of the backing up of the train, and also to send out the rear flagman.

[1, 2] The negative testimony or testimony of witnesses that they did not hear the ringing of a bell or the sounding of a whistle is admissible and sufficient to support a verdict of the jury as to the nongiving of signals, we need only to cite the following cases without quoting therefrom: Jones v. Southern Pacific Co., 74 Cal.App. 10, 239 P. 429; Switzler v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 138, 285 P. 918. The drivers of the cars in the caravan to which we have referred are shown by the transcript to have been sufficiently near to justify the conclusion of the jury that they were in a position to hear warning signals, if any had been given, and also that the testimony of the witnesses who heard the crash were sufficiently near to have heard warning signals, if any had been given.

[3, 4] Based upon the testimony which we have summarized, the appellant challenges the correctness of two instructions given by the court to the jury, the first one of which reads as follows: "It is a presumption of law that a person takes ordinary care of his own concern, and as applied to this case, this presumption means that it is to be presumed, in the absence of evidence to the contrary, that Henry Lahey did everything that a reasonable and prudent man could have done under the same circumstances for the protection of his own

safety, and the burden of pleading negligence on the part of Henry F. Lahey is upon the defendants, and that unless the presumption I have referred to is overcome by satisfactory evidence, you will find for the plaintiffs upon the issue of contributory negligence."

The second challenged instruction reads as follows: "A person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution and caused a bell to be rung or whistle blown, as required by law."

Upon the correctness of the giving of these instructions a large number of cases have been cited. These cases have been considered, but only a limited number of them need to be referred to in this opinion. We have endeavored to select the cases which most clearly set forth the law involved in this action.

In the case of Tyson v. Burton, 110 Cal. App. 428, 294 P. 750, 753 (hearing denied by the Supreme Court), this court had occasion to examine and list authorities involving the correctness in giving instructions similar to the two which we have set forth herein, and also as to when such instructions are proper. We began with the case of Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393, where a limitation appeared in one of the instructions, just as appears in the second instruction above set forth. We quote from the Tyson Case as follows: "In support of the instruction, however, we are cited to the case of Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393, 395, where a somewhat similar instruction was given to the jury reading as follows: 'The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence.' At first reading it might seem that the approval of the instruction which we have just quoted is conclusive in favor of the instruction involved in the instant case. A closer inspection of the instruction given in the Olsen Case, and relied upon by the respondent in support of the instruction given in the instant case, shows that the two instructions are readily distinguishable. In the instant case no limitation is placed upon the instruction, and the presumption was not only declared to be a species of evidence, but was to be considered by the jury at all times in its deliberations, and in that particular differs very materially from the limitation placed upon the instruction in the Olsen Case. There it is said: 'This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.' It may be further observed that the opinion in the Olsen Case does not cite or analyze any former cases where a like presumption has been held applicable to instances where all the parties are alive and the circumstances are fully testified to by them and by eyewitnesses. The cases which have been called to our attention, and which we have been able to discover where the presumption as to taking care of one's self and obeying the law, relate to instances where one of the parties is deceased. As said in Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083, 1085: 'There is also another well-recognized rule of law applying to accidents like the one in the case at bar, to wit, that deceased is presumed to have exercised ordinary care for his own safety.' This rule is fully and fairly stated by Mr. Justice Henshaw in the case of Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 143 P. 714, 716, as follows: 'Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ.Proc. § 1963, subd. 4. * * * This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide'—citing Boyle v. Coast Imp. Co., 27 Cal.App. 714, 151 P. 25; Kreitzer v. Southern Pac. Co., 38 Cal.App. 654, 177 P. 477. And as said in the leading case of Larrabee v. Western Pac. R. Co., 173 Cal. 743, 161 P. 750, 751: 'But, touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be "an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the uncontradicted evidence of the circumstances attending the accident overthrows it."' A large number of cases are cited in this opinion. A well-considered opinion citing authorities on the subject of the application of the presumption that a party takes due care of his own welfare is to be found in the case of Ross v. San Francisco-O. T. Rys. Co., 47 Cal.App. 753, 191 P. 703. It is there held that the presumption is applicable where one party is deceased, and the death of the party alleged to be due to the negligence against whom the action is prosecuted where there were no eyewitnesses to testify to facts controverting the presumption. To the same effect is the case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027. In that case there was no testimony as to the conduct of the defendant, and the presumption of due care was allowed to support the judgment. See, also, Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999; Carpenter v. Atchison, T. & S. F. R. Co., 51 Cal.App. 60, 195 P. 1073. In the case of Ryan v. Union R. Co., 46 Utah, 530, 151 P. 71, 74, the Supreme Court of Utah, considering the question of presumptions, held as follows: 'In the absence of evidence there is a presumption that the deceased used due care and, for his protection, did all that reasonably was required of him. * * * When, however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined not on the presumption, but upon the facts and circumstances proven.'"

In Pinello v. Taylor, 128 Cal.App. 508, 17 P.(2d) 1039, 1041, an instruction was given similar to one challenged herein. The court there said: "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he will not be exposed to danger which will come to him only from violation of law or duty by such person." (Citing a number of authorities.) This comment by the court is based upon the theory that the instruction should be limited, as pointed out in the Tyson Case, from which we have quoted.

In the case of Dullanty v. Smith, 203 Cal. 621, 265 P. 814, 816, an almost identical instruction was upheld by the Supreme Court. The instruction there given reads: "I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution."

In contravention of the foregoing authorities and others which we will hereafter cite, the appellants rely strongly upon the case of Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788. The facts of that case, however, are readily distinguishable from the facts involved herein. There atmospheric conditions did not limit visibility. There were no objects obstructing the view, with which the driver of the car involved was unfamiliar. Ample opportunity to observe the approach of the train was afforded if the driver of the car would only use the means clearly afforded him. All he had to do was to look, at a proper distance from the danger zone. If he had looked, the court held that he must have seen, and therefore the conclusion was arrived at that he did not look.

[5] The facts disclosed in the opinion in the case of Christianson v. Southern Pac. Co., 133 Cal.App. 515, 24 P.(2d) 536, leads us to the conclusion that the ruling there had is not determinative of the questions presented for our consideration. In the Christianson Case there was, just as here, quite a heavy fog. The testimony shows, however, that the train which collided with the automobile which Mrs. Christianson was driving could be seen for at least 200 feet; that the crossing was protected by a wig-wag signal, which in addition to swinging back and forth, also was supplemented by a ringing bell; that Mrs. Christianson had stopped before going upon the crossing for the purpose of allowing a train passing in one direction to go by, and thereafter drove upon the crossing and was killed by a train proceeding in the opposite direction. In addition, the facts show that a red light was displayed at the crossing indicating the approach of the train. There was also testimony as to the whistle being blown. Having stopped her automobile before proceeding over the crossing, in view of the signals to which we have referred, the conclusion necessarily follows that Mrs. Christianson, instead of further acting upon the information which she had received of the dangers of proceeding, disregarded the same and attempted to drive her automobile over the crossing notwithstanding the hazard of so doing, of which the facts disclosed demonstrate that she was well aware. Nothing of that kind appears in the record which we are considering. Likewise, an examination

of the opinion in the case of Friddle v. Southern Pac. Co., 126 Cal.App. 388, 14 P. (2d) 568, 572, discloses the inapplicability of the ruling there had to the facts involved in the case which we are considering. In the Friddle Case the view of the deceased was unobstructed. The deceased was driving a truck along a highway paralleling the tracks of the railroad company for a considerable distance. We quote the following from the opinion: "The evidence adduced by plaintiff discloses a man familiar with the locality and the conditions there existing driving a truck at a speed of approximately thirty-five miles per hour. It shows this driver in a position of complete safety on a highway paralleling a railway track upon which is a train approaching a crossing at a speed of fifty miles per hour, which train is at a distance of between two hundred and fifty yards and three hundred and fifty yards directly behind the truck. The location of the highway upon which the truck is being operated is sixty-two feet from the rails. It discloses the driver of the truck, with the train rushing to the crossing, turning from his place of safety directly into the path of the oncoming train. We may then reasonably and seasonably inquire by what process of reasoning can we indulge the presumption that the truck driver exercised due care for his own safety." We are confronted in this case with no such facts. We have an obstructed view and testimony upon which the jury was entitled to act, that no warning signals were given of the approach of the train. Whether the oncoming train was making considerably less noise than usual by reason of the fact that the engine was practically drifting, using only ten pounds of steam, was a matter for consideration by the jury. In the instant case, whether the deceased did or did not stop and look is practically immaterial, for the simple reason that looking for the approach of a train that could not be seen under the prevailing conditions would have been a useless proceeding; that the jury had a right to assume that the deceased did not hear the approach of the oncoming train from the testimony of the other members of the caravan that such approach was unheard by them. The fact that the living members of the caravan did not hear the approach of the train, being in the same relative position other than immediately upon the track, is some evidence at least that the deceased did not hear any noise made by the approaching train—not to here mention signals.

[6] All of the cases which we have cited we deem, however, controlled by the decision of the Supreme Court in the case of Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529, 532, as to the correctness of giving an instruction that a deceased is presumed to have exercised due care for his own safety, and that this presumption is evidence in the case, and is to be so considered unless it is dispelled and overcome by the testimony that in certain instances such a presumption may outweigh testimony to the contrary. The language of the Supreme Court in the Smellie Case is "that a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state." (Citing a number of cases.) We do not need to cite authorities to the effect that where different minds may draw different conclusions from the conditions presented for consideration, the cause presents facts for the jury to determine, and not of law for the decision of the court.

[7] Based upon the testimony as to the prevailing conditions on the morning of January 28, 1935, the testimony of numerous witnesses that no warning signals were given of the approach of the train, aided by the presumption that the deceased exercised the requisite care for his own safety, we must hold that whether the deceased was or was not guilty of contributory negligence, presented a question of fact for the jury to decide, and that decision having been adverse to the appellants, must be accepted by the court.

As to the obstruction of view by the foggy condition of the morning and the additional obligations cast upon the respective parties, we think it unnecessary to do more than refer to the opinion in the case of Hoffman v. Southern Pac. Co., 101 Cal. App. 218, 281 P. 681, and the same case reported in 215 Cal. 454, 456, 11 P.(2d) 387, adopting in part the opinion of the Appellate Court.

[8-10] The objection that the court erred in giving an instruction to the jury in the language of section 486 of the Civil Code does not appear to us to be well taken. There are several provisions in that section which may constitute negligence and give rise to a cause of action other than that of mere speed alone. No regulations are

shown to have existed regulating the speed of the train as it came to the Power Line crossing. Therefore, the only duty of the railroad company was to regulate the speed of the train so as not to have added to the hazard of others possessing a right to use the same crossing. If, in exercising its right to propel its train over the Power Line crossing without giving the necessary warning of its purpose so to do, anyone was proximately injured thereby without any contributory negligence on his own part, the company would be liable irrespective of the question of speed. In the instant case the testimony, as we read it, is all directed to the question of the silent approach of the train, and was the vital issue establishing the negligence of the appellants, irrespective of the question of speed, and if, in so doing, as we have stated, the deceased, not contributing to his own injury, was killed, liability on the part of the appellants became fixed. The instruction certainly did not mislead the jury. In what we have said in the foregoing we have not overlooked the fact that one approaching a railroad crossing must exercise ordinary care for his own safety, as a railroad crossing is always an evidence of danger.

[11] Finally, the appellants urge that the verdict as reduced by the trial court was and is excessive. This presents a question always surrounded by more or less uncertainty, and cannot be adjudicated along any fixed and unvarying lines. We may here add, also, that the earning capacity or possibilites of any one, during the years 1933 and 1934, owing to the chaotic economic conditions, cannot be considered as furnishing a just rule for estimating earning capacity. At the time of the death of Lahey he had a life expectancy of a trifle over twenty-one years. During a portion of his life he was employed as a miner, earning an income of a trifle over $190 per month. From October, 1923, to March, 1929, his earning appears to have been somewhere in the neighborhood of $150 per month. This was while he was living at Longview, Wash. Thereafter, he moved to Burns, Ore., where he lived two years, and earned approximately $200 per month. The family afterwards moved to Klamath Falls, Ore., where the deceased lived from January, 1931, to May, 1932, where he earned approximately $250 per month. Coming to Sacramento in May, 1932, his average income was cut down to about $100 per month. Subsequently he became a worker in the organization known as SERA, earning about $60 a month. This is outside of the pecuniary loss suffered by the family in comfort, protection and society. As said in some of the cases cited, notably, in Skelton v. Pacific Lumber Co., 140 Cal. 507, 74 P. 13, 15, and Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999: "The proof of the value of the deceased as a wage earner might not alone justify the amount awarded, but there were other elements of damage to be considered by the jury, and which they alone were competent to consider." In view of all the facts which the jury were entitled to consider, we do not feel justified in concluding that the verdict was excessive.

It follows from what we have said that the court did not err in denying appellants' motion for a directed verdict; that the ruling of the court denying appellants' motion for judgment, notwithstanding the verdict, was correct; and that the judgment and orders of the trial court should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

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17 Cal.App.2d 55

Ex parte REILLY.

Cr. 1924.

District Court of Appeal, First District,
Division 2, California.
Oct. 14, 1936.

1. Judges 🔑49(2)

Evidence of alleged bias of trial judge against accused, charged with contemptuously attacking grand jury, which showed no statements made by judge concerning accused or his newspaper in which alleged contemptuous article appeared, *held* insufficient to show prejudice against accused so as to require trial before another judge.

2. Contempt 🔑60(2)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, copy of newspaper in which publication appeared which contained accused's name as editor *held* admissible to prove accused wrote and published article, where witnesses testified that such issue was printed for, paid for by, and delivered to, accused.

3. Contempt ⚷60(3)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, evidence *held* to sustain allegation that accused, as editor and publisher of newspaper, personally published and permitted to be published the contemptuous article.

4. Contempt ⚷60(3)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, whether accused was publisher of newspaper in which contemptuous article appeared was question of fact which could be proved by either direct or indirect evidence.

5. Contempt ⚷61(6)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, finding that article was addressed to and intended to affect investigations of grand jury *held* sustained by the evidence.

6. Contempt ⚷8

Newspaper article concerning grand jury, which specified facts and mentioned such names that trier of facts was warranted in inferring that article was meant to refer to grand jury and its acts, *held* sufficient on which to predicate charge of contempt, notwithstanding article did not mention particular grand jury or its official acts.

7. Contempt ⚷54(4)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, allegation of affidavit charging constructive contempt that investigations of grand jury had not been completed at time of publication *held* sufficient, as against contention facts were required to be alleged showing investigations had not been completed.

8. Contempt ⚷54(4)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, affidavit charging constructive contempt *held* not required to allege facts showing legal impanelment of grand jury, where facts alleged showed that a body was claiming to be duly impaneled and acting grand jury, since existence of de facto grand jury was sufficient for purposes of contempt proceeding.

9. Contempt ⚷54(3)

In contempt proceeding based on accused's alleged newspaper publication of article concerning grand jury, affidavit charging constructive contempt was not defective because it contained an allegation made on information and belief.

◆

Application for writ of habeas corpus by Philip Reilly.

Writ discharged, and petitioner remanded to custody of sheriff.

Raine Ewell, of San Francisco, for petitioner.

Earl Warren, Dist. Atty., R. H. Chamberlain, Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondent.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus, and the petitioner seeks to have a judgment declaring him guilty of contempt of court declared void. His attack is twofold. In the trial court an affidavit was filed in which he was charged with having committed a constructive contempt of court. An order to show cause was served on him, he appeared, filed a demurrer attacking the sufficiency of the said affidavit, and he also filed an answer thereto. At the same time he filed an affidavit alleging that it appeared probable that by reason of bias or prejudice of the trial judge a fair and impartial trial could not be had before him. As the petitioner discusses the second proposition first we will take it up first.

[1] After the petitioner's affidavit alleging prejudice was filed, the trial judge, Judge Frank M. Ogden, one of the judges of the superior court of the state of California in and for the county of Alameda, filed an affidavit denying bias or prejudice. The parties having failed to agree on a judge to hear the charge of disqualification the judicial council appointed the Honorable Maurice T. Dooling, judge of the superior court of the state of California in and for the county of San Benito, to hear said charge. A hearing was had on August 27, 1936. An examination of the transcript of said proceedings discloses that there was no evidence introduced showing any state-

ment or remark by Judge Frank M. Ogden ever made of or concerning this petitioner, nor of or concerning the "Free Press," the periodical in which the alleged contemptuous article appeared. There was some evidence to the effect that in other issues of the Free Press on former occasions four different articles derogatory of Judge Frank M. Ogden had appeared. The latter testified that prior to reading petitioner's said affidavit alleging the disqualification of him he had never seen two of said articles and that the other two were published during one of his campaigns and he then considered, and at the time of the hearing he considered, that petitioner had a right to form his own opinion of candidates and to publish his opinions if he saw fit to do so. He further testified that as to certain facts stated in said articles the writer was mistaken.

Before his election as judge, Judge Frank M. Ogden had been a deputy in the office of Mr. Earl Warren, who was then and is now district attorney of Alameda county. For many years, from time to time, attacks were made in the Free Press on Mr. Warren. Judge Ogden testified he had heard of such attacks and resented them, but he had never read any of said articles and that he conceded the right of anyone to disagree with or to criticize anyone else and such facts would not cause him to be biased or prejudiced in the trial of a proceeding to which either of such persons might be a party.

As to the charge that he had been active in prosecuting and framing the charge of contempt, Judge Ogden testified to the facts, which showed he had directed the foreman of the grand jury to present the matter and he had discussed with the deputies in the district attorney's office how the papers should be entitled, but further than that he had taken no part.

The petitioner cites and relies on Briggs v. Superior Court, 215 Cal. 336, 10 P.(2d) 1003. We think it is sufficient to state that the facts above recited furnish no basis for applying to this case the doctrine of the case cited. Moreover, we have read the record in this case from cover to cover and we have tried to recite every single fact which has the semblance of indicating bias or prejudice as claimed by the petitioner.

We will pass now to the facts out of which the charge of contempt arose. In June, 1935, department 5 of the superior court of the state of California, in and for the county of Alameda, impaneled a grand jury. That body has acted as such ever since and is now acting. Peter H. Hoar and Anna C. Law are members of that body. Commencing in the month of June and continuing down to nearly the present time the said grand jury had under consideration certain charges against the manager of the city of Alameda. B. Ray Fritz was at the time the investigation commenced the manager of Alameda. During the same period the grand jury had under investigation certain complaints regarding the administration within Alameda county of the affairs of the state board of equalization involving violations of law by certain officers and employees of said state board of equalization. One of such officers and employees of said board was Michael Connolly. On June 25, 1936, two indictments were returned against B. Ray Fritz. On July 9, 1936, an indictment was returned against Michael Connolly. But said investigations were not completed and had not been completed on July 14, 1936. However, on the date last mentioned a periodical, "Free Press," published an article in words and figures as follows, to wit:

"A Grand Farce

"It is not generally known but it is a fact nevertheless, that, Grand Jurors and committing magistrates are liable for maliciously issuing indictments, or binding persons over to the Superior Court on flimsy testimony framed by country lawyers trying to build up a reputation. Ignorance of the law is no excuse even for Warren, well-known as an ignoramus despite his Masonic plumage, and his political support coming from that notorious crooked gang of fakers who have never hesitated to steal. In the case of City Manager Fritz hounded to death by that notorious thieving gang on the payroll of the Gas Company all because he dared attempt to stop their graft he will have a comeback. This brainless gang of imbeciles among them Pete Hoar and Anna Law, brought in a flock of indictments against Fritz charging perjury on the statement of a self confessed perjurer. The law is plain in this case, there must be corroborating testimony. Just take the two 'Yes Men' and see how clean their skirts are, Anna, she just loves to wear the other fellow's panties, she did try to put over several deals on the purchase of property for play grounds. Auditor Williams caught them red handed and how he kicked the pants of the gang until there was nothing left in the way of a cut. The Cisco property died in the attempt, since then the political boss is known as Cisco Annie. A damage suit against Peter Hoar, the millionaire would be more interesting, he has something substantial while about the only thing of value Anna has left is, Herbutt, the handy man who can drive a Hennery home to roost with one arm, while the other was wrapped around the midget boss. It would be interesting to hear Mr. Hoar explain why neighboring cattlemen assisted him in his round up for the last several years. Of course there is a reason, that is not entirely youthful errors.

"Then there is the Mike Connolly case. Just because a big mouthed imbecile and his flunky grand jurors have been able to fool the half wits privileged to vote, there might be a story to tell that would change the entire complexion under a new law that goes to show the difference between right and wrong. A judgment against grand jurors would be terrible?"

[2-4] The petitioner contends there was no proof that he wrote the article complained of or published it. In that connection he complains because a copy of the issue of July 14, 1936, of the Free Press was received in evidence. Before said copy was received in evidence, witnesses had testified said issue, and other issues of said paper printed during the last two years, were printed for, paid for, and delivered to petitioner or his order. Each issue was six thousand to seven thousand copies. In the affidavit on which the order to show cause was based it was alleged: "That said edition of said newspaper was immediately after its said publication, freely circulated among the members of the general public in Alameda County." That allegation was not denied but was admitted by the petitioner. When the foregoing evidence was introduced, the petitioner, although present at the hearing, did not take the stand nor did he introduce any evidence whatever. When the record so stood the complaining witness offered said copy of said paper and it was received in evidence. At the top and in the left-hand corner of page two of said copy there is printed: "Free Press. Philip Reilly—Editor and Publisher." Under the circumstances just recited the trial court made a finding that the allegations of paragraph VI were true. Said paragraph alleged: "That affiant is informed and believes and on such information and belief alleges the fact to be, that said Philip Reilly, as editor and publisher as aforesaid, himself personally published, and being in charge and control of said publication, permitted to be published said article as aforesaid." This court is wholly unable to state there was no evidence before the trial court sustaining the allegations contained in said paragraph. As to who was the publisher of Free Press was a fact which, like any other fact, could be proved by indirect evidence or by direct evidence. Globe Automatic Sprinkler Co. v. Braniff, 89 Okl. 105, 214 P. 127, 129.

[5] In the affidavit on which the order to show cause was based, there were appropriate allegations to the effect that said article was addressed to and intended to affect said investigations mentioned above. Those allegations required the trial court to construe the language contained in said article in connection with all of the circumstances. It found said allegations to be sustained. Again it may not be said in the exercise of a sound discretion it did not properly construe said language.

[6-9] The petitioner contends the affidavit on which the order to show cause was issued failed to state facts sufficient on which to predicate a charge of contempt. He asserts that the published article did not on its face mention the said grand jury of Alameda county or its official acts. That is so, but it specified such facts and mentioned such names that the trier of the facts was warranted in inferring that the said article was meant and intended to refer to said grand jury and its acts. He then asserts that no facts were alleged showing the investigations of the grand jury had not been completed. The affidavit contained a direct allegation to that effect. More was not necessary. Again, it is claimed that facts are not alleged showing the legal impanelment of the grand jury. No authority is cited to the effect such allegations were necessary. The alleged contempt was of the court, not the grand jury. The affidavit was sufficient. Ex parte Barry, 85 Cal. 603, 25 P. 256, 20 Am.St.Rep. 248; McDougall v. Sheridan, 23 Idaho, 191, 128 P. 954, 963; Ex parte Lindsley, 75 Cal.App. 122, 241 P. 934. The alleged facts show that a body was claiming to be the duly impaneled and acting grand jury of Alameda county. That is, it was at least a de facto grand jury and that was sufficient for all of the purposes of this proceeding. In this connection the petitioner claims as the grand jury was impaneled June 16, 1935, it had

ceased to be a legal body. The point has no merit. Halsey v. Superior Court, 152 Cal. 71, 91 P. 987. It is said the affidavit was defective because it contained one allegation made on information and belief. That point is not an open one in this state. It has been decided against the contention which the petitioner now makes. Ex parte Acock, 84 Cal. 50, 54, 23 P. 1029; Ex parte Brown, 66 Cal.App. 534, 537, 226 P. 650.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff of Alameda county.

We concur: NOURSE, P. J.; SPENCE, J.

16 Cal.App.2d 691

FECHTNER et al. v. COSTA et al.

Civ. 5598.

District Court of Appeal, Third District, California.

Oct. 3, 1936.

Rehearing Denied Nov. 2, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Automobiles 🔑245(28)

Determination of relationship existing between truck driver hauling milk for dairymen's association under oral arrangements between partnership owning truck and association *held* for jury as regards liability of association as employer for negligent acts of truck driver.

2. Trial 🔑139(1)

Determination of meaning and effect of witness' answer to question *held* for jury.

3. Automobiles 🔑244(26)

Evidence that driver of milk truck operated by copartnership for collecting milk for milk producers' association operated under an oral arrangement, that at time of accident in which truck was involved truck was loaded with milk cans owned by association which were being delivered to creamery, and that copartners received a flat rate per 100 pounds delivery and that, if delivery was not properly made, association could discontinue employment of copartners, *held* to sustain finding that truck driver at time of accident was an "employee" of association so as to render association liable for driver's negligence.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

4. Appeal and error 🔑717

Reviewing court cannot examine opinion of trial court to determine holding of trial court, since opinion constitutes no part of record on appeal.

5. Appeal and error 🔑854(1)

Order of trial court entered in minutes is only record of trial court's action, and order is to be measured by its terms and not by reason court may give for it.

6. Appeal and error 🔑854(6)

Order denying new trial which was otherwise correct *held* not erroneous because of reasons advanced in trial court's opinion in passing upon motion.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Wilhelmina Fechtner, widow of Paul Fechtner, and others against Manuel Costa and others, copartners under the firm name and style of Costa & Cotta, and the Los Banos Dairymen's Association, a corporation. From an adverse judgment, the Los Banos Dairymen's Association appeals.

Affirmed.

Thomas F. Lopez, of Fresno, Stephen P. Galvin, of Merced, and Butler, Van Dyke & Harris, of Sacramento, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, and Borton, Petrini & Conron, of Bakersfield, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment, based upon a verdict of a jury in favor of plaintiffs, arising out of an action for damages brought by the widow and children of Paul Fechtner, who was killed by being struck by a truck operated by Manuel Costa and owned by Costa & Cotta, a copartnership.

The accident occurred while Costa was engaged in hauling milk to the creamery of appellant, and the grounds of appeal are, first, insufficiency of the evidence to support the implied finding of the jury that Costa was a servant of appellant; second, errors in the admission and rejection of certain evidence during the trial; and, third, abuse of discretion in denying the motion for a new trial. The point most strongly emphasized by appellant is that the evidence fails to support the finding that the driver of the truck was an employee of the association.

[1] The arrangements between Costa & Cotta, the association, and the milk producers were entirely oral, and it was within the province of the jury to determine the relationship between these parties. In Giacomini v. Pacific Lumber Co., 5 Cal.App. 218, 89 P. 1059, 1060, the question was whether plaintiff was a servant of defendant or an independent contractor. The court there said: "Where an alleged contract rests entirely in parol, it is the province and duty of the jury to determine whether there is a contract, and to ascertain and fix its terms, unless these terms are precise and explicit and admit of one construction only."

Likewise in Chapman v. Edwards, 133 Cal.App. 72, 24 P.(2d) 211, 214, where, in a collision between a truck owned and driven by one Klein resulting in the death of Charles Chapman, the same question arose. The arrangements were oral, and Klein was paid by the load for dirt he was hauling in his truck. The question of the relationship between Klein and Edwards Bros. was submitted to the jury. The court there held: "Conceding that there may be certain features of the employment from which an inference supporting the relationship of an independent contractor may be drawn, yet it is equally true that there are present many facts and circumstances from which it might be reasonably inferred that the relationship was that of master and servant. It is only where the evidence is reasonably susceptible of but a single inference that the question of whether one is an employee or an independent contractor becomes one of law for the court."

To the same effect we find, among many others, the cases of Chas. R. McCormick Lumber Co. v. O'Brien, 90 Cal.App. 776, 266 P. 594; May v. Farrell, 94 Cal.App. 703, 271 P. 789; Eng-Skell Company v. Ind. Acc. Comm., 44 Cal.App. 210, 186 P. 163; Dillon v. Prudential Ins. Co. of America, 75 Cal.App. 266, 242 P. 736.

It is clear, therefore, that the question of relationship between the driver of the truck and the association is a question for the jury to determine, which question was in this case submitted to them under instructions of which no complaint is made.

Let us then examine the facts to see if there is to be found in the record substantial evidence supporting the implied finding of the employee-employer relationship, for, if such evidence is found in the testimony and accepted by the jury, that is a complete answer to the contention of appellant. It appears from the evidence that the accident in question happened upon the Pacheco Pass highway near the town of Los Banos. At that time the deceased was assisting some parties who had been in an accident, and, while Fechtner was standing between two cars, defendant Manuel Costa, operating a truck owned by himself and Tony M. Cotta, and carrying approximately a five and one-half ton load of 110 milk cans, some filled and some empty, came down the highway and ran into the rear end of one of the parked cars, causing the death of Fechtner.

The appellant, Los Banos Dairymen's Association, operates a large creamery near Los Banos, milk for which is gathered from the producers in that portion of the San Joaquin Valley. The milk is either delivered at the creamery by the producers themselves or is hauled by independent truckmen for the dairymen or, as was the case here, gathered up at the ranches and delivered to the association by truckers, who, it is claimed by respondents here, were employees and servants of the association. In the case of defendants Costa and Cotta, the record reveals that the check by which they were paid while hauling the milk and empty cans involved in this accident was the check of the Los Banos Dairymen's Association. Upon the check appears in type the following: "This voucher-check is issued in payment of items as per statement following. The endorsement of payee on back will constitute a receipt in full." Then upon the face of the check in typewriting appears, "Hauling: Aug. 1–16, 1934, Incl." This check was signed by the president and secretary-treasurer of the association and indorsed by Costa & Cotta, and was drawn upon the banking account of the association. From the evidence it appeared that they had but one bank account from which they paid all of their employees, and other disbursements connected with the business.

Mr. Costa testified that he had no conversation at any time with the producers whose milk he was hauling concerning the method of payments. Both Mr. Costa and Mr. Cotta at times solicited new customers for the association. No written agreement was produced defining the relationship of Costa & Cotta and the association nor between Costa & Cotta and the milk producers.

At the time of the accident there were approximately 110 milk cans on the truck. These cans belonged to the Los Banos Dairymen's Association, and, of the 110 cans, 100 were filled with milk and the remaining were empty, being returned to the association. It was also testified that all cans were returned to the creamery, and each day steamed and scalded by the association. For the services rendered by Costa & Cotta they received eight cents for every hundred pounds of milk delivered to the creamery. This rate was paid regardless of the distance the milk was hauled. This compensation for hauling was deducted by the bookkeeper of the association from the cream check of each milk producer, and the balance thereof paid to the producer, and the amount for hauling paid as heretofore indicated by check of the association directly to Costa & Cotta. Certain producers engaged truckers other than Costa & Cotta who were paid directly by the producers themselves, and in one instance, at least, the producer used one of his own employees to haul the milk to the creamery, and these producers received full price from the association for their milk without any deductions for hauling.

Costa & Cotta also returned to the producers whose milk they collected the weight and test tags for the milk delivered by them to the association. All of the cans used by Costa & Cotta in their work belonged to the association, and the association numbered the cans and weighed and tested the milk delivered by them.

[2] It is contended by respondent that the association had the right to discharge Costa & Cotta. The answer to the question eliciting this information is somewhat ambiguous, but it was for the jury to determine what the witness meant by his language. Mr. Costa was asked: "Q. The Los Banos Dairymen's Association had the right to fire you anytime they wanted to, didn't they? A. Well, if I went in the wrong way there, yes." Counsel differ as to what the witness meant, but the jurors were the judges of the meaning and effect of that evidence.

[3] Hillen v. Ind. Acc. Comm., 199 Cal. 577, 250 P. 570, holds that the fact one was performing work and labor for another is prima facie evidence of an employment and supports the presumption that such person is the servant and employee of the other in the absence of evidence to the contrary. While a recital of the single transactions between the association and Costa & Cotta, standing alone, might not be enough to establish the relationship of employer and employee, yet, taken together, they indicate a course of conduct sufficient to justify the implied finding of employer and employee.

Appellant also cites many cases of what they claim to be errors in rulings on evidence. These rulings had to do with the effect of testimony given by a witness, when called under section 2055 of the Code of Civil Procedure; refusal to permit a witness to testify whether or not he was an agent or employee of the association; the asking of certain ambiguous questions which it is claimed resulted in confusion to the witness and misconception of the answers by the jury; and the refusal by the court to permit appellant to call defendant Costa as a witness under section 2055 of the Code of Civil Procedure.

We find no serious error in the rulings of the court upon the matters specified. Perhaps in some instances the court might have reached a different conclusion and made a different ruling, but we cannot see that it would have affected the rights of any of the parties to this litigation or the final result as reached by the jury. It is apparent the case was fully and fairly tried and all of the issues presented to the jury, and they, upon competent and sufficient evidence, have determined in accordance with the contentions of respondents.

The last contention of appellant is that the court abused its discretion in passing upon the motion for a new trial. Appellant bases its argument upon this point that the trial court in its opinion rendered in denying the motion for a new trial, after pointing out the various facts in evidence favorable to the association and those favorable to the plaintiffs, then said: "The jury after hearing the evidence, observing the witnesses, returning a unanimous verdict against the association thus finding they were bound as principals and the truckmen as their agents, delivering milk to them. While the court would have found otherwise I believe there was sufficient evidence upon which a verdict could be based and therefore the verdict is not against law."

[4] We cannot examine the opinion of the court to determine the holding of the court. The opinion constitutes no part of the record on appeal. 2 Cal.Jur. p. 488; Classen v. Thomas, 164 Cal. 196, 128 P. 329.

[5, 6] The order entered in the minutes is the only record of the court's action, and it is to be measured by its terms and not by the reason the court may give for it. The order of the court is that the motion for a new trial be denied.

We believe the trial court was entirely correct in denying the motion for a new trial, and, the verdict of the jury being fully supported by the facts in evidence, the judgment appealed from should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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17 Cal.App.2d 31

TAYLOR v. CHAPMAN et ux.

Civ. 1981.

District Court of Appeal, Fourth District, California.

Oct. 9, 1936.

Hearing Denied by Supreme Court Dec. 7, 1936.

Lis pendens 🔑22(5)

Where purchaser of two lots at tax sale brought quiet title action and filed lis pendens notice prior to recording of deeds to lots by owner, but with knowledge of actual facts failed to make owner defendant in the action, judgment obtained by purchaser subsequent to suit by owner to quiet her title to lots *held* not conclusive under statute as against owner, where purchaser's rights were not injured by failure to record deeds (Civ. Code § 1214, as amended by St.1895, p. 50).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marion Taylor, a single woman, against R. A. Chapman and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Virgil S. Kipp and Sherman Lacey, both of San Diego, for appellants.

R. J. Gresham, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff, a housemaid by occupation, purchased two lots from the Mission Beach Company for which she paid $3,800, receiving two deeds dated May 25, 1929, and September 15, 1930, respectively. She did not record the deeds until April 30, 1934, but she paid some $400 in taxes and assessments and her name and address appeared frequently on the tax and assessment records. The defendant R. A. Chapman was engaged in the business of searching tax records for the purpose of furnishing a tax service to certain investors. He discovered that a lighting assessment of $4.01 against one of the plaintiff's lots and $2.23 against the other were not marked paid. He claims to have purchased the two lots at a tax sale for these delinquent assessments and to have received deeds from the city.

On February 8, 1934, Chapman filed an action to quiet his title to these and certain other lots, naming eighteen defendants, including the Mission Beach Company, and recorded a notice of lis pendens. The plaintiff in the present action was not made a defendant in that action and did not intervene therein. On April 23, 1934, Chapman wrote a letter to Miss Taylor stating that he had been informed at the city hall that she had sent in funds to pay the lighting assessments on these lots; that these lots had been sold to him by the city treasurer for unpaid assessments; that he had advised the city office to return her money; that he was willing to sell her the lots; and that he had a suit pending to establish his legal title. Miss Taylor consulted an attorney and on May 12, 1934, brought the present action to quiet her title, filing a notice of lis pendens the same day. On May 24, 1934, the Mission Beach Company stipulated with Chapman that he might take judgment in the other action and on the same day judgment was entered quieting his title to the lots in question as to all defendants named in the action.

At the trial of the present action Chapman relied exclusively upon the judgment thus obtained, and did not introduce his tax deeds or make any proof as to the regularity of the proceedings upon which they were based. The court found that pursuant to deeds from the Mission Beach Company Miss Taylor was and had been continuously the owner and entitled to the possession of these two lots, and that the defendants had no right, title, or interest whatsoever in them; that through inexperience in business she had failed to record her deeds until April 30, 1934; that she had paid certain taxes and assessments but had overlooked and omitted to pay a lighting assessment of $4.01 against one lot and $2.23 against the other; that the defendants claimed to have bid in both lots at a delinquent sale held by the city treasurer for a trivial consideration, which was found to have been not less than $7 and not more than $10; that the defendants claimed to have become the owners of said lots through deeds which they claimed were issued by the city treasurer, but which were not in evidence; that on February 8, 1934, the defendants commenced an action to quiet title to said lots against Mission Beach Company, but the plaintiff was not made a party to said action; that a notice of lis pendens in said action was filed on February 8, 1934; that on May 24, 1934, these defendants obtained a judgment and decree purporting to quiet their title to said lots as against Mission Beach Company; that although these defendants were without knowledge or notice of this plaintiff's interest in said property at the time the other action was commenced, they had actual notice thereof before judgment was entered; that they had a full opportunity to make her a party to that action and knew where she was and that she could be readily served with process therein; that these defendants proceeded to take judgment without making her a party to that action; that this plaintiff had knowledge of the pendency of that action prior to May 24, 1934, but did not intervene in that case; that the decree entered in the other action quieting the title of these defendants as against the Mission Beach Company is not binding on this plaintiff, as she was not a party to said action, and they had notice of her claim prior to the time they obtained judgment; and that section 1214 of the Civil Code is not applicable to the case at bar as against this plaintiff. Judgment was entered quieting the plaintiff's title to these lots and the defendants have appealed.

The appellants rely entirely upon their judgment in the other action, contending that it was unnecessary, as against this respondent, to prove their title or the regularity of the tax sale through which they claim, that the only remedy open to this respondent was to have intervened in the other action, and that the judgment obtained by them is conclusive against this respondent under section 1214 of the Civil Code. This section, which originally provided that an unrecorded conveyance of real property is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration whose conveyance is first recorded, was amended in 1895 (St.1895, p. 50) by adding the provision relied upon by appellants, which reads as follows: "And as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

Ordinarily a judgment in a quiet title action is conclusive only against those who are made defendants therein, and ample provisions are made to enable a plaintiff to bring in a party whose interests and claims he desires to terminate. All proceedings in tax sales are in invitum, and tax titles are of little value in this state until the sufficiency and regularity of the proceedings have been confirmed through a quiet title action. The real purpose of such actions is to give the purchaser at a tax sale an opportunity to establish the validity of the tax proceedings and sale, and to give the former owner an opportunity to be heard. On the day the appellants filed their answer in the present action they secured a stipulation from the Mission Beach Company and obtained judgment in the other action. With full knowledge of the respondent's interest in the property and her payment of taxes and assessments for several years, of her address, and of the pendency of this action, the appellants, without making her a defendant or moving to consolidate the actions, hurried through a consent judgment without a contest, when they must have known that the Mission Beach Company had no interest in the property. And in the present action they made no effort to establish the validity of their tax deeds, claiming that the respondent lost her right by failing to intervene in the other action and that her deeds became ipso facto void when their notice of lis pendens was filed. If, as appellants claim, the rights of the parties were fixed and determined at the time the lis pendens was filed in the other action, under section 1214 of the Civil Code, the right of the respondent to intervene was an empty right and she would not have been able to attack the validity of the appellant's tax deeds or to establish her own title. If, on the other hand, she had a right to a hearing in some forum, she was not limited to intervention, but could file a separate action.

In Moore v. Schneider, 196 Cal. 380, 238 P. 81, the court considered section 1214 and compared it with the New York statute, but refused to pass upon the question whether the section would apply where a prior grantee was not made a party to the action, or where it appeared that a plaintiff had actual knowledge of the unrecorded claim of title at the time of the commencement of the action. It may be observed in passing that the wording of the New York statute would have permitted an intervention in such a case as this, with an opportunity to the respondent to establish her claim and to attack the validity of the tax deeds.

The appellants' interpretation of section 1214, if accepted, would lead to strange results which might often constitute a travesty on justice. Suppose, for instance, that the appellants had taken a quitclaim deed from some one who had owned these lots fifty years before, although there had been a dozen intervening owners, and had brought a quiet title action against that grantor who, consenting to judgment, had obviated the necessity of any real proof. By filing a lis pendens ahead of the deed of a bona fide purchaser a judgment thus obtained would render void the title of the real owner, without any hearing as to his rights and regardless of any lack of equities in the other claim. Again, a man purchasing a property for cash and recording his deed within an hour might find that he had no title because some one was sharp enough to file notice of lis pendens, a few moments before, in an action to quiet title against a fictitious owner. The case at bar furnishes another illustration which speaks for itself.

We are unable to believe that it was the intention of the Legislature to make section 1214 applicable to such a situation as that here presented, where the grantee in the unrecorded conveyance was not a party to the action referred to in the notice of lis pendens, and where the party securing the judgment obtained any rights he has through a tax sale, and not through the affirmative acts of the grantee in the unrecorded conveyance or of any of his predecessors. The purpose of the statute was to protect those who in good faith acquire an interest in property in reliance on the record. We think the amendment, added in 1895, was not unrelated to this purpose, and that it was adopted with this in mind. Assuming that the amendment applies where the party obtaining the judgment derived his rights from some person under whom the grantee in the unrecorded conveyance claims, and where the failure to record an instrument has substantially affected the rights of the party seeking the judgment, we are of the opinion that the amendment has no application in such a case as this where the appellants claim under a tax title and not under any grant, encumbrance, or lien made or suffered by the respondent's predecessor, where the respondent was not made a party to the action, and where the substantial rights of the appellants have not been injured by the failure to record the conveyance. Especially is this true where, as here, the appellants, with the burden of establishing the validity of their tax deeds as against the owner of the property, have failed to make such owner a defendant after being informed of the actual facts and after being served in another action brought by that owner.

If this section, as amended, was intended and is to be construed to apply in such a case as this, it is unconstitutional and void as depriving this respondent of her property without that due process of law which is guaranteed by the Constitution. The respondent paid for this property, received deeds therefor, and was the owner thereof. If the filing of the lis pendens in the other action rendered her deeds void and is conclusive upon her regardless of the validity of the tax sale, she has been deprived of her property without notice, without a hearing, and with no opportunity to defend her own title or to attack the claims of the appellants, and this in spite of the fact that another action was then pending to establish her claims, which were well known to the appellants. The situation here is entirely different from that prevailing in a case where a subsequent purchaser takes property subject to a mortgage and where his predecessor, being made a party, may be deemed to represent him in a foreclosure action which follows. In a quiet title action following a tax sale the former owner of the property is not the representative of the present owner, and no question of deceiving a subsequent purchaser, encumbrancer, or judgment creditor by failing to record a conveyance can possibly arise.

We conclude that under the circumstances here appearing section 1214 of the Civil Code has no application, and that the judgment relied on by the appellants is not controlling.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

16 Cal.App.2d 535

COLLINS v. NELSON et al.

Civ. 11051.

District Court of Appeal, Second District, Division 1, California.
Sept. 24, 1936.

1. Judgment ⚷199(1)

Judgment notwithstanding verdict may not be rendered by trial court before or after entry of judgment on verdict, unless it appears that motion for directed verdict should have been granted in first instance (Code Civ. Proc. § 629).

2. Trial ⚷142

Right to grant motion for directed verdict is to be exercised only when, after giving to plaintiff's testimony its full scope and indulging in all favorable and legitimate inferences therefrom, there is no substantial evidence to support verdict for plaintiff (Code Civ.Proc. § 629).

3. Automobiles ⚷245(24)

In guest's injury action against driver, to defeat defendant's motion for directed verdict, guest *held* required merely to offer competent evidence of such substantial nature that it might reasonably be inferred therefrom that driver was guilty of willful misconduct.

4. Appeal and error ⚷934(1)

On appeal from judgment for defendant notwithstanding verdict for plaintiff, appellate court must view testimony in light most favorable to plaintiff.

5. Automobiles ⚷245(24)

In guest's action against driver for injuries sustained when automobile turned over, evidence that automobile had defective brakes and that accident occurred when driver was cutting in and out among automobiles on boulevard at rate of 45 to 50 miles per hour *held* sufficient for jury on issue of driver's willful and wanton misconduct.

6. Trial ⚷139(1), 140(1)

Although trial court may weigh evidence and determine credibility of witnesses on motion for new trial, it may not do so on motion for directed verdict.

7. Judgment ⚷199(3)

Entering judgment for defendant automobile driver in guest's personal injury action, notwithstanding verdict for guest, on ground that driver's motion for directed verdict should have been granted in first instance, *held* error, where evidence of driver's willful and wanton misconduct was sufficient for jury (Code Civ.Proc. § 629).

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Betty Collins, a minor, by Ray A. Collins, her guardian ad litem, against Jack Nelson, a minor, by W. W. Nelson, Jr., his guardian ad litem, and others. A verdict was returned in favor of plaintiff and against the named defendant, and from a judgment in favor of the named defendant, notwithstanding the verdict, plaintiff appeals.

Reversed and remanded, with directions to enter judgment on the verdict as rendered.

Avery M. Blount and E. B. Drake, both of Los Angeles, for appellant.

Joe Crider, Jr., and E. H. Tilson, both of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an action for damages for personal injuries sustained by the minor plaintiff, Betty Collins, who was a guest in an automobile driven by the minor defendant, Jack Nelson, which overturned on Pico boulevard in the vicinity of Nineteenth and Twentieth streets in the city of Santa Monica, about 8:30 o'clock on the evening of September 13, 1935. Joined as plaintiff in the capacity of guardian ad litem is Ray A. Collins, the father of the minor plaintiff. Named as defendants are the owner and driver of the guest car, Jack Nelson, a minor, and his father and mother, who had signed his application for an operator's license. The cause was tried before the court with a jury, and at the close of evidence defendant Jack Nelson moved for a directed verdict against the plaintiff. This motion was denied, and thereafter a verdict was returned by the jury in favor of plaintiff and against the minor defendant, Jack Nelson, for $6,000, whereupon said defendant made a motion for judgment in his favor notwithstanding such verdict; said motion being made in the alternative form, reserving the right to apply for a new trial if such motion were denied. This motion was granted, and the court ordered judgment to be entered in favor of the defendant notwithstanding the verdict. From such judgment plaintiff prosecutes this appeal.

The motions for a directed verdict and for judgment notwithstanding the verdict were made on the grounds that the evidence is insufficient to support a verdict in favor of plaintiff, and that the entire record is barren of any evidence showing any willful misconduct on the part of the minor defendant, Jack Nelson.

Section 629 of the Code of Civil Procedure provides, in part, that when a motion for a directed verdict which should have been granted is denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict. In the instant case, a motion for a directed verdict was made and by the court denied, and the judgment recites that in the opinion of the trial court the motion for a directed verdict should have been granted, for which reason, the judgment further declares, the motion for judgment in favor of the defendant notwithstanding the verdict was granted.

[1] The question before us, therefore, is whether the trial court should have granted the motion for a directed verdict, for, in the final analysis of this question, it is manifest that no judgment may ever be rendered or ordered by the trial court notwithstanding the verdict, either before or after entry of judgment on the verdict, unless it appears that the motion for a directed verdict should have been granted in the first instance. Tracey v. L. A. Paving Co., 4 Cal.App.(2d) 700, 703, 41 P.(2d) 942.

The rule governing the power of the trial court to direct a verdict has received the attention of the courts of this state on numerous occasions, and the principles were reviewed in Re Estate of Lances, 216 Cal. 397, 14 P.(2d) 768, quoted with approval in Re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579, 580, wherein our Supreme Court says:

"'It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." Nelson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; In re Estate of Sharon, 179 Cal. 447, 177 P. 283; In re Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal. Jur. pp. 912-918. Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799. A motion for a directed verdict "is in the nature of a demurrer to the evidence, and is governed by practically the same rules, *and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.* * * * *Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence.* * * * The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. * * * If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict." Hunt v. United Bank & Trust Company of California, 210 Cal. 108, 117, 118, 291 P. 184, 188. In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.*' (Italics ours.)"

[2] Thus we see that the right to grant a motion for a directed verdict is to be exercised only when, after giving to the testimony of the plaintiff its full scope and indulging in all favorable and legitimate inferences from it, there is no substantial evidence to support a verdict for the plaintiff.

[3] We proceed, then, upon the basis that, in order to defeat the motion for a directed verdict, plaintiff was required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that the driver of the guest car was guilty of willful misconduct.

The evidence indicates that the minor defendant was driving his automobile west on Pico boulevard on the early evening of September 13, 1935, with the minor plaintiff and two others with him as his guests. As to the minor defendant's conduct in the operation of his automobile preceding the accident, we have the following testimony from the minor plaintiff, Betty Collins:

"Q. By Mr. Drake: Go back a quarter of a mile, then. A. He was passing all the cars that were on the road, he was passing some of them on the right and some of them on the left. He was dodging in and out amongst the cars. Do you want me to tell how the accident happened?

"Q. Go ahead and tell how he turned over, if you will. A. We had passed a few cars on the left-hand side. We were out in the middle of the street then, the cars that were in front of us were not going fast enough, he went around to the right of the next car. When we got over to the right-hand side of the road there was a car a few car lengths in front of us that was almost standing still, or else it was stopped; I told him to stop, to slow up, because he couldn't make it. Instead of doing that he just * * *

"A. Yes. Instead of doing that he just kept on going. When he got up to the car that was going very slow in front of us he tried to pass it on the left-hand side, and in doing so his back fender came in contact with the front fender of the car in the next lane to us. He looked back to see what damage had been done. We started towards the curb, so I yelled to him to turn around. He did; then he cramped the wheel to avoid hitting that curb. We went in the middle of the street and turned over. * * *

"Q. Had you said anything to him before that about his driving? A. Yes.

"Q. What had you said? A. When he was dodging in and out among the cars I told him not to do it, I told him to go slower, that he should be very careful. * * *

"Q. How fast would you say you were going when you passed the Stutz, turned across and went over, turned over? A. I should say around 50 miles an hour."

There is also in the record testimony to the effect that for about a quarter of a mile before the accident, and when the minor plaintiff spoke to the minor defendant driver, the latter was driving at the rate of 50 miles per hour, and continued at this speed for the entire quarter of a mile preceding the time of the accident. With reference to the condition of traffic on the highway, the minor defendant himself testified, through his deposition which was introduced at the trial, that "there were quite a few cars around," and, in answer to a question as to how fast in his opinion he was driving at the time he was passing the automobiles immediately before the accident, the minor defendant responded, "About 45 miles an hour."

In the evidence given by the minor defendant we find the following:

"Q. Isn't it a fact that Miss Collins said to you on occasions when you were passing these other cars, 'Don't do that. Don't cut in and out of this traffic?' A. Well, she told me to be more careful.

"Q. Told you to be more careful. Just state how she said that. That might be a conclusion as to what she told you. Tell us what she did say that you thought she wanted you to be more careful if you remember. A. Well, she said something like, 'Jack, don't do that.'

"Q. What were you doing when she said, 'Jack, don't do that'? A. I was passing a car—just finished passing.

"Q. Weren't you cutting out of your lane of traffic and going around a car? A. Yes. * * *

"Q. * * * Now when she said, 'Don't do that; be careful,' did you slow down your speed? A. I was about to pass this other car—

"Q. Just answer the question. Did you change your method of driving or slacken your speed after she said that or did you proceed just as you had been driving? A. I drove just as I had been.

"Q. In other words, you didn't pay any attention to what she said about being careful? A. No, sir.

"Q. You just went right on like you had been driving? A. Yes, sir."

With reference to the condition of the brakes on his automobile, the minor defendant testified as follows:

"Q. What was the condition of your brakes in your opinion? A. Well, I had had them adjusted but they didn't work so hot.

"Q. What do you mean by that, you couldn't stop very quick with them? A. No, sir.

"Q. You felt they were out of adjustment to some extent? A. Yes, they got out quite often.

"Q. At this particular time? A. They always were practically out of adjustment so I guess they were at this time.

"Q. As a matter of fact you had them relined immediately after this accident happened, didn't you? A. Yes, sir."

[4-6] Possibly it is true, as contended by respondents in their brief, that the brakes were not a proximate cause of the accident, whether they were defective or not, because no attempt was made at any time to use the brakes which caused or contributed to the accident. Conceding this to be true, nevertheless the condition of the brakes throws some light upon the state of mind and conduct of the minor defendant driver. Surely it cannot be claimed that driving an automobile with defective brakes at the rate of 45 to 50 miles per hour on Pico boulevard, "cutting in and out among the automobiles," constitutes anything but a wanton and reckless disregard of the possible result of a combination of speed, erratic driving, and defective brakes.

Upon the record before us, and in the light of the testimony herein set forth, which we must view in the light most favorable to plaintiff, and without consideration of opposing or conflicting evidence, we conclude that such evidence, if believed by the jury, would support a finding that the defendant driver operated his automobile with a knowledge that serious injury to the occupants would be the probable (as distinguished from the possible) result of his conduct, and that his conduct indicated a wanton and reckless disregard of its possible result. It might here be stated that at the conclusion of plaintiff's case, with the foregoing testimony before the jury, after making a motion for a nonsuit, defendant rested without producing any witnesses in his behalf, and thereupon made a motion for a directed verdict, which was denied. Conceding the existence in the record of evidence somewhat in conflict with the foregoing, still such conflict does not destroy the substantiality of the testimony herein quoted from the evidence given by the minor defendant driver, because, although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.

[7] Under the rules governing directed verdicts and the conclusions we have drawn from the record of the evidence, as above stated, we are of the opinion that the trial court was in error when it decided, after rendition of the verdict, that a verdict for the defendant should have been directed when that motion was made in the first instance, and therefore did not have the right to order judgment notwithstanding the verdict.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment on the verdict as rendered.

We concur: **YORK, Acting P. J.; DORAN, J.**

16 Cal.App.2d 556

BRYANT et al. v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY et al.

Civ. 5664.

District Court of Appeal, Third District, California.

Sept. 28, 1936.

1. **Certiorari** 🔑39

Parties' rights to writ of review cannot be cut off by antedating order or the entry thereof.

2. **Executors and administrators** 🔑239

Where minute order vacating allowance of claims against estate failed to identify subject-matter of order, and referred to but one claim, which was not identified by name of claimant or otherwise, and where court subsequently filed a full and complete order, the subsequent order constituted order of court as regards question whether petition for writ of review was timely filed.

3. **Certiorari** 🔑41

Remedy by way of petition for writ of review may be barred by laches, although there is no statutory limitation on time for filing petition.

4. **Certiorari** 🔑41

Where defense of laches is presented to petition for writ of review, in addition to unexplained lapse of unreasonable time there must be circumstances causing prejudice or injury to adverse party in order to sustain the plea.

5. **Executors and administrators** 🔑239

Order vacating orders approving and allowing claims against estate *held* not "appealable order" (Probate Code, § 1240, as amended by St.1935, p. 1972).

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

6. **Executors and administrators** 🔑241

Approval of claim against an estate is prima facie evidence of its validity, and burden of showing invalidity is cast on those who contest it.

7. **Executors and administrators** 🔑239

Order vacating orders allowing claims against estate could not be reviewed or nullified by representing claims and appealing from judgment if adverse, as regards availability of remedy by way of petition for review.

8. **Executors and administrators** 🔑239

Petition for writ of review to annul order vacating prior order allowing claims against estate *held* not premature on ground that adjudication was not final.

9. **Executors and administrators** 🔑241

Order allowing claims against estate does not preclude an attack upon claims by any person interested in estate and adversely affected thereby, and a contest as to correctness or validity of claims may be instituted at any time prior to settlement of final account of executor or administrator (Probate Code, §§ 713, 927).

10. **Executors and administrators** 🔑238

After expiration of more than two years from order allowing claims against estate, orders were "final" as regards right to appeal, but not final in sense that court could not set them aside if inadvertently allowed by judge.

[Ed. Note.—For other definitions of "Final Order," see Words & Phrases.]

11. **Motions** 🔑59(2)

Independent of statutory provisions, courts have power to correct mistakes in their proceedings, and within reasonable time to annul orders inadvertently made by them.

12. **Executors and administrators** 🔑238

Where claims against estate appeared on their face to have been barred in part when presented to executor for allowance, action of court in vacating prior orders allowing claims on ground that court acted through inadvertence and by mistake, and without due consideration of claims in making allowance, *held* not error (Code Civ.Proc. §§ 344, 337, subd. 2, 937; Probate Code, § 708).

13. **Limitation of actions** 🔑54(3)

Transaction rendering account mutual did not have effect of removing bar of statute as to any item in account which was at that time barred (Code Civ.Proc. §§ 344, 337, subd. 2).

Writ of review to Superior Court, San Joaquin County.

Proceeding for writ of review by Jeannette G. Bryant, and another, against the Superior Court of the State of California in and for the County of San Joaquin, and D. M. Young, judge of such Superior

Court, to annul an order of respondent judge vacating and setting aside two orders previously signed by him allowing a claim theretofore presented by each petitioner against the Estate of Sarah H. Gillis, deceased, wherein respondents moved to dismiss the proceeding and interposed a demurrer to the petition.

Motion to dismiss denied, demurrer to petition sustained, and order vacating orders allowing petitioners' claims affirmed.

Louttit, Marceau & Louttit, of Stockton, for petitioners.

Neumiller & Ditz, of Stockton, for respondents.

GLENN, Justice pro tem., delivered the opinion of the court.

Petitioners seek to annul an order made by respondent judge, vacating and setting aside two certain orders previously signed by him approving and allowing a claim theretofore presented by each petitioner against the estate of Sarah H. Gillis, deceased. The ground stated in the petition for writ of review is that the superior court lacked jurisdiction to make the order vacating said orders allowing their claims, because of the fact that more than six months had elapsed from the date of said orders and the order purporting to vacate and set the same aside.

Respondents have moved to dismiss the proceeding, and have also interposed a demurrer to the petition.

Sarah H. Gillis died testate in the month of January, 1932. After regular proceedings had therefor in the matter of her estate, the executor of her last will and testament was appointed and qualified. The claim of each petitioner was regularly presented in the month of October, 1932, and each was approved by the executor on December 27, 1933, and allowed and approved by the respondent judge on December 28, 1933, the approval being indorsed on each claim, and thereupon each claim was filed and registered as an approved claim against said estate. Subsequently, the executor passed away and an administrator with the will annexed was appointed and qualified. On January 3, 1936, certain legatees and devisees named in said will filed notice of motion to vacate and set aside the allowance of said claims by the said executor, then deceased, and by the said respondent judge, and for the rejection of said claims, the grounds stated being that neither claim was supported by proper vouchers, and also that they were allowed ex parte by the judge, inadvertently and without notice to the petitioners, and were disputed by them. The motion was heard on March 11, 1936, and thereupon the court directed a minute order to be entered on said date in the matter of the estate of said Sarah H. Gillis, deceased, wherein it is stated: "This matter having been brought to trial and this day submitted to the Court, it is ordered that the order of Court allowing the said claims * * * filed herein be set aside. * * *" This minute order was entered by the clerk on said date. The minute order was indefinite and defective in several respects. It failed to identify the subject-matter of the order; referred to but one claim, and that was not identified by the name of the claimant, or otherwise; also, the court refused to vacate the allowance of the claim by the executor, a fact not mentioned in the minute order.

A full and complete order was signed and filed by the court on March 18, 1936. This is the order which petitioners have brought before this court for review. Notwithstanding this fact, on May 28, 1936, the court ordered the order of March 11, 1936, to be amended by the clerk nunc pro tunc as of March 18, 1936, which was done by him by interlineation in the minute book.

A transcript of the record and proceedings in the matter of the estate of Sarah H. Gillis has been certified to this court.

The motion to dismiss is based upon four grounds: (1) That the application for a writ of review should have been made within sixty days from entry of this order in the minute book, and was not so made; (2) that petitioners have a plain, speedy, and adequate remedy at law; (3) that respondents did not lack jurisdictional power to make the order; (4) that the application for writ of review was made prematurely in that said order of said superior court is not subject to review by the above-entitled court.

A disposition of the demurrer to the petition herein will necessarily involve a discussion and determination of the merits of the third ground assigned for dismissal of this proceeding, and, hence, we will not consider the same in determining the motion to dismiss.

Some of the grounds upon which the motion to dismiss is based are also covered in the briefs on demurrer to the petition. A disposition of them on the motion will obviate reference thereto in considering the merits of the demurrer.

1. Respondents made the point that the application for a writ of review must be made within sixty days after the entry of a judgment or order and that in probate proceedings the application therefor runs from the entry of the order in the minute book, and hence they state: "The order here in review was entered in the minute book of the probate department of the Superior Court of the State of California, in and for the County of San Joaquin, on March 11, 1936. The petition for writ of review was filed May 18, 1936, which is more than sixty (60) days after entry of said order of March 11, 1936."

Petitioners claim that the order sought to be reviewed is the one signed by the judge on March 18, 1936, which was a full and complete order. Respondents, in making the claim that the petition was not filed within time, rely upon the incomplete minute order as first entered on March 11, 1936. That order, as we have stated, does not indicate the subject-matter before the court, nor does it designate which claim was ordered set aside. That such order was deemed and treated by the court as insufficient on account of its indefiniteness is evidenced by the fact that a full and complete order was signed on the 18th of March, 1936, and filed with the clerk, and on May 28, 1936, the court also ordered an amendment of the first minute order nunc pro tunc as of March 11, 1936. Respondents' position would prevent petitioners from securing a writ of review on account of the defective order until it was corrected by the nunc pro tunc order of May 28th, at which time, according to the contention they make, it would be too late. To dismiss the proceeding, respondents, therefore, rely upon the incomplete and uncertain order, but to sustain the order vacating and setting aside the allowance of these claims they must rely either upon the written order filed March 18, 1936, or the nunc pro tunc order made on May 28, 1936.

[1, 2] The rule is well established that a party's right to an appeal cannot be cut off by antedating an order, or the entry thereof. 2 Cal.Jur., p. 403; Spencer v. Troutt, 133 Cal. 605, 65 P. 1083; O'Rourke v. Finch, 8 Cal.App. 263, 96 P. 784; Rosslow v. Janssen, 136 Cal.App. 467, 29 P.(2d) 287. While the order under review is not an appealable order, as we will later point out, on analogy the same principle applies.

Although it is not material to the conclusion reached above, whether the order filed March 18, 1936, or the minute order as amended, is the court order in the matter, we hold that the order filed on March 18th, being full and complete, constitutes the order of the court, as there can be but one order rendered, and the second order was an idle act and of no force or effect. In re Estate of Vizelich, 123 Cal.App. 651, 11 P.(2d) 870.

[3, 4] There is no statutory provision placing a limitation on the time within which a petition for a writ of review must be filed. The remedy may be barred by laches, although "there is no hard and fast rule by which to determine whether laches has barred the remedy." Reid v. Superior Court, 44 Cal.App. 349, 186 P. 634, 636. Where there has been an unreasonable, unexplained delay in seeking the writ, the courts have considered the time allowed by law within which to appeal from a final judgment as sufficient, and, by analogy, have held that the remedy through certiorari should be held barred by the lapse of the same length of time. Reynolds v. Superior Court, 64 Cal. 372, 28 P. 121; Smith v. Superior Court, 97 Cal. 348, 32 P. 322. In Boyer v. City of Long Beach, 47 Cal.App. 617, 191 P. 35, the court stated that "the time within which certiorari * * * may be instituted is determined by the equities of the case." In the case of Security-First National Bank v. Superior Court, 132 Cal.App. 683, 23 P.(2d) 1055, 1057, a writ of review was sought of an order granting a new trial, which order had been made more than six months prior thereto. Several of the cases above cited were relied upon to substantiate the claim that the remedy was barred by laches. After referring to these cases, the court states: "Where the defense of laches is presented it is usually held that in addition to the unexplained lapse of an unreasonable time there must be circumstances causing prejudice or injury to an adverse party in order to sustain the plea. [Citing a number of cases in support thereof.] If the general rule which we have stated be applied to the facts of the case before us, the defense of laches cannot be sustained because of the lack of any prejudice or injury to respondents and the San Diego Trust & Savings Bank from the mere lapse of time. The position of none of them has been changed in the slightest degree between the making of the order granting the new trial on January 15, 1932,

and the filing of the petition for a writ of review in this court on July 15, 1932."

The language applies with equal force to the instant proceeding.

[5-7] 2. The order under review is not an appealable order. Section 1240, Probate Code, as amended by St.1935, p. 1972; In re Estate of Mailhebuau, 201 Cal. 664, 666, 258 P. 378; Kowalsky v. Superior Court, 13 Cal.App. 218, 220, 109 P. 158. It has been held that even so, if the effect of an order can be reviewed and nullified by an appeal from the judgment, certiorari will not lie. Hughson v. Superior Court, 120 Cal.App. 658, 8 P.(2d) 227. Relying on this principle of law, respondents claim that petitioners have a plain, speedy, and adequate remedy at law, as they can again present their claim to one of the judges of the superior court for allowance; if disallowed in whole or in part, a suit to enforce the claim may be prosecuted, and, if an adverse judgment is had, an appeal lies therefrom. Prior to the order vacating these claims, they stood as acknowledged debts against the estate. The approval of a claim against an estate is prima facie evidence of its validity, and the burden of showing invalidity is cast upon those who contest it. 11a Cal.Jur., sec. 588, p. 824. It is apparent, therefore, that the effect of the order vacating the orders allowing the claims cannot be reviewed or nullified by the method suggested by respondents.

[8] 3. Respondents assert that the petition was filed prematurely, the claim being that there has been no final adjudication or determination of the subject-matter. Frost v. Superior Court, 41 Cal.App. 580, 183 P. 206, and Howe v. Superior Court, 96 Cal. App. 769, 274 P. 992, are cited in support of the proposition.

The orders involved in the cases cited, while final in a certain sense, did not finally adjudicate or determine the subject-matter. We have already pointed out the finality of the order setting aside the orders allowing these claims, and will merely add that the subject-matter of said order was limited to the question of whether the court should set aside the said former orders allowing petitioners' claims. It determined this question in the affirmative, and there can be no proceeding or action entertained by said superior court wherein the effect of this order on the status of these claims can be changed.

As to the demurrer:

[9] 1. The order under review was made more than two years after the claims had been allowed, filed, and registered, as provided by law. While the six months' limitation provided by section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851 does not apply where the inadvertence or mistake in making the order was that of the court or judge, as distinguished from that of a party making the motion to be relieved therefrom; nevertheless, the courts have held that such application must ordinarily be made within six months, that being considered, by analogy to the requirement of said section, as the limit of what may be considered a reasonable time. Consolidated Construction Co. v. Pacific Electric R. Co., 184 Cal. 244, 193 P. 238, 240, and cases therein cited. We have heretofore called attention to the case of Security-First National Bank v. Superior Court, 132 Cal.App. 683, 685, 23 P.(2d) 1055, where the facts justified relaxing the usual rule, and, therefore, the court refused to sustain the defense of laches, on the ground that the respondents suffered no injury or prejudice by the mere lapse of time. In the instant matter no prejudice or injury was shown by the delay in ordering the vacation of the orders allowing the claims.

The orders allowing these claims did not preclude an attack on them by any person interested in the estate and adversely affected thereby. A contest as to their correctness or validity may be instituted at any time prior to the settlement of the final account of the executor or administrator, as the case may be, as neither had been reduced to judgment. Sections 713 and 927, Prob.Code. They were not finally effective, and were still under the control of the court, and could, therefore, be vacated by it, either upon its own motion, or upon motion of any party adversely affected thereby. The distinction which the law makes between an order which has the finality of a judgment and one over which the court still retains control is pointed out in the case of Consolidated Construction Co. v. Pacific Electric R. Co., supra. In that case it appeared that although summons had been issued and the defendant company had been served with summons and complaint nothing appeared in the record of the county clerk showing the issuance of the summons. The defendant not having appeared within the year, one Stewart, claiming to be interested in the land involved in the suit, presented an affidavit ex parte stating that summons had not been issued within a year, although the action had been pending for more than a year. Accordingly, the action was dismissed under the provisions of section 581a of the Code of Civil Procedure. About ten months later the attorneys for plaintiff discovered the dismissal and presented an affidavit ex parte setting up that the summons had actually been issued within the year of the commencement of the action, and ask for a vacation of the order of dismissal, which was granted. Within a few days thereafter, a motion was made on behalf of Stewart, upon notice to plaintiff, to set aside the order of vacation on the ground that it was made without jurisdiction. The feature of the case we are now concerned with is the fact that the order dismissing the action was never entered until almost a year after, and had not been entered when the order was made, at the instance of plaintiff, vacating it. In this regard the court states: "The question, therefore, is: Was such entry necessary in order to make the order finally effective, in order that there be a judgment, as distinguished from a mere order upon which a judgment could be had? If the order of dismissal was still of the latter character only, it was something over which the court still retained control, and which it could revoke, either on the motion of a party or on its own motion. * * * Robson v. Superior Court, 171 Cal. 588, 154 P. 8. It has even been held that after rendition of a judgment, by the filing of findings of fact and conclusions of law, with a direction for the entry of a certain judgment thereon, the court has still the power, up to the time of the entry of the judgment, to change the conclusions of law and the judgment to be entered. See Brownell v. Superior Court, 157 Cal. 703, 708, 109 P. 91, and cases there cited. After entry of judgment, however, such power is gone. First Nat. Bank v. Dusy, 110 Cal. 69, 42 P. 476."

The court held that the dismissal was not finally effective until entered upon the minutes, and, after citing a number of cases to the point, quotes the following from Page v. Page, 77 Cal. 83, 84, 19 P. 183: "'The dismissal is not complete, in the sense that the control of the court over the cause is terminated, until the judgment is entered.'"

The court also states:

"It follows that it was still within the control of the court, which could vacate it, if made inadvertently or through mistake. * * *

"Before concluding, we should, perhaps, say that when we have been speaking of an order of dismissal, or an order for judgment, as not effective until entered, we have been speaking of it only as effective as a final determination of the action, discharging the parties, so to speak, from before the court, and ending the general authority of the court over the action. In many other ways an order of dismissal or an order for judgment is effective before entered, or before judgment is entered upon it. See, for example, Fresno Estate Co. v. Fiske, 172 Cal. 583, 599, 157 P. 1127, and cases there cited."

In Egan v. McCray, 220 Cal. 546, 31 P.(2d) 1041, the court held that an order of dismissal, based upon the grounds therein stated, was not effectual or conclusive as a judgment or final order until a judgment was rendered, and hence the court retained jurisdiction until such rendition of judgment to vacate and set aside the order of dismissal. See, also, to the same effect, McCallum v. Stull, 59 Cal.App. 572, 211 P. 466.

[10] The orders allowing these claims had long since become final, so far as any appeal therefrom was concerned, but they were not final in the sense that the court could not set them aside, if inadvertently allowed by the judge. That the court has such authority is established by the case of In re Estate of Sullenberger, 72 Cal. 549, 14 P. 513, where the order allowing a claim was set aside by the court on the ground that the claim was barred by the statute of limitations when allowed.

[11] Independent of statutory provisions, courts have power to correct mistakes in their proceedings, and within a reasonable time to annul orders inadvertently made by them. Burbank v. Continental Life Ins. Co., 2 Cal.App.(2d) 664, 38 P.(2d) 451, and cases cited. The delay of several years, under the circumstances stated, cannot be successfully urged as justifying the annulment of the said order.

2. Petitioners make the additional contention that no showing of inadvertence on the part of the judge in the allowance of said claims was made on the motion to vacate. The only ground set forth in the

petition upon which lack of jurisdiction is based is the fact that more than six months had elapsed from the date of the orders allowing petitioners' claims and the application to vacate the same. The effect of the demurrer to the petition being to adopt as the return to the writ the facts alleged therein (Burlingame v. Justice's Court, 1 Cal.(2d) 71, 33 P.(2d) 669), the claim so made appears to be without the issue thus presented. Passing this, however, we will consider the contention so made, as well as the respondents' statement during the oral argument that the claims were barred by the statute of limitations when presented to the executor for allowance.

The claims were allowed by the respondent judge ex parte. The order under consideration states that in so doing he acted through inadvertence and without due consideration thereof. The record does not disclose the facts upon which the inadvertence or lack of due consideration is based, other than as may appear from the claims themselves.

Section 937 of the Code of Civil Procedure provides that: "An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made."

In Alpers v. Bliss, 145 Cal. 565, 79 P. 171, 174, the defendant made an ex parte application for leave to file a cross-complaint against the plaintiffs and certain other parties not named defendants in the complaint. This order was subsequently set aside upon motion of the plaintiffs. The court, in sustaining the order so vacating the previous order made on the ex parte application of defendant, calls attention to that fact and to the provisions of said section 937 of the Code of Civil Procedure, and in this regard states: "It may be assumed that, when plaintiffs moved to vacate the order granting leave to file the cross-complaint, the judge made a more careful examination of the pleadings than was given when the order was made."

So, in the instant proceeding, in determining that he had acted through inadvertence and by mistake and without due consideration of the claims presented, we assume, as is doubtless the fact, that the judge made a more careful examination of these claims. In doing so he necessarily took into consideration the various items, the nature of the charges made, and the dates thereof. Section 708 of the Probate Code provides that no claim which is barred by the statute of limitations shall be approved or allowed. From the examination we have made, these claims appear on their face to have been barred, in part, when presented to the executor for allowance, as will appear hereafter.

In Re Estate of Wilson, 97 Cal.App. 529, 275 P. 977, the superior court, on its own motion, set aside an order previously made, allowing a creditor's claim against the estate. In affirming the order the court said: "The court did not err in setting aside the original order allowing the claim, and in requiring direct proof thereof in connection with the settlement of the executor's account. In re Sullenberger, 72 Cal. 549, 552, 14 P. 513."

In Re Sullenberger's Estate, the order allowing the claim was subsequently set aside. Exception was taken to the notice of motion to set the order aside. The court stated in this regard: "Exception is taken to the notice of motion to set aside. But the order allowing the claim having been made out of court and without notice, no notice of motion to set it aside was necessary. Code Civ.Proc., § 937."

In the case of Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617, 620, application was made to the Supreme Court for a writ of review to annul an order made by the trial court on an ex parte application of plaintiffs and without notice to defendants, vacating a restraining order theretofore granted by it, for the purpose of preserving the status quo pending the appeal. In the course of the opinion the court called attention to the provisions of said section 937 of the Code of Civil Procedure as authority for the action of the trial court, stating further that if there was any doubt as to the applicability of that general rule to provisional remedies, then it had such authority under the specific provisions of section 532 of said Code relating to injunction granted without notice to the person enjoined. In concluding the opinion, the court thus expressed itself: "We are of the opinion that the respondent court in vacating the restraining order here in question was acting in the exercise of the jurisdiction so to do reserved in it by the provisions of sections 937 and 532 of the Code of Civil Procedure."

Each claim was presented on the theory that it was a mutual, open, and current account against the deceased. As to such a claim, the statute of limitations is four years. Section 337, subd. 2, Code Civ.Proc. Where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the date of the last item proved in the account on either side. Section 344, Code Civ.Proc.

The claim of Jeannette G. Bryant covers items for nursing care, board for nurses, and cash advanced to her mother, the decedent, the first entry being under date of October 8, 1923. The charge for nursing covers seven years and eleven months at $50 per month. Among other items during that period is one dated June 14, 1926, "loan to mother $275.00." Commencing February 11, 1931, and ending January 4, 1932, there are items of cash advanced to claimant's mother totaling $129.50. The account gives deceased credit for various cash advanced to claimant totaling $375 and covering the period from July 15, 1926, to February 19, 1931. It is well recognized that "an account consisting of items of charges on one side and payments merely on the other is not a 'mutual' account." Carter v. Canty, 181 Cal. 749, 756, 186 P. 346, 349, and cases cited.

[12, 13] The claim of P. A. Bryant dates from June 1, 1922, which is more than nine years before the claim was presented for approval. For use of a car and certain personal services commencing on said date three charges are made, respectively of $70, $70, and $1,140, the last item covering 114 months. Under "cash paid Mrs. Gillis" is listed a sum of money each month, commencing August 4, 1928, to and including January 4, 1932, the first three entries being for $50 each, and each of the others being for $10. There appears another charge for rental collected by Mrs. Gillis on an acre of land belonging to the claimant from July 16, 1928, to January 1, 1932. On the other side of the account in favor of Mrs. Gillis we find nothing until July 16, 1928, under which latter date credit is given her for what appears to be the purchase price of an acre of land and also an item for interest thereon, these two items totaling $545.60. If we treat this as a reciprocal demand on her part (which we have assumed for the purpose of the decision), the account on that date thereby became mutual. Such fact did not have the effect of removing the bar of the statute as to any item in the account which was at that time in fact barred. This principle is stated in the case of Fuerbringer v. Herman, 225 Mich. 76, 195 N.W. 693, 694, as follows: "If on July 14, 1921, the old account was not mutual * * * and if a mutual account was opened on that day, it would not, of its own force, draw into it items then more than six years old."

We are not, of course, concerned with the period of limitation in any jurisdiction other than our own.

The case of Nason v. Superior Court, 39 Cal.App. 448, 179 P. 454, cited by petitioners, involved an order purporting to have set aside a decree of court discharging an administratrix. The record showed affirmatively that the administratrix was entitled to her discharge, and that there were no reasons shown upon which the court might base an order setting it aside. An attempt was made by respondents to invoke the provisions of said section 937 of the Code of Civil Procedure, but the court said that they could secure no aid from the provisions of that section as the decree discharging the administratrix was not "an order made out of court." In Klokke Inv. Co. v. Superior Court, 39 Cal.App. 717, 179 P. 728, the court annulled an order purporting to vacate an order for publication of summons. Here, also, the record showed affirmatively that proper affidavits upon which the order for publication was based had been presented and filed and publication had been duly made. All steps had been regularly taken and had. From what we have stated above, these cases appear not in point.

We express our conclusion in the language of the court in Alpers v. Bliss, supra: "The motion was addressed to the judicial discretion of the court, and we cannot say that there was any abuse of this discretion in granting it."

The motion to dismiss is denied; the demurrer to the petition is sustained; and the order vacating the said orders allowing petitioners' claims is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

16 Cal.App.2d 709

Ex parte CONNOLLY.

Cr. 1920.

District Court of Appeal, First District,
Division 2, California.

Oct. 6, 1936.

1. Habeas corpus ⚷27

Under statute providing that witness could not be held criminally liable for any fact or act touching which he was required to testify before legislative committee, habeas corpus *held* to lie to secure release from custody under indictment founded upon testimony given by prisoner as witness before legislative committee, since such immunity was jurisdictional (Pol.Code, § 304; Pen.Code §§ 1484, 1487).

2. Habeas corpus ⚷85(1)

Where lack of jurisdiction because of immunity from prosecution does not appear on face of indictment, evidence to prove that fact may be heard in habeas corpus proceeding (Pen.Code, §§ 1484, 1487).

3. Criminal law ⚷42

As regards right of prisoner in habeas corpus proceeding to secure release from custody under indictment founded upon testimony given by him before legislative committee, whether prisoner was served with a subpœna or appeared before committee voluntarily *held* immaterial (Pol.Code, § 304; Pen.Code, § 1487).

4. Criminal law ⚷42

In habeas corpus proceeding to secure release from custody under indictment based on testimony given by prisoner before legislative committee, prisoner, to secure release, must show that evidence relating to matters covered by indictment was obtained by compulsion and was not given voluntarily (Pol. Code, § 304).

5. Criminal law ⚷42

Prisoner indicted on basis of testimony given by him before legislative investigation committee *held* not entitled to release in habeas corpus proceeding on ground of statutory immunity respecting such testimony, where it appeared that material testimony upon which indictment rested was given by prisoner voluntarily when asked if there was anything further that he would like to state (Pol.Code, § 304).

Proceeding in the matter of the petition of Michael Connolly for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Wilbur S. Pierce and Marvin Sherwin, both of Oakland, for petitioner.

Earl Warren, Dist. Atty., R. H. Chamberlain, Asst. Dist. Atty., and Cecil Mosbacher, Deputy Dist. Atty., all of Oakland, for respondent.

Leo R. Friedman, Sp. Counsel for Assembly Committee on Auditing, of San Francisco, amicus curiæ.

NOURSE, Presiding Justice.

The petitioner seeks his release from custody under an indictment charging the receiving of bribes, extortion, and a violation of section 653f of the Penal Code. The respondent has demurred to the petition and has also filed a return thereto. The petitioner has traversed the return in the nature of both demurrer and answer. Stipulations were made at the oral argument covering minor differences in the various statements of facts, and the cause was submitted upon all these pleadings as thus agreed to. Hence, when we refer to any allegation in the pleadings, it is to be understood that the matter was either admitted by demurrer or by express stipulation.

The indictment rests upon the activities of the petitioner while acting as an employee of the state board of equalization in the enforcement of the liquor control statutes. The first two counts charged the petitioner with asking for and receiving from one Jack Biale two separate payments of money upon promises that he would not commence proceedings against Biale on account of violations of the Liquor Control Act (St.1935, p. 1123). The third and fourth counts charged extortion arising out of the same transactions. The fifth count charged the petitioner with soliciting Jack Biale to commit the crime of bribery as denounced by section 653f of the Penal Code.

The basis of the petition is that all the matters relating to the transactions with Biale and upon which each count of the indictment is founded were fully covered in the testimony of the petitioner when called as a witness before a legislative investigation committee duly appointed by the state assembly at its last legislative session.

Because of this the petitioner relies upon the immunity granted by section 304 of the Political Code, which reads:

"Witnesses Not to be Held to Answer Criminally. Refusal to Testify. No person sworn and examined before either house of the legislature, or any committee thereof, can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor is any statememt made or paper produced by any such witness competent evidence in any criminal proceeding against such witness; nor can such witness refuse to testify to any fact or to produce any paper touching which he is examined, for the reason that his testimony or the production of such paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution and punishment for perjury committed by him on such examination."

The respondent does not controvert the assertion that each count of the indictment relates to a fact or act "touching which" the petitioner testified before the legislative committee. It is his contention that this testimony was given voluntarily and that the petitioner was not therefore "required to testify." The evidence relating to this feature is not satisfactory in all respects, but a fair statement of the circumstances is that the petitioner was requested to appear as a witness, that he apparently welcomed the opportunity, and that he volunteered some testimony which was not in answer to any specific question directed from the committee.

Upon this state of the record but two questions arise which require consideration: (1) Can the petitioner rely on section 304 in a proceeding in habeas corpus or must he await the day of trial and tender it as a defense? (2) Does the expression "touching which he is required to testify" limit the immunity to those facts or acts only regarding which the witness was compelled to testify, or does it cover all facts and acts regarding which he gave testimony after having been duly sworn as a witness?

[1] The first question would seem to find a complete answer in the express provisions of our statutes. Section 1487 of the Penal Code permits a discharge on habeas corpus "when the process, though proper in form, has been issued in a case not allowed by law." Section 1484 of the same Code provides that the petitioner may allege any fact to show that his detention is unlawful "or that he is entitled to his discharge." The same section provides that the court "must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment * * * and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." Since section 304 of the Political Code declares that one sworn and examined before a legislative committee cannot "be held to answer criminally" for any fact or act touching which he was required to testify, it cannot be said that one who is indicted and compelled to stand trial before a jury has not been "held to answer criminally" within the meaning of section 304, and there is less room for argument that the process so issued is not issued "in a case not allowed by law" within the meaning of section 1487.

The respondent rests upon the early case of Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65, 66, and cases from outside jurisdictions. The Rebstock Case involved an interpretation of section 64 of the Penal Code which relieved from prosecution a witness who had testified in a proceeding concerning offenses of the election laws. The Supreme Court there held that the immunity from prosecution granted by that section was a matter of defense and did not limit the jurisdiction of the superior court to proceed with the trial under the indictment. This case was followed by Ex parte Blake, 155 Cal. 586, 102 P. 269, 18 Ann.Cas. 815, where the court held that the statute of limitations is a mere matter of defense and not ground for discharge on habeas corpus. The decision was based wholly upon the rule that habeas corpus will not lie for the correction of mere errors which may be reached by motion or on appeal.

This ancient rule relating to the office of habeas corpus has been followed in many cases which are cited in respondent's briefs. It would serve no purpose to refer to them specially; it is sufficient to say that they adopt the rule upon the doctrine that the function of the writ of habeas corpus is to inquire into the jurisdiction of the court from which the process is issued and that such question must be determined upon the face of the proceedings alone. There is, however, a distinct line of cases which recognize an exception to the general rule where the question of the statute of limitations is involved. In Ex parte Vice, 5 Cal.App. 153, 89 P. 983, the prisoner was held to answer upon a complaint charging that, while acting as a clerk of a corporation in April, 1903, there came into his possession certain funds which he embezzled in October, 1906. The complaint was filed October 25, 1906. Upon the hearing of the writ the appellate court found that the prisoner had been discharged from the company's employ on May 1, 1903, that the alleged embezzlement occurred in April of that year, and that the three-year statute of limitations barred the prosecution. For this reason he was discharged from custody. In Re Berman, 104 Cal.App. 259, 286 P. 1043, the plea of once in jeopardy had been interposed and this was followed by a motion to dismiss the indictment. The appellate court heard the whole matter on the return to the writ of habeas corpus and found that the plea was good. It thereupon ordered the discharge of the prisoner. In People v. McGee, 1 Cal.(2d) 611, 36 P.(2d) 378, 379, the defendant was convicted upon an information filed November 3, 1930, alleging the commission of an offense on March 30, 1926. On March 18, 1933, he moved to set aside the judgment on the ground that the prosecution was barred by the statute of limitations. The motion was denied and on appeal, though the defendant had pleaded guilty to the information, the Supreme Court reversed the order, and upon the question whether the statute was jurisdictional or a mere matter of defense said:

"Whether the statute of limitations in criminal cases is jurisdictional, or a matter of defense to be affirmatively pleaded by the defendant, is a question upon which there exists some diversity of opinion. In California the law is in a most confused state. This court, in Ex parte Blake, 155 Cal. 586, 102 P. 269, 18 Ann.Cas. 815, declared that the statute was a mere matter of defense, and not ground for discharge on habeas corpus. The District Court of Appeal, in Ex parte Vice, 5 Cal.App. 153, 89 P. 983, came to the opposite conclusion; and in People v. Hoffman, 132 Cal.App. 60, 22 P.(2d) 229, the court held that a motion to set aside a judgment would lie where the information showed on its face that the statute had run. A hearing in the Hoffman Case was denied by this court. The early case of People v. Miller, 12 Cal. 291, also lends support to this conclusion.

"It is necessary that this confusion be eliminated, and that the rule which shall govern prosecutions in this state be declared. In our view, the more desirable rule is that the statute is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense. The point may therefore be raised at any time, before or after judgment."

It is the contention of the petitioner that the McGee Case overruled both Rebstock v. Superior Court and Ex parte Blake, and we take the same view. The Blake Case was expressly overruled and, since it followed and rested upon the Rebstock Case, it is a fair assumption that the court intended to overrule both. The language of the McGee Case is clear. It states that the statute is jurisdictional and not a mere matter of defense; that the state has declared that it will not prosecute crimes after the period has run, "and hence has limited the power of the courts to proceed in the matter."

There is not such a difference in principle between a statute which limits the period of prosecution for certain offenses and one which declares that at no time can one "be held to answer criminally" for any act touching which he testified before a legislative committee so that the first should be declared jurisdictional and the other a mere matter of defense. In view of the positive rule of the McGee Case, there is no reason left in the Rebstock Case, which was a plain repudiation of the language of section 64 of the Penal Code declaring that "no prosecution can afterwards be had against such witness." To hold that one may nevertheless be indicted, imprisoned, or compelled to furnish bail, and put to the expense of employing counsel and furnishing evidence to the jury, has not been "prosecuted" or "held to answer criminally," is subversive of the plain intent of the statute.

But the respondent argues that the rule cannot be applied unless the fact of immunity appears on the face of the indictment. The argument is based upon the all too broad statement that the function of habeas corpus is limited to the question of jurisdiction as it appears on the face of the proceedings. The accepted rule in this state (and the only one applicable under the Code sections above cited) is clearly stated in Re Lake, 65 Cal.App. 420, 423, 224 P. 126, 127, where the court says:

"The scope of the inquiry which the court can make upon either habeas corpus or certiorari is precisely the same. Ex parte Drew, 188 Cal. 717, 207 P. 249, 250; Commercial Bank, etc., v. Superior Court, [192 Cal. 395] 220 P. 422, 423. While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. Hotaling v. Superior Court [191 Cal. 501] 217 P. 73, 75 [29 A.L.R. 127]. This inquiry, of course, cannot go beyond the question of jurisdiction and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. Stumpf v. Board of Supervisors, 131 Cal. 364, 367, 63 P. 663, 82 Am.St.Rep. 350; McClatchy v. Superior Court, 119 Cal. 413, 419, 51 P. 696, 39 L.R.A. 691; Estate of Paulsen, 179 Cal. 528, 529, 530, 178 P. 143; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 185, 149 P. 35; Van Hoosear v. Railroad Com., 189 Cal. 228, 207 P. 903, 907; Hotaling v. Superior Court [191 Cal. 501] 217 P. 73, 75, [29 A.L.R. 127]."

To the same effect are In re Chaus, 92 Cal.App. 384, 388, 268 P. 422, and King v. Superior Court (Cal.App.) 56 P.(2d) 268, both resting on the clear statement of the rule found in Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 75, 29 A.L.R. 127, where the court, in defining the scope of certiorari, said: "While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. Schwarz v. Superior Court, [111 Cal. 106, 43 P. 580], supra; McClatchy v. Superior Court, supra; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35."

[2] The whole theory of these cases is that, since both habeas corpus and certiorari are confined to the question of jurisdiction alone, the court may consider evidence which discloses a lack of jurisdiction. Hence, if the immunity from prosecution shows lack of jurisdiction and that fact does not appear on the face of the indictment, evidence to prove that fact may be heard, otherwise there is no meaning in that portion of section 1484 of the Penal Code which provides that the court "must thereupon proceed in a summary way to hear such proof" that the imprisonment is unlawful or that the process "has been issued in a case not allowed by law." Section 1487, Pen.Code.

The contrary view, for which the respondent contends, is found in that portion of the opinion in the Rebstock Case which held that the immunity granted by section 64 of the Penal Code was a matter of defense to be pleaded under section 1020 of that Code and which there says: "Under his plea of not guilty, defendant may therefore show the facts here alleged, *just as he could show a defense under the statute of limitations,* and, if improperly denied his rights in this regard, may have *the error* corrected on appeal." (Italics ours.) As has been clearly pointed out in People v. McGee, supra, the statute of limitations is not a matter of defense but one of jurisdiction. The rule of the Rebstock Case was manifestly based upon the wrong theory and must be deemed to have been rejected by the later decision.

[3] The second question rests upon the facts pleaded concerning which there is no real dispute. The respondent first argues that petitioner was not served with a subpœna, that he appeared before the committee voluntarily. The petitioner alleged that on June 12, 1936, he was served with a subpœna to appear and testify before the committee. The respondent denies that petitioner was served with a subpœna. From the transcript of the testimony before the committee it appears that petitioner "having been first duly sworn as a witness, was examined and testified as follows." The transcript closes with the statement of Assemblyman Chatters: "You are excused, Mr. Connolly. * * * You are still under subpœna, and we will ask you to check in with the committee upon your return" (i. e., from Oakland). But we do not consider the matter of a subpœna as controlling. The statute reads: "No person sworn and examined." Any one sworn as a witness undertakes to testify, and it makes no difference how he is brought before the examining body. If he is sworn he is required to testify truthfully and may be compelled to do so under ordinary circumstances, notwithstanding the manner of his appearance.

[4, 5] It is then argued that, after he had testified upon direct examination by members of the committee, he was asked if there was anything further he would like to state and that the material testimony

upon which the indictment rests was then given voluntarily. The transcript supports this statement of the circumstances. When the question was put to him the witness replied that he would like to give the committee the facts of what happened in Oakland and added: "I believe that's giving me a chance to explain for myself something I have to explain to the grand jury when I appear before them in Oakland tomorrow."

Bearing in mind that the Code section grants immunity from prosecution "for any fact or act touching which he is *required to testify*," it is incumbent upon the petitioner to show that evidence relating to the matters covered by the indictment was obtained by some form of compulsion and that it was not given by him voluntarily. Though the Code section has not been interpreted in this state, similar statutes in other jurisdictions support the conclusion that "compulsion is a condition precedent for immunity." Scribner v. State, 9 Okl.Cr. 465, 132 P. 933, 940, Ann.Cas.1915B, 381; Burt v. State, 20 Ala.App. 296, 101 So. 768; U. S. v. Skinner (D.C.) 218 F. 870. The prevailing rule and the reason for it is well expressed in the case last cited where the court, at page 878 of 218 F., said: "The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects. The government is also entitled to be informed, before the examination of the witness, that the witness claims the answer he is asked to give will tend to incriminate him, and in what way. The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. The question of privilege cannot be determined until the witness has been summoned and sworn before the examining tribunal. Then for the first time the government must make its election. In order to intelligently make the election, it must be apprised first as to whether the witness gives his testimony voluntarily for the purpose of exoneration, or involuntarily, because he would be compelled to testify if he refused. Only in the latter case would immunity flow from his evidence. It the witness fails to assert his privilege, the government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result."

The same principle is found in the opinion of the three dissenting justices in People v. Fryer, 175 Cal. 785, 796, 167 P. 382, 386, where it is said: "That no witness who, without objection in any manner or form whatsoever, takes the stand and gives testimony whereby he incriminates himself can claim immunity under the statute; that, if he would claim immunity from prosecution, he must first object or in some manner show that he is not a voluntary witness, and that until he does this, the provision presuming him to have asked to be excused, does not apply."

For the purpose of this proceeding we do not hold that it is necessary for the witness in all cases to claim the immunity granted under the section. But we do hold that, before he can successfully assert the claim of immunity in a proceeding of this kind, it is incumbent upon him to show that his testimony before the committee was not voluntary, but was given under some form of compulsion. It has often been said that the object of these immunity clauses is to assist the state in procuring credible evidence to aid in the enforcement of the law, and that it is not their object to prevent a witness from voluntarily incriminating himself or to enable a clever criminal, by voluntarily and surreptitiously including criminal with noncriminal facts, to secure wholesale immunity.

The writ is discharged and the petitioner remanded.

We concur: STURTEVANT, J.; SPENCE, J.

17 Cal.App.2d 174

METROPOLITAN LAUNDRY CO., Limited, v. GREENFIELD et al.

Civ. 10347.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1936.

Appeal and error ⚷460(2)

Appeal from order granting injunction restraining laundry employee from doing such acts as agreement with a prior employer recited he was not to do for one year after termination of employment *held* not to suspend operation of injunction, since injunction was "prohibitory" and not "mandatory."

[Ed. Note.—For other definitions of "Mandatory" and "Prohibitory," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the Metropolitan Laundry Company, Limited, against B. C. Greenfield and others. A temporary injunction was granted, and the named defendant petitions for a writ of supersedeas.

Petition denied.

Otto G. Kuklinski, of San Francisco, for appellant.

Thomas, Beedy & Paramore, of San Francisco, for respondent.

TYLER, Presiding Justice.

Application for a writ of supersedeas. The petition was filed by defendant Greenfield and it alleges that he has perfected an appeal from a preliminary injunction granted by the court below; it further alleges that the perfecting of the appeal has stayed the operation of said injunction because of the fact that it is mandatory in character. The answer filed to the petition denies certain allegations in the petition, and particularly the one alleging the injunction to be mandatory. In this connection the answer alleges the injunction to be a preliminary one; that it is not mandatory but prohibitory in character, and is not stayed by the appeal. As a further defense to the petition plaintiff alleges that petitioner consented to the granting of the preliminary injunction upon the filing by plaintiff of an additional bond in the sum of $500.

The action in which the injunction was prayed for and issued was one for damages. The allegations are to the effect that defendant Greenfield was employed by plaintiff as a laundry driver to collect from and deliver to customers of plaintiff certain laundry work; that at the time Greenfield entered upon his employment he agreed in writing that while in the employment of plaintiff, or thereafter should such employment be terminated, he would not solicit, divert, or take away or furnish to any person, for a period of one year after the termination of such employment, information that would enable him to obtain plaintiff's customers. The complaint further alleged that the employment had terminated and Greenfield had and was violating his contract with plaintiff by soliciting plaintiff's customers to bestow their work upon a competitor of plaintiff, and many customers had in consequence been induced to give their work to a rival concern to the great and irreparable damage of plaintiff.

In his answer Greenfield denied the facts recited in the complaint and in addition he alleged certain other facts which he claims show that plaintiff was not entitled to maintain the action. He also alleged that he was earning his livelihood as a laundry driver and the business he had was his as of right.

Upon reading the verified complaint, to which was attached defendant Greenfield's agreement with plaintiff not to solicit plaintiff's customers for their business in the event of a termination of the employment, a preliminary injunction was issued by the terms of which Greenfield was restrained from doing such acts as his agreement recited he was not to do.

Petitioner makes the contention that he was denied the opportunity of presenting his defense, and the action of the trial court in issuing the injunction was an abuse of discretion, arbitrary and erroneous. We are not here concerned with the question as to whether or not the injunction was properly or improperly granted. That question is one to be decided upon the appeal from the order. The only question here presented is whether or not the injunction is mandatory or prohibitory. If mandatory, the appeal suspends the operation of the injunction. If prohibitory merely, the appeal does not suspend it. That the language of the injunction is simply prohibitory there can be no question. The injunction does not compel petitioner to do any affirmative act, but merely prohibits him from doing the very things he agreed under his contract with plaintiff not to do. The difference between prohibitory and mandatory injunctions is gone into and fully discussed in United Railroads v. Superior Court, 172 Cal. 80, 155 P. 463. No useful purpose would be subserved by discussing it here. Greenfield is protected by the bond given upon the issuance of the injunction and it is an easy matter to have the case set for trial and disposed of on its merits.

The petition is denied.

We concur: KNIGHT, J.; CASHIN, J.

17 Cal.App.2d 40

THOMAS v. SUPERIOR COURT, LOS ANGELES COUNTY, et al.

Civ. 11229.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1936.

Courts ⚷475(2, 3)

Superior court had jurisdiction to determine petition for distribution of testamentary trust which was created by final decree of distribution, to determine extent of interests of various assignees of beneficial interests under trust, to determine conflicting claims of assignees, and to partition various beneficial interests in trust under assignment (Probate Code § 1120, as amended by St.1933, p. 2495).

Petition by Phillip E. Thomas for writ of prohibition against the Superior Court, County of Los Angeles, and Honorable Frank C. Collier, Judge of said court.

Writ denied.

Brown, Bissell & Beery, of Los Angeles, for petitioner.

CRAIL, Presiding Justice.

This is a petition for a writ of prohibition against the superior court of Los Angeles County to restrain it from hearing or determining a petition for distribution of a testamentary trust which was created by the final decree of distribution in the estate of Richard D. Davis, deceased, and from determining the extent of the interests of the various assignees of the beneficial interests under said trust and from determining conflicting claims of said assignees among themselves and from partitioning in said proceeding the various beneficial interests in said trust under said assignment.

The contention of the petitioner is that the superior court has no jurisdiction in such proceeding to determine such matters, and he relies upon the case of Kingsbury v. Ross, 217 Cal. 484, 19 P.(2d) 784, and cases cited therein. Petitioner does not overlook section 1120 of the Probate Code (as amended by St.1933, p. 2495), but he contends that the court does not have jurisdiction in spite of said section. The section reads as follows: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of his trust, or at the termination thereof, render for settlement his accounts and report his acts as such trustee, before the superior court in which the will was probated. For that purpose, the trustee, or, in case of his death, his legal representatives, shall present to the court his verified account and report, setting forth his accounts in detail, reporting his acts as trustee, and showing the condition of the trust estate, and giving the names and post-office addresses, if known, of the beneficiaries. The trustee may also petition such court, from time to time, for instructions as to the administration of the trust. The clerk shall set the account and report or petition for settlement or hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. The trustee shall cause notice of the hearing to be mailed to the beneficiaries at their last known addresses, as provided in said section 1200, whether they have requested special notice or given notice of appearance or not." It will be observed that under said section the court does not lose jurisdiction of the trust estate by the final distribution of the probate estate, but that the superior court "shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust," etc. The petition for distribution is pending before the superior court as such and that court has jurisdiction, subject to the limitations of section 1120, to do the very things which the petitioner seeks to have this court prohibit.

Writ denied.

We concur: WOOD, J.; McCOMB, Justice pro tem.

17 Cal.App.2d 180

LAVERNE v. DOLD et al.

Civ. 5607.

District Court of Appeal, Third District, California.

Oct. 20, 1936.

1. New trial 🔑159

In passing upon motion for new trial, trial court becomes judge of both weight and sufficiency of evidence and credibility of witnesses.

2. New trial 🔑6

Trial court is clothed with wide discretion in passing upon motion for new trial.

3. New trial 🔑70

Trial court's discretion in granting new trial upon ground of insufficiency of evidence will not be deemed to have been abused unless favorable decision for moving party would have no substantial legal support in evidence.

4. Appeal and error 🔑933(1)

On appeal from order granting a new trial, presumptions are in favor of such order and against the verdict.

5. New trial 🔑70

Evidence that automobile in which guest was riding entering intersection first was struck by truck traveling on wrong side of street at excessive speed and failing to yield right of way justified grant of new trial on guest's motion on ground of insufficiency of evidence in suit by guest against truck driver and his employer.

6. Appeal and error 🔑981
New trial 🔑99

Grant of new trial upon ground of newly discovered evidence is within trial court's discretion and will not be disturbed unless abuse of discretion is clearly shown.

7. New trial 🔑99

To justify grant of new trial upon ground of newly discovered evidence, such evidence must be newly discovered, more than accumulative, such as would render different result probable and the best evidence, and diligence to secure it must be shown by moving party.

8. New trial 🔑108(4)

Trial court *held* not to have abused discretion in granting new trial in automobile collision case on ground of newly discovered evidence to be given by witness alleged to have witnessed collision from different angle than any of other witnesses who could not previously be located by investigators, notwithstanding failure to obtain continuance.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Lucille Laverne against William Dold and another. From an order granting a new trial, defendants appeal.

Affirmed.

Gerald M. Desmond, Stanley W. Reckers and Downey, Brand & Seymour, all of Sacramento, for appellants.

Clifford A. Russell, of Sacramento, and Richard L. Oliver and Noel B. Martin, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this case the trial court set aside the verdict of the jury and granted the motion of plaintiff, respondent herein, for a new trial upon the ground of insufficiency of the evidence, and newly discovered evidence. Appellant urges such order constituted an abuse of discretion.

The accident with which this litigation is concerned occurred in the afternoon of May 18, 1933, in a business district and at an obstructed intersection of Third and M streets in Sacramento. Defendant Rose, as the employee of defendant Dold, was driving a truck southerly on Third street where it intersects M street, and plaintiff, a guest, was riding in the front seat of a Stutz automobile being driven by Mrs. Nourse, easterly on M street. There was a street car track on Third street and double car tracks on M street. Plaintiff testified she saw the truck before it entered the intersection, the Stutz then being about its length in the intersection. She also testified the truck was on the wrong side of the street and was traveling about 35 miles per hour and the Stutz traveling about 15 miles per hour. The Stutz, in an attempt to avoid a collision, was stopped when its front wheels were about two feet beyond the easterly track of the car tracks and was struck by the truck near the left front wheel.

[1] Clyde W. Reid, a witness who was standing on the Third street sidewalk testified the truck was going about 30 or 35 or maybe 40 miles an hour into the intersection, traveling along the car tracks in the center of the street. He testified the Stutz entered the intersection first and stopped with its front wheels four or five feet east of the easterly rail of the Third street line. The driver of the Stutz testified as to the position of plaintiff in the car, that plaintiff was her guest, and that when she was almost in the middle of the street she saw the truck enter the intersection going about 35 miles an hour. She stopped, believing the truck would pass either to her rear or in the front. Other witnesses testified to the same effect, all tending to show the Stutz entered the intersection first, but that the truck failed to yield the right of way, the excessive speed of the truck, the fact that it was being driven on the wrong side of the street, and the failure to turn the truck to the right or the left to avoid the collision. Some of this testimony is contradicted by witnesses called for the defense, but in passing upon a motion for a new trial the trial court becomes the judge of both the weight and sufficiency of the evidence and of the credibility of the witnesses. Cookson v. Fitch, 116 Cal.App. 544, 3 P.(2d) 27; Chorn v. Pacific G. & E. Co., 135 Cal.App. 195, 26 P.(2d) 726.

[2, 3] It needs the citation of no authority that the trial court is clothed with a wide discretion in passing upon a motion for a new trial. That court had the opportunity, which the reviewing court did not have, of seeing the witnesses and observing their manner while testifying on the stand, and it was very proper that the trial judge be given such latitude. The rule is laid down in Erickson v. Grady, 119 Cal.App. 596, 6 P.(2d) 1002, that the discretion in granting a new trial upon the ground of insufficiency of the evidence will not be deemed to have been abused unless a decision in favor of the moving party would have no substantial legal support in the evidence. An examination of the entire evidence shows that there was substantial evidence to support a verdict for plaintiff.

[4, 5] In construing a motion such as this, we find the trial court is clothed with a wide discretion (Malloway v. Hughes, 125 Cal.App. 573, 13 P.(2d) 1062), and on appeal the presumptions are in favor of the order granting a new trial and against the verdict. Rosenberg v. George A. Moore & Co., 194 Cal. 392, 229 P. 34. We find ample support in the record to justify the trial court in granting a new trial upon the ground of insufficiency of the evidence.

[6, 7] Likewise the court was justified in granting a new trial upon the further ground of newly discovered evidence. An order upon that ground is also a matter within the discretion of the court and will not be disturbed unless an abuse of discretion is clearly shown (Waer v. Waer, 189 Cal. 178, 207 P. 891), and will rarely be disturbed. Spear v. United Railroads, 16 Cal.App. 637, 117 P. 956. Such evidence must be (1) newly discovered; (2) more than accumulative; (3) would render a different result probable; (4) diligence to secure same must be shown by the moving party; and (5) it must be the best evidence. Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 276 P. 394. From the affidavit in support of the motion, the evidence of the missing witness comes within these requirements.

[8] The accident occurred in May, 1933, but the case did not go to trial until April, 1935. One Lester B. Robinson is claimed to have witnessed the collision from a different angle than that of any of the other witnesses, and it is alleged he would have testified as to the position of the cars and the speed of each. Affidavits in support of the motion to which counteraffidavits were not filed, showed that investigators were employed to locate Robinson in Sacramento and in San Francisco, but they were un-

successful. Appellant claimed respondent made no effort to obtain a continuance of the trial, but as respondent points out, at that time she would have been unable to make an affidavit that the witness would be produced at a given time, nor did she know as to what he would testify if called, and not knowing his whereabouts, she was then unable to produce a deposition to be used at a subsequent date if the cause were continued.

Finding no abuse in the discretion exercised by the trial court, the order appealed from is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

17 Cal.App.2d 193

PALO ALTO MUT. BUILDING & LOAN ASS'N v. COOK et al.

Civ. 10269.

District Court of Appeal, First District, Division 2, California.
Oct. 21, 1936.

Mortgages ⚷375

Statute shortening period within which to bring action for deficiency remaining after foreclosure sale *held* applicable to sale made after effective date of statute, notwithstanding note and trust deed were executed prior to effective date of statute (Code Civ.Proc. §§ 337, subd. 1, and 580a as amended by St. 1933, pp. 2116, and 1672).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the Palo Alto Mutual Building & Loan Association against L. H. Cook and wife. From an adverse judgment, the plaintiff appeals.

Affirmed.

Rodgers & Costello, of Palo Alto, for appellant.

Frank V. Kington, of Redwood City, for respondents.

SPENCE, Justice.

This action was brought to recover a deficiency judgment after a sale under a deed of trust. Defendants interposed a demurrer and contended that the cause of action was barred by the provisions of section 337, subd. 1, and section 580a of the Code of Civil Procedure. Said demurrer was sustained, and thereafter judgment of dismissal was entered. Plaintiff appeals from said judgment.

The note and deed of trust were executed on August 19, 1930. In 1933, and prior to the sale under said deed of trust, the above-mentioned sections of the Code of Civil Procedure were amended (St.1933, pp. 2116, and 1672) so as to require that an action for a deficiency judgment after a sale under a deed of trust should be brought within three months after the time of sale. Thereafter, a sale was held under said deed of trust on September 4, 1934, and this action for a deficiency was not commenced until April 8, 1936.

It is appellant's contention that the provisions of the amendments to the above-mentioned sections, limiting the time within which an action for a deficiency judgment may be brought, do not apply in any case where the note and deed of trust were executed before the effective date of said amendments. We find no merit in this contention. It will be noted that the sale here was held in 1934 and after the effective date of said 1933 amendments. Under these circumstances, this action was subject to the limitation provided by said amendments notwithstanding the fact that the note and deed of trust were executed before the effective date of said amendments. Reynolds v. Jensen (Cal.App.) 58 P.(2d) 687; hearing denied by Supreme Court, August 10, 1936.

Appellant calls our attention to the language used in Central Bank of Oakland v. Proctor, 5 Cal.(2d) 237, 54 P.(2d) 718, where it is indicated that said section 580a does not apply to deeds of trust antedating its enactment. But the court there was dealing with provisions of said section other than those relating to the time for bringing an action to recover a deficiency judgment. Reading that decision in the light of the question before that court, we find nothing therein which is in conflict with the holding in Reynolds v. Jensen, supra.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

17 Cal.App.2d 159

MARGOLIS v. SAN DIEGO TRUST & SAVINGS BANK.

Civ. 1968.

District Court of Appeal, Fourth District, California.

Oct. 19, 1936.

Rehearing Denied Nov. 16, 1936.

1. Municipal corporations ⚷939

In action for seller's failure to deliver street improvement bonds to plaintiff after he had been notified by seller that his bid had been accepted, amount for which bonds were then sold to another party was some evidence of their value at time.

2. Municipal corporations ⚷939

In action for seller's failure to deliver street improvement bonds after defendant had notified plaintiff that his bid on bonds had been accepted, evidence as to market value of bonds *held* to support finding to effect that plaintiff suffered no damage.

3. Municipal corporations ⚷939

In action for failure to deliver street improvement bonds, evidence of market value of bonds *held* not inadmissible on ground that there could be no market value because no two were secured by the same property, in absence of evidence that properties back of respective bonds were not of equal value.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by B. B. Margolis against the San Diego Trust & Savings Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas C. McCarty, of La Mesa, and Frank M. Downer, Jr., of San Diego, for appellant.

Frank A. Gazlay and George H. Stone, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for breach of a contract. On September 22, 1935, the respondent invited bids on certain street improvement bonds belonging to a trust estate. On October 5, 1935, the appellant, in the form of a letter, made an offer for the bonds. The various bids received were opened on October 7, 1935, and on October 8 the respondent notified the appellant that his bid was accepted. Shortly thereafter the respondent discovered that due to a mathematical error in computing the amount of the bid the appellant was not the highest bidder, as another bidder had offered $50 more. The bonds were delivered to the other bidder and the appellant, after tendering $3,528.86, the amount of his bid, brought this action seeking to recover $1,273.80, the difference between the amount of his bid and the face value of the bonds plus accrued interest and penalties.

At the trial it was stipulated that the par value of the bonds in question was $4,195.17, that the delinquent interest and penalties amounted to $635.49, and that there was a tax delinquency on the properties covered by the bonds amounting to $5,587.45. The court found that the market value of the bonds at the time delivery was refused was 80 cents on the dollar or $3,356.14, and also found that it was not true that by reason of the refusal to deliver the bonds the appellant had been damaged in the sum of $1,273.80, or in any other sum or at all. From a judgment in favor of the respondent this appeal is taken.

The appellant contends that in the absence of evidence to the contrary the presumption is that the face value of these bonds is their true value, and, as such, must be taken as the measure of damages, and that there is no evidence to support the court's findings to the effect that no damage was suffered. Since evidence was received as to the market value of these bonds, the controlling question is whether or not there is any evidence to support the findings referred to.

[1, 2] A number of witnesses testified that there was a market for street bonds of this character in San Diego at the time, and it is clear from the testimony that this market was fairly active. One witness, who qualified as an expert, being a dealer in bonds of that type, testified that in his opinion the fair market value of these bonds at the time in question was $3,093. The appellant himself testified that he had purchased similar bonds at about 70 cents on the dollar. Another witness, after testifying that there was an active market for such bonds, testified that a few months after the transaction here involved she purchased nearly half of the bonds in question for 80 cents on the dollar and that she later sold them for less than their face value. It fully appears that the respondent asked for bids on these bonds more than three weeks before October 15, 1935, the

date on which it is alleged delivery was refused, that a number of bids were received, and that the highest bid was only $50 more than the amount of the appellant's bid. The amount for which the bonds were sold is not only some evidence of their value at the time, but, under the circumstances, might well be taken as the best evidence of their market value. While the evidence is somewhat meager, we think it is sufficient to support the findings.

[3] The appellant maintains that there could be no such thing as a market value for these bonds, since no two were secured by the same piece of property. No evidence was introduced as to the condition or nature of the various properties on which the bonds were a lien and in so far as appears the properties back of the respective bonds may have been of equal value and the security similar in all respects to that behind other bonds of the same and other issues. Under such circumstances, the rules governing sales of corporate stocks and bonds are applicable, in so far as this particular question is concerned, and evidence of the market value was properly received.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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17 Cal.App.2d 176

MEDEIROS v. SOARES.

Civ. 10164.

District Court of Appeal, First District, Division 2, California.

Oct. 20, 1936.

Rehearing Denied Nov. 19, 1936.

Hearing Denied by Supreme Court Dec. 17, 1936.

1. Automobiles 🔑245(78)

Whether motorist seeking recovery for injuries suffered in automobile collision was contributorily negligent by operating automobile when he was blinded by rays of setting sun *held* for jury.

2. Appeal and error 🔑1064(1)

In action for injuries sustained in automobile collision, instruction that in absence of contrary evidence, both parties are presumed to have done everything reasonably prudent persons would have done under circumstances for protection of their own safety, and that presumption that plaintiff was not contributorily negligent is species of evidence continuing until overcome by contrary evidence, *held* not prejudicial, where there was evidence as to care exercised by plaintiff.

3. Statutes 🔑207

California Vehicle Act requiring driver of vehicle approaching intersection to yield right of way to vehicle which has entered intersection and driver who has stopped at entrance to through highway to yield to other vehicle which has entered or is approaching intersection so closely as to constitute hazard, but authorizing driver to proceed as to other vehicles, *held* not conflicting (St.1931, p. 2126, § 131).

4. Trial 🔑243

In action for injuries sustained in automobile collision occurring at intersection with through highway, instruction relating to motorists' duty under California Vehicle Act when approaching an intersection to yield right of way to vehicle which has entered into intersection, and when having stopped as required at entrance to through highway to yield to other vehicles within intersection or approaching closely, *held* not erroneous on ground two rules conflicted (St. 1931, p. 2126, § 131).

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Frank Medeiros against Antone Soares. Judgment for the plaintiff, and defendant appeals.

Affirmed.

Francis N. Foley, of San Mateo, for appellant.

Frank Lee Crist, of Palo Alto, and Edmund Scott, of Redwood City, for respondent.

STURTEVANT, Justice.

From a judgment awarding the plaintiff damages for injuries suffered in an automobile collision, the defendant has appealed.

At about sunset on the evening of July 8, 1934, the defendant was driving southeast on the Bay Shore highway near Palo Alto. About the same time the plaintiff was driving southwest on University avenue. In the intersection of those roads their cars collided, and for injuries suffered the plaintiff commenced this action.

[1] The defendant contends that the plaintiff was guilty of contributory negligence. That contention is based on the claim that at a time when he was blinded by the rays of the setting sun the plaintiff drove forward and the collision complained of occurred. It is a sufficient answer to that contention to state that repeatedly the plaintiff testified the sun was not shining in his eyes as he drove forward, and he did not drive forward while blinded by the rays of the sun. Moreover, the contention which the defendant now makes was alleged in his answer, was submitted to the jury under specific instructions, and was by the jury found in favor of the plaintiff and against the defendant.

[2] Upon the request of the plaintiff the trial court instructed the jury as follows: "In the absence of evidence to the contrary, the law presumes that both parties did everything that reasonably prudent persons would have done under the circumstances for the protection of their own safety. The presumption that the plaintiff was not guilty of contributory negligence is, in itself, a species of evidence which continues with the plaintiff throughout the trial of this case and until overcome by contrary evidence. Such presumption must prevail and control your deliberations until and unless it is overcome by satisfactory evidence." Calling our attention to the fact that the plaintiff took the stand and was examined and cross-examined on what care he exercised and that he called other witnesses who were also examined and cross-examined on the care the plaintiff exercised, the defendant claims any presumption on the subject was dispelled and that the instruction should not have been given. He cites Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 9, 210 P. 269. Conceding that the giving of the instruction was error, the plaintiff claims in the instant case it was not a prejudicial error. Rogers v. Interstate Transit Co., 212 Cal. 36, 40, 297 P. 884. We think his claim is sound for the following reasons: The trial court gave several kindred instructions. All contained words to the effect that the presumption applies only "in the absence of evidence to the contrary, * * *" "until overcome by contrary evidence, * * *" etc. The instruction under attack is the fairest of the lot as it applied to "both parties" and is not limited to one party. Every juror heard each party produce evidence for or against the guilt or innocence of each party according to their respective contentions. When the instructions were read the jurors heard the limitations, "In the absence of evidence to the contrary, * * *" "until overcome by contrary evidence, * * *" etc., and as they had heard a great deal of contrary evidence, we must assume each juror understood that, in view of the evidence so received, said presumptions were not to be applied. As shown on its face the instruction complained of was addressed to a contingency (the absence of evidence to the contrary) which did not arise. Therefore, the effect of giving the instruction was merely to instruct on a subject that was not present in the action on trial. It could not have been prejudicial. In re Estate of Clark, 180 Cal. 395, 398, 181 P. 639.

[3, 4] The trial court on the request of the plaintiff instructed the jury as follows:

"I instruct you that at the time of the happening of the accident involved in this action, section 131 of the California Vehicle Act provided in part as follows:

"(1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection.

"(2) The driver of any vehicle who has stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely on the through highway as to constitute an immediate hazard but said driver having so yielded may proceed and other vehicles approaching the intersection on the through highway shall yield to the vehicle so proceeding into or across the through highway." (Numbering ours.) The defendant claims that paragraph (1) applies to intersections in general, not otherwise provided for, and that paragraph (2) applies only to intersections with through highways, and that the two rules conflict. He cites Lindenbaum v. Barbour, 213 Cal. 277, 2 P.(2d) 161. That case is not in point. It involved section 131 as enacted by chapter 240, p. 412, Statutes of 1925, and which was quite different from section 131 (St.1923, p. 560) as amended by chapter 1026, Statutes of 1931, p. 2126, and which was, in part, copied in the instruction under attack. The section is divided into paragraphs which prescribe different duties. As the first paragraph contains no words to the contrary, it applies to all intersections. As the third paragraph specifically mentions "through highways," it applies to intersections with such "through highways." As the intersection involved in this case was one with a "through highway," the trial court did not err in including a part of paragraph 1 and a part of paragraph 2 of said section in giving the instruction complained of. The two paragraphs do not conflict one with the other, but both are to be given effect. No other objection to the instruction is made by the defendant. The objection he makes is without merit.

The judgment is affirmed.

I concur: NOURSE, P. J.

17 Cal.App.2d 144

OLDHAM v. ÆTNA INS. CO. et al.

Civ. 10607.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1936.

Rehearing Denied Nov. 10, 1936.

Hearing Denied by Supreme Court Dec. 17, 1936.

1. Trial 🔑335

Where action is for compensatory damages suffered on account of a wrong in which both defendants join, damages cannot be severed.

2. Trial 🔑335

In action for damages for false arrest and imprisonment wherein evidence supported finding that defendants were joint tortfeasors, judgment awarding certain sum as special and compensatory damages as against one defendant and a different sum as special and compensatory damages as against other defendant *held* erroneous, since damages were not severable.

3. Appeal and error 🔑930(1)

Doctrine that all reasonable inferences will be indulged in to support rather than defeat verdict and judgment does not validate a verdict and judgment which are inherently invalid.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Harold Oldham against the Aetna Insurance Company, Everett Moran, and others. From a judgment for plaintiff, and from an order denying named defendants' motion for judgment notwithstanding the verdict, named defendants appeal.

Order affirmed, and judgment reversed and remanded.

Hindman & Davis, of Los Angeles, for appellant Ætna Ins. Co.

Angus C. McBain, of Los Angeles, for appellant Everett Moran.

Joseph Scott, Theodore C. Heyl, and Cuthbert J. Scott, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendants Ætna Insurance Company and Everett Moran from a judgment on a verdict entered against them in favor of plaintiff.

The action was brought by plaintiff, Harold Oldham, for damages alleged to have been sustained by virtue of an alleged false arrest and imprisonment. The plaintiff was arrested without a warrant on November 27, 1933, on suspicion of grand theft and violation of sections 548 and 549 of the Penal Code of California, by R. E. Warwick, detective lieutenant of the Glendale police department. Appellant Moran, who was an independent insurance adjuster, to whom Ætna Insurance Company had assigned the adjustment of Mr. Oldham's loss, was present at the time of the arrest.

At the conclusion of plaintiff's case, plaintiff dismissed the action as to three defendants, namely, Marshall Rankin, Mervyn F. Collopy, alleged to be special adjusters of Ætna Insurance Company, and R. E. Warwick, the detective lieutenant who arrested plaintiff.

The record reveals that plaintiff's apartment was burglarized on September 29, 1933. At that time he was insured with the Ætna Insurance Company against loss from burglary and theft, and he filed a claim with said company for loss alleged to represent the value of the articles stolen, in the sum of $1,575. The complaint in the usual form alleged that appellants caused respondent's arrest and that said arrest was without probable cause.

The jury returned the following verdict: "We, the jury in the above entitled action, find for the plaintiff and against the defendants Ætna Insurance Co. and Everett S. Moran and assess plaintiff's damages against defendant Aetna Insurance Co. at $282.00 special damages, $6000.00 compensatory damages and $ none exemplary damages, and assess plaintiff's damages against defendant Everett S. Moran at $282.00 special damages, $4000.00 compensatory damages and $ none exemplary damages."

Upon said verdict the following judgment was entered: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said Harold Oldham have and recover from said Aetna Insurance Company the sum of $6282.00 and from Everett S. Moran the sum of $4282.00, together with his costs and disbursements incurred in this action, amounting to the sum of 454 and 00/100 dollars."

[1-3] At the outset it should be noted that the verdict was for compensatory damages and special damages only; no punitive damages were awarded. The law appears to be well settled that where the action is for compensatory damages suffered on account of a wrong in which both defendants join, the damages cannot be severed. McCool v. Mahoney, 54 Cal. 491.

In Marriott v. Williams, 152 Cal. 705, 711, 93 P. 875, 878, 125 Am.St.Rep. 87, the Supreme Court declared: "In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted irrespective of the degree of culpability." On the same subject the Supreme Court has further declared as follows: "In an action for compensatory damages against joint tort feasors (the action contemplated by the Civil Code, § 3333), the law will not permit an apportionment of the damages, since it will not attempt to measure the degrees of culpability of the joint tort-feasors; nor in an action for malicious prosecution, where the existence of malice in fact must be found against every tort-feasor, before any judgment can be rendered against him, will the law, for the same reason, admit or permit an apportionment of damages" (Davis v. Hearst, 160 Cal. 143, 169, 116 P. 530, 542), and to the same effect in Hallinan v. Prindle, 220 Cal. 46, 55, 29 P.(2d) 202. The evidence in the instant case supports the necessary and implied finding that appellants were joint tort-feasors.

The doctrine that "* * * all reasonable inferences will be indulged in to support, rather than defeat, the verdict and judgment" (Snodgrass v. Hand, 220 Cal. 446, 449, 31 P.(2d) 198, 200) cannot be applied to serve respondent in the case at bar. Such doctrine does not operate to validate a verdict and judgment that are inherently invalid. Appellants' contention that the judgment is invalid is sustained.

It is unnecessary to consider other questions raised by the appeal.

From a reading of the record, it does not appear that the evidence was insufficient to support the verdict in favor of plaintiff, and therefore the order denying defendants' motion for judgment notwithstanding the verdict is affirmed.

The judgment is reversed, and cause remanded.

We concur: HOUSER, P. J.; YORK, J.

WHITING v. NATIONAL CITY. *

Civ. 1962.

District Court of Appeal, Fourth District, California.

Oct. 15, 1936.

Hearing Granted by Supreme Court Dec. 14, 1936.

1. Municipal corporations 🔑823

In action for injuries sustained by pedestrian as result of alleged defect in sidewalk, finding that condition of sidewalk was "unsafe" *held* equivalent to finding that it was "dangerous," since words "unsafe" and "dangerous" are synonymous and possess a like meaning (St.1923, p. 675, § 2).

[Ed. Note.—For other definitions of "Dangerous" and "Unsafe," see Words & Phrases.]

2. Trial 🔑375

Where trial judge inspected sidewalk, defect in which allegedly caused pedestrian to fall, what judge saw was required to be considered as evidence supporting findings and judgment.

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*For subsequent opinion see 69 P.2d 990.

3. Municipal corporations ⚷821(3, 16)

Whether dangerous condition in sidewalk has existed for sufficient length of time to constitute constructive notice and whether reasonable time to remedy condition has elapsed are questions of fact to be determined under all facts and circumstances in evidence.

4. Municipal corporations ⚷819(8)

Evidence that defective condition of sidewalk allegedly causing pedestrian to fall had existed unchanged for several years before accident and that members of city council, two superintendents of streets, and city clerk had walked over broken sidewalk *held* to sustain finding that city had sufficient notice of dangerous and defective condition of sidewalk (St.1923, p. 675, § 2).

5. Appeal and error ⚷1008(1)

Question whether alleged defect in sidewalk rendered it dangerous was one of fact addressed to trial judge sitting without jury (St.1923, p. 675, § 2).

6. Municipal corporations ⚷819(1)

Where edge of one square of sidewalk was raised about three-fourths of an inch above surface of adjoining square and about an inch from bottom of expansion joint between squares, evidence *held* to sustain finding that sidewalk was in a defective and dangerous condition rendering municipality liable for injuries sustained by pedestrian falling because of such defect (St.1923, p. 675, § 2).

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Jessie M. Whiting against the City of National City. Judgment for plaintiff, and defendant appeals.

Affirmed.

M. L. Campbell, of Bonita, for appellant.

George R. Baird and O. C. Ludwig, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $2,000 damages for injuries received on October 25, 1934, when she tripped and fell on a broken sidewalk in a public street in the business district of National City.

Defendant is a municipal corporation of the sixth class, and this action was brought against it under the provisions of section 2 of the Public Liability Act (St.1923, p. 675). This act, among other things, makes the municipality liable for injuries to persons which result from the dangerous or defective condition of public streets and property in cases where the board, officer, or person having authority to remedy the condition had knowledge or notice of the same and failed for a reasonable time after receiving such knowledge or notice to remedy such condition or to take such action as might be reasonably necessary to protect the public against injury. It is not questioned that the city council of National City was its governing body and had authority to remedy a dangerous or defective condition in its streets and sidewalks.

In his opening brief, counsel for defendant states the following grounds for a reversal of the judgment:

"(1) Is the evidence sufficient to show that the defendant city had knowledge or notice of the defect in the sidewalk?

"(2) Was the evidence sufficient for the Court to find as a matter of law that the sidewalk in question was defective?

"(3) Did the Court err in its construction of the Statutes of 1923, p. 675, as to the words 'knowledge or notice?'"

On the question of the dangerous or defective condition of the sidewalk, the trial court found as follows:

"That in the particular sidewalk herein described and in question herein there existed, on and before the 25th day of October, 1934, a condition as follows: That said sidewalk was made up of squares or areas of pavement with expansion joints between them; that one such square or area was raised at its easterly edge above the square or area of said sidewalk next adjoining it on the east; that at its highest point said square or area was raised about three-quarters of an inch above the surface of the square or area next adjoining it on the east; that in addition, the space occupied by the expansion joint between said raised square or area and the square or area next adjoining it on the east made a depression, to the bottom of which from the highest point of said raised block, square or area there was a fall of about one inch; that said raise extended for several feet to the north across said sidewalk, gradually lessening in height to a point where the surfaces of said squares were approximately even or level.

"That the condition of said sidewalk constituted an unsafe and defective condition in said sidewalk."

[1] It is to be observed that the trial court found the condition of the sidewalk to be "unsafe and defective" instead of "dangerous or defective," the language used in the statute. We can attach no importance to the difference in the language of the finding and that of the statute. It has been held that the words "unsafe" and "dangerous" are synonymous and possess a like meaning. Houston & T. C. R. Co. v. Smallwood (Tex.Civ.App.) 171 S.W. 292; Hanson v. City of Anamosa, 177 Iowa, 101, 158 N.W. 591; Coates v. Town of Canaan, 51 Vt. 131. Therefore, the finding that the condition of the sidewalk was unsafe is equivalent to a finding that it was dangerous.

[2] In addition to the evidence received in court the trial judge inspected the sidewalk. What he saw must be considered as evidence supporting the findings and judgment. Gray v. Magee, 133 Cal.App. 653, at page 658, 24 P.(2d) 948; Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.(2d) 919.

A statement of the elements necessary to be proved by a plaintiff in order to make out a cause of action in cases of this kind have been so recently detailed by the Supreme and Appellate Courts that it is unnecessary to repeat them here. See Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Watson v. City of Alameda, 219 Cal. 331, 26 P.(2d) 286; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643, 645; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768; Crone v. City of El Cajon, 133 Cal. App. 624, 24 P.(2d) 846.

[3, 4] On the question of the sufficiency of the evidence to prove notice of the dangerous or defective condition of the sidewalk, various witnesses testified that the break had existed unchanged for several years before the accident, and that there had been other accidents similar to the one suffered by plaintiff. Four members of the city council, two superintendents of streets, and the city clerk of National City each testified that prior to the accident in question each had walked over the broken sidewalk, some of them many times.

It has been held that "It is a question of fact for the trial court to determine under all the facts and circumstances in evidence whether the dangerous condition in the sidewalk has existed for a sufficient length of time to constitute constructive notice and also whether a reasonable time to remedy the condition has elapsed. Wise v. City of Los Angeles [9 Cal.App. (2d) 364], 49 P.(2d) 1122 [50 P.(2d) 1079]; Hook v. City of Sacramento, 118 Cal.App. 547, 554, 5 P.(2d) 643." Cressey v. City of Los Angeles, 10 Cal.App.(2d) 745, 53 P.(2d) 172, 173.

When we apply this rule to the facts of the instant case, the conclusion follows that the finding that the city had sufficient notice of the dangerous and defective condition of the sidewalk is supported by the evidence. The defect was in a sidewalk on a main street of the city and had existed in about the same condition for a number of years. Long-continued existence of a defect has been held to indicate constructive notice to the city. Boyce v. San Diego High School District, 215 Cal. 293, 10 P.(2d) 62. The responsible officers of the city had passed over the broken sidewalk many times before the accident. They may be charged with notice of that which is plainly within their vision. Hook v. City of Sacramento, supra.

Defendant relies upon the case of Nicholson v. City of Los Angeles, 5 Cal. (2d) 361, 54 P.(2d) 725, as supporting its contention that there was not sufficient notice of the defect to charge the city with liability. A study of that case has led us to the conclusion that it does not conflict with anything we have said. The only evidence in that case on the question of notice was that a small break, somewhat similar to the one described in the instant case, had existed for several months in a sidewalk in Los Angeles. There was no evidence in the record that any officer, agent, or employee of the city had passed over the broken sidewalk. In the instant case the fact that the responsible officers of National City had walked over the sidewalk many times should be sufficient to have charged the city with actual notice of the condition.

[5, 6] Defendant next urges that the evidence is insufficient to support the find-

ing that the broken walk rendered it dangerous and defective. That question is one of fact addressed to the trial judge when he is sitting without a jury. That being true, and the trial judge having viewed the portion of the sidewalk in question and heard the witnesses describe it, and having found that the condition was dangerous and defective, we cannot as a matter of law say that the break in the walk did not constitute a defective condition which was dangerous for those using it. In Hook v. City of Sacramento, supra, it was said:

"No hard and fast rule can be laid down in cases of this kind, as to the size or character of the hole or depression in a sidewalk or street that would constitute a dangerous or defective condition within the meaning of the statute, but each case must stand upon its own particular facts, and in the case at bar, under the evidence above set forth, we are not justified in holding as a matter of law that the hole or depression in said apron did not constitute a dangerous and defective condition in the sidewalk, or that respondent, by the exercise of ordinary care for her own safety, should have seen said depression and avoided the accident.

"As above stated, all these questions whether the apron or sidewalk were or were not in a reasonably safe condition, whether the respondent was or was not exercising due care in walking down said incline, were questions, under the conflicting evidence, addressed to the jury, and its verdict here on these questions is final. Heath v. Manson, 147 Cal. 694, 82 P. 331; Wile v. Los Angeles Ice & Cold Storage Co., 2 Cal.App. 190–192, 83 P. 271; Taylor v. Manson, 9 Cal.App. 382, 99 P. 410; Sharpless v. Pantages, 178 Cal. 122, 124, 172 P. 384; Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435."

The case of Nicholson v. City of Los Angeles, supra, does not conflict with anything we have just said. The only question decided in that case was the insufficiency of notice of the broken sidewalk and not whether the condition was dangerous or defective as a matter of fact.

The last assignment of error does not require separate consideration, as what we have already said sufficiently covers it.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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17 Cal.App.2d 62

WILLIAMS v. GOODIN et al.

Civ. 10699.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1936.

1. Appeal and error ⚷983(1)
Judgment ⚷855(1)

Whether dormant judgment shall be enforced is matter within sound discretion of trial court, and in absence of abuse of such discretion, reviewing court cannot interfere.

2. Judgment ⚷855(1)

Judgment creditor *held* not entitled as matter of right to order for issuance of writ of execution on showing that prior execution was issued within five years after judgment, where twenty-one years had elapsed since judgment was rendered (Code Civ.Proc. § 681, and section 685, as amended by St.1933, p. 2499).

3. Judgment ⚷855(1)

Refusing to issue execution on money judgment twenty-one years after judgment was rendered where prior execution had been issued within five years after judgment *held* not abuse of discretion under circumstances (Code Civ.Proc. § 681, and section 685, as amended by St.1933, p. 2499).

HOUSER, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Bessie H. Williams against F. C. Goodin and C. B. Keiser, wherein judgment was rendered for plaintiff. From an order denying her motion for the enforcement of the judgment, and the issuance of execution thereon against last-named defendant, plaintiff appeals.

Affirmed.

Ingall W. Bull and Franklin B. MacCarthy, both of Los Angeles, for appellant.

Kiggens & Hoffman, of Los Angeles, for respondent.

YORK, Justice.

Plaintiff appeals from an order denying her motion for the enforcement of a money judgment after a lapse of five years from the date of its entry, and the issuance of execution thereon, pursuant to section 685 of the Code of Civil Procedure, as amended by St.1933, p. 2499, against defendant Keiser, one of the judgment debtors in the above-entitled action, it appearing from the record that defendant Goodin had left the jurisdiction of the court.

The judgment for $1,809.75 and costs was entered on March 9, 1911, and on May 11, 1911, a writ of execution issued which was returned by the sheriff wholly unsatisfied. On June 29, 1914, an alias writ of execution issued, which was also returned unsatisfied, but defendants at that time were examined under proceedings supplemental to the execution which failed to reveal any property subject to levy thereunder. The validity and amount of the judgment are not questioned, nor the fact that it remains unsatisfied.

Appellant on September 30, 1935, moved the court for an order to enforce and carry into execution the aforesaid judgment, having given due notice thereof to the respondent Keiser, pursuant to the provisions of section 685 of the Code of Civil Procedure, as amended in 1933. (Stats. 1933, p. 2499.) This motion was supported by memorandum of points and authorities and an affidavit of the attorney for appellant which briefly summarized the history of the case, and attached to which was a letter written to him by respondent's former wife, upon which he apparently based his affidavit in support of the motion although nowhere in his affidavit does he attest to the fact that he believed the facts set forth in said letter were true. In opposition to the motion, respondent filed his affidavit stating that he had been a resident of Los Angeles continuously from the date of the entry of the judgment to the time of making the affidavit in question; that he had received inheritances in the years 1918 and 1931 which could have been disclosed to appellant by a supplemental proceeding; that up until the year 1929 he was an able-bodied man in good health and capable of following a gainful occupation; that in the year 1929 respondent became afflicted with diabetes from which he has been a constant sufferer; that in May, 1934, and in September, 1935, he suffered strokes, and as a result thereof, respondent at the time he made the affidavit here involved was not capable of following any gainful occupation, but was then entirely dependent for his living upon such few assets as he then possessed.

Upon hearing, the motion was denied. Appellant now contends that the order denying such motion should be reversed because, "(1) if the trial court had any discretion in passing upon the motion that discretion was abused; (2) under the 1933 amendment to section 685 of the Code of Civil Procedure plaintiff and appellant was entitled to an order for the issuance of execution upon showing compliance with section 681, C.C.P., as a matter of right."

[1, 2] Whether a dormant judgment shall be enforced is a matter within the sound discretion of the trial court. 11 Cal.Jur. 51, § 12; Faias v. Superior Court, 133 Cal.App. 525, 530, 24 P.(2d) 567; Blumer v. Madden, 128 Cal.App. 22, 26, 16 P.(2d) 319; Palace Hotel Co. v. Crist, 6 Cal.App.(2d) 690, 45 P.(2d) 415. In the absence of an abuse of such discretion, this court cannot interfere with the judgment of the trial court.

It was said in the case of Tolle v. Doak, 12 Cal.App.(2d) 195, at page 197, 55 P.(2d) 542, 543: "It has been the law of this state since 1861 that the superior court has power to order the issuance of execution on a judgment which became final more than five years before the application therefor. Prior to 1933 such an application could be made ex parte. In that year (St.1933, p. 2499) section 685 of the Code of Civil Procedure was amended to add to the provision that a judgment 'may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion,' the requirement 'and after due notice to the judgment debtor.' * * * As the statute is silent as to the manner of giving the notice, personal service is required." The notice required by such amendment was complied with in the case before us.

In the case of Shields v. Superior Court, 138 Cal.App. 151, 31 P.(2d) 1045, decided in 1934, the petitioner sought a writ of mandate to compel issuance of a writ of execution on a decree of divorce awarding alimony and support for children, contending that she was entitled thereto as a matter of right. Respondents claimed that the provisions for support were not enforceable by execution in the same manner as an ordinary money judgment under sections 681 and 685 of the Code of Civil Procedure, but that said provisions were enforceable only in the discretion of the trial court under section 140 of the Civil

Code. It was there said, 138 Cal.App. 151, at page 153, 31 P.(2d) 1045, 1046: "Under said section 685, a writ of execution may be had upon a judgment only 'by leave of court' after the lapse of five years 'from the date of its entry.' The decree here was entered in 1924, and the motion for the issuance of execution was made in 1934, approximately ten years after the entry of the decree. Under either view, petitioner was not entitled to a writ of execution as a matter of right at the time the motion was made, but only in the discretion of the trial court. * * * Assuming that sections 681 and 685 of the Code of Civil Procedure are the sections providing for the manner of enforcement as contended by petitioner, she was not entitled thereunder to the issuance of execution as a matter of right after the lapse of five years from the date of the entry of the decree."

It therefore appears that appellant was not entitled as a matter of right to an order for the issuance of a writ of execution upon showing compliance with section 681 of the Code of Civil Procedure, especially in view of the fact that over twenty-one years had elapsed since she had complied with said section.

[3] A perusal of the record before us compels the conclusion that there was no abuse of discretion on the part of the trial court in denying the motion to issue execution.

Since we are upholding the action of the trial court, and because the question has not been raised by either party to this appeal, we are not taking into consideration or deciding whether that portion of section 685, as amended supra, relating to the revivor of a judgment for the recovery of money "which shall have been barred by limitation at the time of the passage of this act," re-enacted by the amendment to said section in 1933, would preclude the court from making the order appealed from.

The order is affirmed.

I concur: DORAN, J.

HOUSER, Presiding Justice.

I dissent. It is well-established law that before a sound discretion may be exercised, it is necessary that sufficient and material facts be presented upon which the judgment of the court may operate. With that principle of law in mind, a careful reading of the affidavit of the judgment debtor would seem to disclose the existence of no material fact that properly might be used as a basis for the denial of the motion. It should be apparent that the fact that the judgment debtor was a continuous resident of Los Angeles county furnished no sufficient reason for the exercise of discretion in denying the motion; neither did the circumstance that the judgment debtor at some time had received certain inheritances, and that by the timely use of supplementary proceedings the judgment creditor might have discovered that fact. In addition thereto, for aught that appears herein, those inheritances may have been received in some foreign state; of which fact the judgment debtor supplementary to the execution of the judgment, unless by the judgment debtor within this state, the date of such receipt was long after that within which execution could have been levied as a matter of right within the terms of the statute. Moreover, in his application to the trial court for an order of examination of the judgment debtor supplementary to the execution of the judgment, unless the judgment creditor could have made affidavit to some facts which were both new and material, and consequently which were not contained within his affidavit that presumably was used on his former application for such an order, nor at that time reasonably available to the judgment creditor, ordinarily he would have been unable to obtain a new order for a second examination of the judgment debtor. Certainly the remaining facts contained in the affidavit made by the judgment debtor and which were submitted as a reason why the motion should be denied, had no materiality whatsoever to the exercise of discretion by the trial court in acting upon the motion. It would seem to be self-evident that because "that up until the year 1929 he was an ablebodied man in good health and capable of following a gainful occupation; that in the year 1929 respondent became afflicted with diabetes from which he had been a constant sufferer; that in May, 1934, and in September, 1935, he suffered strokes and as a result thereof, respondent at the time he made the affidavit here involved was not capable of following any gainful occupation, but was then entirely dependent for his living upon such few assets as he then possessed," presented not the slightest legal reason for depriving the judgment creditor of that which rightfully belonged to him.

The correct principle for the exercise of sound discretion is set forth in the case of Bailey v. Taaffe, 29 Cal. 422, and thereafter quoted with approval in the case of Demens v. Huene, 89 Cal.App. 748, 753, 265 P. 389. In the former case it was said: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates."

According to the record herein, appellant made a showing to the trial court that in all respects complied, not only with the plain terms of statutory demands, but also with all requirements that from time to time have been suggested in the several judicial constructions of the pertinent statute by the appellate courts of this state. To my mind, no sound reason existed for the denial to the judgment creditor of the rights which were intended to be secured to him by the statute.

With reference to the point suggested in the last paragraph of the prevailing opinion herein, to wit, that the motion properly might not have been granted because of the provisions of the statute (re-enacted in 1933) to the effect that there may be no revivor of a money judgment that has been barred by limitations "at the time of the passage of this act," the authorities clearly are to the effect that when a revising or amending statute is intended as a substitute for an original statute, the effect is simply to continue in force that which is re-enacted. Consequently, since the identical language with reference to revivor of the judgment appears in the original statute, clearly the point is not available to the judgment debtor in the instant matter. 23 Cal.Jur. 683, § 73; vol. X, p. 384, Cal.Jur.Supp., and authorities there respectively cited; Pierce v. County of Solano, 62 Cal.App. 465, 468, 217 P. 545; Shearer v. Flannery, 68 Cal. App. 91, 228 P. 549.

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16 Cal.App.2d 737

HOME INS. CO. OF NEW YORK v. LOS ANGELES WAREHOUSE CO.

Civ. 11057.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1936.

Rehearing Denied Nov. 4, 1936.

Hearing Denied by Supreme Court Dec. 3, 1936.

1. Warehousemen 🔑14

As respects warehouse company's liability for damage to sugar, warehouse receipt, which required claim for loss to be filed within thirty days, was the contract between parties, and provisions of rules and regulations filed with state railroad commission became part of contract where sugar was stored subject to rules and regulations on file (Gen. Laws 1931, Act 6386, § 14(b); Act 9059, § 3).

2. Warehousemen 🔑24(7)

Warehouse company *held* not liable to storer of sugar for damage resulting from fire caused by company's alleged negligence where warehouse receipt was made subject to regulations filed with state railroad commission which required claims for loss to be filed within thirty days after merchandise was delivered from warehouse, or within thirty days after delivery of last package of lot in warehouseman's apparent possession, and claim was not filed within thirty days after delivery (Gen.Laws 1931, Act 6386, § 14 (b); Act 9059, § 3).

◆

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Home Insurance Company of New York against the Los Angeles Warehouse Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON and EDMONDS, JJ., dissent.

Hindman & Davis and W. H. Abrams, both of Los Angeles, for appellant.

Hewitt & Anderson and C. H. Hartke, all of Los Angeles (Sherman Anderson and Leslie R. Hewitt, both of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiff appeals from a judgment of nonsuit. Plaintiff's assignor, Coca-Cola Company, stored 42,645 bags of sugar in the warehouse conducted by defendant on the premises designated as 316 Commercial street and 324 North San Pedro street in the city of Los Angeles. A fire occurred in the warehouse on August 4, 1930, and the sugar was damaged. Some of the bags were totally destroyed and the balance delivered to plaintiff's assignor in a damaged condition. Plaintiff's complaint is in three counts, the first being for conversion, the second charging negligence on the part of defendant in storing fireworks in close proximity to the sugar, and the third count charging that defendant permitted a nuisance to be maintained on that part of the premises that had been leased to the owner of the fireworks. Defendant denied the allegations of the complaint and pleaded the failure of plaintiff's assignor to present a written claim of loss or damage within thirty days after delivery of the sugar from the warehouse. At the trial plaintiff presented proof concerning the storage of the sugar and the fireworks and the cause of the fire. The parties entered into a written stipulation covering many of the facts, including the stipulation that neither plaintiff nor its assignor presented a claim in writing for loss or damage within thirty days or at any time prior to the date of the commencement of the action, February 3, 1933. It was also stipulated that at the time of the storage of the sugar plaintiff's assignor received from defendant a negotiable warehouse receipt in which defendant acknowledged receipt of the sugar "subject to all the terms and conditions contained herein and on the reverse hereof." On the reverse side of the receipt, the following appears: "These goods are stored and handled subject to the rules, regulations, rates and charges as published in our warehouse schedules, on file with the Railroad Commission of California and in our office, and such amendments thereto as may hereafter be filed." Paragraph IX of the stipulation provides in part as follows: "That prior to the storage of any of said sugar in said warehouse, and on or about the 7th day of June, 1928, the defendant Los Angeles Warehouse Company filed with the Railroad Commission of the State of California and in the form designated by the said Commission as provided by Section 14, Subdivision b, of the 'Public Utilities Act' of the State of California a schedule showing all rates, charges and classifications for the storage of goods, wares and merchandise in its said warehouse, together with all rules, regulations, privileges and facilities which in any manner affected or related to such rates, charges or services. That said defendant Los Angeles Warehouse Company caused said schedule to be printed and kept the same open to public inspection in its office at said warehouse on the premises designated by the street number 316 Commercial Street, in the City of Los Angeles; that the said schedule is entitled 'Warehouse Tariff No. 7-A,' and had been printed and was kept open to public inspection in said defendant's office at all times since the 7th day of June, 1928, including the period from July 8th, 1929, to July 26th, 1930, both dates inclusive, when the said sugar was delivered by said Coca Cola Co. for storage in defendant's said warehouse. That the said 'Tariff No. 7-A' is the tariff referred to in the warehouse receipts mentioned in Paragraph IV of this stipulation, and that the rules and regulations contained and set forth in said Warehouse Tariff No. 7-A contain, among other things, the following provisions: * * * As a condition precedent to recovery, claims for loss or damage must be made in writing within thirty days after the merchandise is delivered from warehouse, or, in the case of failure to make delivery, then within thirty days after delivery of the last package of the lot in warehousemen's apparent possession." Plaintiff did not present any evidence to excuse its failure to present a written claim within the thirty days specified.

[1, 2] The warehouse receipt was the contract between the parties. In Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259, 260, 54 L.R.A. 774, 86 Am.St.Rep. 250, there was printed in small type on the side of the warehouse receipt: "This receipt is given in accordance with the California Warehouse Laws, as well as the laws of the United States. Loss or damage by fire, the elements, shrinkage, leakage, or natural decay at owner's risk." The court stated: "Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them, as one of the terms of the contract." Section 3 of the Warehouse Receipts Act (Deering's Gen.Laws, 1931, vol. 3, Act 9059, pp. 4975, 4977) provides: "A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—(a) Be contrary to the provisions of this act. (b) In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." Section 14, subd. (b) of the Public Utilities Act

(Deering's Gen. Laws, 1931, vol. 2, Act 6386, pp. 3523, 3533) provides: "Under such rules and regulations as the commission may prescribe, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission may designate, and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges and classifications collected or enforced or to be collected or enforced, together with all rules, regulations, contracts, privileges and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service." Defendant is a public utility and as such was required to file its rules and regulations which in any manner affect or relate to rates or service. The rules and regulations filed by defendant by which it is required that written claims must be filed within thirty days undoubtedly relate to and affect the service. Since the sugar was stored subject to the rules and regulations on file, the provisions of the rules and regulations become part of the contract between the parties. The provision requiring the prompt presentation of a written claim is reasonable. It is designed to give a warehouseman timely opportunity to ascertain the facts concerning the asserted loss.

The Supreme Court of the United States has in a number of decisions held valid provisions requiring the presentation of claims within the periods provided by contract. In Erie Ry. Co. v. Stone, 244 U.S. 332, 37 S.Ct. 633, 61 L.Ed. 1173, an agreement providing that a written claim for damages to horses being shipped must be presented within five days was upheld. In Gooch v. Oregon Short Line R. Co., 258 U. S. 22, 42 S.Ct. 192, 66 L.Ed. 443, an agreement requiring claimant to file his written claim within thirty days in the case of a drover who suffered personal injuries while acting as caretaker for cattle in shipment was upheld. In Southern Express Company v. Caldwell, 21 Wall. 264, 22 L.Ed. 556, the court, speaking through Mr. Justice Strong stated: "It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit. It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in [New York C.] R. Co. v. Lockwood [17 Wall. 357, 21 L.Ed. 627]. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required."

In Cudahy Packing Co. v. Munson S. S. Line, 22 F.(2d) 898, 899, Circuit Court of Appeals, Second Circuit, the plaintiff's cause of action was founded upon alleged negligence of the defendant as a common carrier in failing promptly to unload a shipment of hams at Havana. The plaintiff delivered the hams to the Illinois Central Railroad in Iowa for shipment to Havana by way of Mobile. The through bill of lading issued by the Illinois Central Railroad contained a provision making the bill of lading subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company. The regular forms of bills of lading of the steamship company provided: "The carrier shall not, in any event, be liable for any claim or demand arising hereunder or in respect of the goods, unless notice of the claim be presented in writing to the carrier within thirty days after delivery of the goods to the carrier." At the close of the case, the trial judge directed a verdict for the defendant on the ground that the plaintiff had failed to prove notice of claim as required by the bill of lading. In upholding the judgment, the reviewing court stated: "The requirement that notice be given by the shipper imposes an affirmative duty on him, and makes him in respect to it an actor. * * * If plaintiff had sued on the bills of lading instead of in tort sur case, it would have been obliged under the Goethals decision [(D.C.) 298 F. 933] to allege and prove the giving of notice or some excuse for failure to give it. This burden of proof cannot be avoided by suing in tort. When the defendant set up the terms of the bill of lading, which are not disputed, the plaintiff had to prove everything necessary to establish a breach. * * * But it seems established that the provisions in the ocean bills of lading referred to in the through bill of lading were part of the contract of which the shipper was chargeable with notice." In Brennan Packing Co. v. Cosmopolitan Shipping Co. et al. (D.C.) 14 F.(2d) 971, the plaintiff shipped goods from Chicago by rail and thence to Europe by steamship. The railroad company issued a bill of lading in which it was provided: "That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment." The ocean bill of lading contained a provision that the carrier should not be liable for any claims unless certain prescribed written notice should be given to the carrier. The plaintiff did not comply with the provisions of the ocean bill of lading relative to serving notice of claim of damage. In deciding for the defendant, the court stated: "I am of the opinion not only that the provision for notice of claim and bringing of suit for damages was reasonable and not against public policy, but also that the libelant carried the burden of proving compliance therewith as a condition precedent to recovery. The Sagadahoc (D.C.) 291 F. 920. Notwithstanding this burden, libelant has neither complied with the provisions of the bills of lading, nor attempted in any way to excuse its failure so to do."

The contention of defendant is in harmony with California decisions. In Breuner Co. v. Western Union Telegraph Company, 108 Cal.App. 243, 291 P. 445, 447, the plaintiff sought to recover the sum of $1,000 which had been paid to a party in Orange, N. J., whereas the instructions were to pay the sum mentioned at Atlantic City in New Jersey. The money was paid to an impostor. For the purposes of this reference, all of the complicated details of the case need not be here set forth. The defendant delivered to the plaintiff a receipt for the money stating that it was received "subject to the terms and conditions of money transfer of this date." The defendant telegraph company had adopted and caused to be printed and issued to all of its money transfer offices throughout the United States its "book of rules of money transfer instructions to its agents and employees." This book was in use at all telegraph money transfer offices, but it was not shown to the representative of plaintiff, who had no actual knowledge of the book of rules or of any of its contents. The reviewing court held that defendant had breached its contract in making payment at Orange, but decided in favor of defendant for the reason "that the changed place of payment, under the facts of this case, was not the proximate cause of plaintiff's loss." In holding that the plaintiff was bound by the rules and regulations of the defendant company, the court stated: "Appellant, on the other hand, contends that the contract, as evidenced by the application and receipt, was and should be construed only with reference to the rules and regulations of the defendant company, as admittedly existing. We are of the opinion that the authorities support the contention of the appellant in this respect. * * * Under the authorities hereinafter cited, it is our conclusion that the rules of service are an inseparable part of the public service regulated and to be rendered, and that when one contacts or contracts with such public service the rules governing necessarily become a part of the contract from which neither of the parties may deviate. * * * Respondent argues that, admitting the service to be regulated and controlled by the rules, nevertheless one dealing with the telegraph company is not presumed to know the rules and is not chargeable with any knowledge thereof. This contention is likewise fully answered in the cited cases and to the contrary of the claim made by respondent. * * * And to put the public service dependent upon the proof of actual knowledge of every rule properly adopted as regulatory of the service would eventually narrow and restrict the utility to limitations seriously hampering its efficiency. * * * From the foregoing it is manifestly our conclusion that when plaintiff delivered for transfer the funds in question, it did so mindful of the rules of service adopted by the defendant telegraph company and that these rules entered into and became an integral part of the contract."

In Forest Lawn M. P. Ass'n v. De Jarnette, 79 Cal.App. 601, 250 P. 581, 582, the defendant purchased by contract a burial lot in the plaintiff's cemetery. One of the plaintiff's rules provided that those interred in the cemetery should be of the Caucasian race. The contract provided that the premises were accepted by the purchaser subject to the rules and regulations in force, and that "it is expressly agreed that this contract contains and embodies all the terms and conditions to be performed." The plaintiff sued to rescind the contract on the ground that the defendant was of the negro race and that the plaintiff had no knowledge of this fact when the contract was executed. Judgment for the plaintiff was affirmed, the court saying: "Appellant contends that she had a right to rely upon the provision that—'This contract contains and embodies all the terms and conditions to be performed by the parties hereto.' The answer is that one of the terms of the contract provides: 'Said premises to be conveyed to and accepted by the purchaser subject to the rules and regulations now in force and such as may hereafter be adopted.' By such reference the rules and regulations were made a part of the contract." See, also, Wells Fargo, etc., Bank v. Haslett W. Co., 60 Cal.App. 225, 212 P. 647.

Our disposition of the issue above discussed makes it unnecessary to pass upon other points argued in the briefs. The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

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17 Cal.App.2d 103

INDERBITZEN et al. v. LANE HOSPITAL et al.

Civ. 10222.

District Court of Appeal, First District, Division 1, California.

Oct. 15, 1936.

1. **Appeal and error 🔑1203(3)**

Statute making it mandatory to dismiss an action if not brought to trial within three years after remittitur following reversal on appeal *held* not to deprive court of its inherent jurisdiction to dismiss in shorter period in proper case (Code Civ.Proc. § 583).

2. **Dismissal and nonsuit 🔑60(1)**

Duty rests upon plaintiff at every stage of a proceeding to use diligence and to expedite his case to a final determination.

3. **Appeal and error 🔑973**

Trial court's dismissal of action for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been gross abuse of trial court's discretion.

4. **Appeal and error 🔑1203(3)**

Where action was not originally brought to trial for some four years after it was filed and final motion to set the case over to trial after reversal on appeal was not made for two years and ten months after remittitur, at a time when many of defendants' witnesses were not available, although nothing prevented plaintiff from bringing case to trial promptly following remittitur, trial court's dismissal of action for lack of prosecution *held* not abuse of discretion (Code Civ.Proc. § 583).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Julia L. Inderbitzen and another against the Lane Hospital and others. From a judgment dismissing the action for failure to use due diligence in prosecution thereof, the plaintiffs appeal.

Affirmed.

Vincent W. Hallinan, of San Francisco (Elton C. Lawless and F. Bruce McMullen, both of San Francisco, of counsel), for appellants.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents.

TYLER, Presiding Justice.

Appeal from a dismissal of an action for failure to use due diligence in the prosecution thereof. The motion to dismiss was addressed to the inherent discretionary power of the court and was granted under that power. It is appellants' claim that the court had no jurisdiction to grant the motion. This contention is based upon the last sentence of section 583 of the Code of Civil Procedure, which provides: "When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial, (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court." Appellants argue that the mandatory portion of the section compelling a dismissal after the three-year period deprives the court of the power of dismissing the action for any delay amounting to a shorter period than that which under the statute gives a defendant an absolute right of a dismissal. The record discloses that this action was brought against defendant hospital for injuries alleged to have been sustained by plaintiff Julia Inderbitzen while she was being delivered of a stillborn child in defendant institution, which injuries are alleged to be due to malpractice by defendants and their servants. Special damages were claimed by her husband in procuring subsequent medical care.

The action was commenced July 19, 1926. More than four years thereafter the case was brought to trial. At the conclusion of plaintiffs' case the court granted a motion of defendants for a nonsuit. A new trial was denied and plaintiffs appealed. The judgment was reversed. Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.(2d) 744, 13 P.(2d) 905. A petition by respondents for a rehearing was made and denied, and a petition for transfer was denied by the Supreme Court August 22, 1932. The remittitur of this court reversing the judgment was filed in the superior court on August 24, 1932. In April, 1933, plaintiffs filed a motion to set the case for trial. The case went off the calendar for failure of plaintiffs to deposit jury fees. Some seven months thereafter, and on November 23, 1934, plaintiffs again gave notice to set their action for trial. Nothing came of the motion, and the action was not given a trial date. About six months later a memorandum of motion to set the cause for trial was again made, and at the same time a notice of motion to advance the cause on the calendar was given by plaintiffs. Counsel for respondents thereupon filed an objection to the motion to advance and also a notice of motion to dismiss upon the ground that plaintiffs had unduly delayed the prosecution of the action, and had failed to use due diligence in bringing the same to trial after the going down of the remittitur reversing the judgment of nonsuit. It thus appears that the action was not originally brought to trial for some four years after it was filed, and the final motion to set the case for retrial after reversal and the going down of the remittitur was not made for some two years and ten months.

[1-4] Defendants' affidavit in support of their motion to dismiss, sets forth in substance among other things that many of defendants' witnesses were internes and nurses of defendant hospital at the time of the operation, and some have since removed to places far distant from San Francisco; in other instances their whereabouts are unknown; that nothing prevented plaintiffs from bringing the action to trial promptly following the filing of the remittitur, and their delay in this respect is inexcusable and unreasonable. Under these facts plaintiffs' contention that a court, in view of section 583 of the Code of Civil Procedure, making it mandatory for it to dismiss an action if not brought to trial within three years from the going down of the remittitur, is circumscribed or impaired in its inherent jurisdiction to dismiss in a shorter period, is wholly without merit. While this precise provision of the Code it seems has not received judicial construction in this state, the principle has long been established that the mandatory provisions in statutes of like character do not have the effect claimed. Thus in Lieb v. Lager, 9 Cal.App.(2d) 324, 49 P.(2d) 886, the question addressed to the court was the extent of discretion vested in a court to dismiss an action for failure to serve and return a summons in less than three years, where section 581a of the Code of Civil Procedure made dismissal mandatory for such cause at the expiration of three years. It was there held that mandatory provisions of such character did not impair or circumscribe the inherent jurisdiction of a court to dismiss in a shorter time. If courts under section 581a are vested with discretion to dismiss for failure to serve and return summons before the expiration of three years, when dismissal is mandatory, then it follows that courts are vested with discretion to dismiss for failure to bring an action to trial, after the filing of a remittitur, before the expiration of the three years when dismissal is mandatory. The section involved is one of a series having the same general object; that is, to compel reasonable diligence in the prosecution of an action. The question involves the proper exercise of discretion and not, as claimed, the proper exercise of jurisdiction. Provisions of the character here involved do not control the inherent power of the court to dismiss for failure of a plaintiff to prosecute his action with reasonable diligence. Romero v.

Snyder, 167 Cal. 216, 138 P. 1002. It will be noticed that there is no express provision in the section restricting or limiting the power of the court to dismiss for want of prosecution after the filing of the remittitur where the delay has been for a shorter period than is named in the statute where dismissal is mandatory. Nor did the court, as claimed, abuse its discretion in dismissing the action before three years had elapsed from the filing of the remittitur. The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal. Steinbauer v. Bondesen, 125 Cal. App. 419, 14 P.(2d) 106; Vogel v. Marsh, 122 Cal.App. 748, 10 P.(2d) 791. From the facts shown it cannot be said that the court abused its discretion.

It is only fair to present counsel for plaintiffs to state that they have only recently become connected with the case and are in no manner responsible for the delay in the prosecution of the action. The record shows that there have been several substitutions of attorneys in the course of the litigation.

The judgment for dismissal is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

17 Cal.App.2d 43

COOPER et al. v. BUTTE COUNTY et al.

Civ. 5612.

District Court of Appeal, Third District, California.

Oct. 13, 1936.

1. Highways 🔑203

Compliance with general statutory requirements relating to filing of claims against counties by claimants for damages for death of person allegedly caused by negligence of county in allowing dangerous condition in highway to exist *held* insufficient since specific statute relating to filing of claims for injuries to persons resulting from dangerous condition of highway and requiring filing of verified claim therefor controlled (Pol.Code, §§ 4075–4078; Code Civ.Proc. § 1859; St.1931, p. 2475).

2. Highways 🔑203

Under statute requiring filing of verified claim against county in cases of damages resulting from defective condition of public streets, filing of claim is condition precedent to any cause of action governed by statute (St.1931, p. 2475).

3. Highways 🔑203

Provision of statute requiring filing of verified claim by any person seeking recovery against county for injuries sustained as result of dangerous or defective condition of public street or highway *held* not subject to waiver by county, and county could not be estopped to set up failure to comply with statute as defense in action against county for injuries, where claim was not verified (St.1931, p. 2475).

Appeal from Superior Court, Butte County; H. S. Gans, Judge.

Suit by Mrs. Willie Cooper, mother of Beatrice Gabriel, deceased, and others, against the County of Butte and others. From an adverse judgment, the plaintiffs appeal.

Affirmed.

H. D. Gregory, of Oroville, for appellants.

J. R. King, Jr., of Oroville, and Bronson, Bronson & Slaven, of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On June 29, 1935, plaintiffs filed their original complaint against defendants herein, but by amendment dismissed as against all defendants except the county of Butte, and in a subsequently filed amended complaint and in an amendment thereto alleged certain acts of negligence on the part of the county of Butte in allowing a dangerous condition in a highway to exist, by reason whereby Beatrice Gabriel met her death on December 23, 1934. This amended complaint also set forth that on January 18, 1935, plaintiffs filed a written claim for damages with the board of supervisors of the county of Butte, which contained "all details and full consideration of the legality of said claim as provided by chapter 1167 of the California Statutes for the year 1931." The claim itself was not set forth in the amended complaint.

It was also alleged that the claim was not verified and no affidavit attached thereto because at the time of the filing of said claim and for more than 20 years prior thereto the board of supervisors of the county of Butte had, under the authority granted them by the provisions of sections 4075 and 4076 of the Political Code, not required an affidavit to a claim so filed before it. The amended complaint also alleged defendants were estopped to complain of the failure to verify the claim because the board of supervisors, having failed to act upon said claim within 90 days, the claim was by law deemed rejected on its merits and not because of any lack of verification, such lack of verification not having been called to the attention of plaintiffs or counsel.

As a further ground of estoppel it is also alleged that the attorneys for defendants asked for and received an extension of time to plead to plaintiffs' complaint, and thereby "lulled plaintiffs to sleep until their day of grace had passed." To this amended complaint defendants demurred, which demurrer was sustained, and plaintiffs, refusing to amend within the time allowed by the court, their default was entered, and thereafter a judgment rendered in favor of defendant county, from which judgment plaintiffs prosecute this appeal.

[1] It is the contention of appellants that having complied with the provisions of section 4075 of the Political Code, and the board of supervisors of the county of Butte having waived verification of claims under the provisions of section 4076 of the Political Code, the claimants herein were not required to present a verified claim as a basis for their action; but in spite of counsel's able and vigorous presentation we are compelled to hold adversely to his contention.

In 1931 the Legislature passed an act known as Act 5149, Deering's General Laws (St.1931, p. 2475), relating specifically to the liability in damages of counties in cases of injuries to persons resulting from the dangerous condition of the highways and requiring the presentation of a verified claim therefor. Sections 4075–4078 of the Political Code do not specifically relate to the filing of claims for damages arising out of personal injuries caused by defective highways, whereas Act 5149 does concern itself particularly with such matters. Therefore, the provisions of Act 5149 being specific and subsequent in enactment to section 4075 et seq. of the Political Code must govern rather than the general statutory requirements contained in the Political Code. This has been expressly held in the case of Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.(2d) 185, 187. There an action was filed against the county for personal injuries alleged to have arisen out of a defective condition of a highway. The plaintiff there failed to file a claim within the time prescribed by Act 5149 and it was contended on appeal by plaintiff that that act was ambiguous and uncertain for the reason that it conflicted in certain respects with the sections of the Political Code above mentioned. This contention was overruled by the court, which held that Act 5149 was paramount to the Political Code sections relating to claims, and in support of its opinion cited section 1859 of the Code of Civil Procedure, which provides: "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and (a) particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

Therefore, Act 5149 requiring the filing of a verified claim as a prerequisite to an action against any county for personal injuries arising out of the defective condition of the highway must be observed, and the compliance with the provisions of the Political Code sections only are not sufficient.

Neither can we support appellant in his contention that the county or its officers can waive the provisions of Act 5149 in regard to the verification of claims, nor can a county be estopped from asserting as a defense, a failure of a claimant to verify his claim in accordance with that act.

In Spencer v. City of Calipatria, 9 Cal.App.(2d) 267, 49 P.(2d) 320, 321; Johnson v. City of Glendale (Cal.App.) 55 P.(2d) 580, 583, and Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035, 1038, the contention was made that the municipalities had waived compliance with the act, but were estopped to set up that the defense of failure to comply therewith because of actions or representations of officers of said municipalities. These cases hold that such municipalities cannot waive compliance with such statutes and cannot be estopped to set up as a defense a failure to comply therewith. The case of Spencer v. City of Calipatria, supra, is very similar to the case at bar. In that case the complaint alleged that the plaintiff presented in writing to the defendants a claim setting forth the facts concerning the injuries sustained by plaintiff, which claim was received and accepted by the defendants; that thereafter a compromise offer was made, which claim was rejected, but at no time was any objection ever made by the defendants or any of them to the claim of plaintiff as to its form, wording, or the fact that the same was not verified or made under oath, and that plaintiffs were led to believe by the defendants that the form and manner of making presentation of such claim was satisfactory. To this complaint the defendant city demurred, which demurrer was sustained without leave to amend. In affirming this ruling the court said: "The first question raised is as to whether the provisions of the statutes referred to are mandatory. It has long been held that there must be at least a substantial compliance with statutes of this nature, making certain steps essential before a suit may be filed. Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.(2d) 377. Not only is the filing of an unverified claim not a substantial compliance with a statute requiring that a verified claim be filed, but, in two recent cases, it has been held that the provisions of the two statutes here in question are mandatory and must be complied with in order to lay the foundation for an action. Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.(2d) 185; Myers v. Hopland Union Elementary School District of Mendocino County [6 Cal.App.(2d) 590], 44 P.(2d) 654. No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure and conditions under which it may be exercised. That such a claim must be verified is a reasonable provision which should not be held to be ineffectual and meaningless."

The holding in this case was approved by the Supreme Court in the case of Douglass v. City of Los Angeles, 5 Cal.(2d) 123, 53 P.(2d) 353, 355, wherein that court said: "The holding therein made is hereby declared to be the law in all cases coming within its purview."

The case of Johnson v. City of Glendale, supra, is an action for personal injuries alleged to have been caused by a defective condition of a public sidewalk. No claim for damages was presented by plaintiff to defendant within 90 days as required by Act 5149, but was presented later. A demurrer interposed to this complaint was sustained upon the ground that the presentation of a claim within the prescribed time was a prerequisite to the maintenance of the action. Upon appeal the ruling of the trial court was affirmed. In that case the complaint of plaintiff alleged that certain city officials "informed plaintiff that they would investigate her claim and that they would determine the question of settlement and liability and that they would advise her in regard to said liability and settlement." It was further alleged that plaintiff relied upon these promises and did not employ counsel to file a claim within the time prescribed by law. The court in discussing this allegation said: "This contention cannot be upheld. It is the generally accepted rule that a municipality and its officers are without power to waive compliance with the law in such matters. Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035; Spencer v. City of Calipatria, supra. Touhey v. City of Decatur [175 Ind. 98, 93 N.E. 540, 32 L.R.A.(N.S.) 350] supra; Dechant v. City of Hays, 112 Kan. 729, 212 P. 682; Berry v. City of Helena, 56 Mont. 122, 182 P. 117. The statute does not authorize a waiver nor does it provide any substitute for a written verified claim. The authorities we have cited quite generally hold that actual knowledge on the part of officers of a municipality of the facts required to be stated in the claim does not dispense with the claim itself."

In the case of Chapman v. City of Fullerton, supra, an unverified and unitemized claim had been filed with the city. The board of trustees of the city approved the claim and ordered a warrant drawn on the city treasurer in payment thereof. Thereafter a taxpayer brought an action to enjoin the officers of the city from paying the warrant. The trial court enjoined the officers of the city from paying the warrant, and on appeal the court said: "The ordinance containing the provisions relating to itemization of claims carried the same force and effect as an act of the Legislature * * * and consequently the board of trustees was not empowered to suspend its operation or ignore its effect, * * * and the fact that the board may have attempted to act favorably upon the claim in the defective form presented did not legalize the same, even though the city may have received value from the claimant. * * * True, the allowance of claims should be sustained in certain instances where it is apparent that the claimant has endeavored to itemize the same, and, as appellant contends, under some circumstances the question of the sufficiency of the itemization is one for the board to determine; but here, as will be noted, no attempt whatever was made to itemize the claim, and, not being subscribed or sworn to as required by the ordinance, did not constitute even a skeleton claim."

In the case of Osburn v. Stone, 170 Cal. 480, 150 P. 367, the court held that if officers of a municipal corporation could waive the provisions of such statutes or could be estopped to set up such provisions as a defense, these statutes would become meaningless, and illegal expenditures could be made in any case.

In 18 California Jurisprudence, page 799, it is said: "Want of power is always a defense to a municipal corporation, and no estoppel, by conduct or by ratification, to raise a defense can be urged against such a corporation. If the rule were otherwise, the corporation, by ratification, could validate an act, void as being ultra vires, and no limit could be set to its powers."

Act 5149, Deering's Gen.Laws 1931, St. 1931, c. 1167, p. 2475, provides as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Section 1.

[2] The statute has made the filing of a claim a condition precedent to any cause of action governed by that statute. Thompson v. County of Los Angeles, supra; Phillips v. County of Los Angeles, 140 Cal.App. 78, 35 P.(2d) 187; Douglass v. City of Los Angeles, supra; Union Bank & Trust Company v. County of Los Angeles, 2 Cal.App.(2d) 600, 38 P.(2d) 442.

In Thompson v. County of Los Angeles, supra, the court said: "The provisions of Act 5149 are mandatory and not merely permissive, as urged by appellant. Plaintiff had no right to maintain her action until she had presented her claim to the board of supervisors under the provisions of that act. Mello v. County of Tulare, 99 Cal.App. 268, 278 P. 465. The implication in that act that a failure to present a claim is fatal is as plain as would have been an express declaration to that effect"; which holding is reaffirmed in the subsequent cases of Douglass v. City of Los Angeles, supra.

Appellants have cited the cases of Nohl v. County of Del Norte, 45 Cal.App. 306, 187 P. 761, and Pedro v. County of Humboldt, 217 Cal. 493, 19 P.(2d) 776. Both of these cases arose under the provisions of section 4075 of the Political Code and do not involve Act 5149, and inasmuch as the latter act superseded the sections of the Political Code in regard to claims for personal injuries arising out of alleged defective streets, these cases cannot be considered as authority on the question here involved.

[3] Appellant has cited a number of decisions from sister states holding that verification may be waived, but the foregoing cases clearly established the law in California to be that a county cannot waive the provisions of Act 5149 and cannot be estopped by its action to set up the failure to comply with that statute as a defense, and regardless of what attitude may have been taken by other states, and regardless of the feeling of this court as to the equities in the instant case, the Legislature has definitely declared that steps must be taken to maintain such an action as is here before us.

The case of Spencer v. City of Calipatria, supra, is of itself sufficient to justify the holding of this court in the instant case.

Without discussing the several other points urged by appellant, we believe that the trial court was justified in sustaining the demurrer interposed and entering the judgment, and, for the reasons given, the judgment heretofore entered should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

17 Cal.App.2d 19

MARSHALL v. STANDARD OIL CO. OF CALIFORNIA et al.

PACIFIC ELECTRIC RY. CO. v. CARR OIL CORPORATION et al.

HUNTINGTON BEACH CO. v. SAME.

Civ. 5633.

District Court of Appeal, Third District, California.

Oct. 9, 1936.

Rehearing Denied Nov. 7, 1936.

1. Deeds 🔑97

Although declaration of purpose for execution of deed in habendum clause does not limit interest conveyed, such principle is inapplicable where qualifying words appear in granting part of deed.

2. Deeds 🔑145

A covenant in a deed may create a trust relationship and impose upon grantee obligation to use premises for purposes stated, but a condition does not impose a trust but enables grantor to claim reversion upon breach of condition.

3. Deeds 🔑145

Covenants in deeds will be more liberally construed than conditions.

4. Deeds 🔑155

Conditions in a deed working a forfeiture are strictly construed.

5. Deeds 🔑145

Covenant in deed imposes trust and raises an implied promise by grantee to use premises for purposes specified.

6. Dedication 🔑37

Use by city of avenue as public highway for many years amounted to dedication to public of avenue for its benefit to be enjoyed by it without unnecessary obstruction placed thereon or limitations of use thereof.

7. Deeds 🔑90, 93

Intention of parties and construction to be given to deed is to be ascertained from consideration of whole instrument.

8. Covenants 🔑7
Injunction 🔑57

Acceptance of deed containing covenant by grantee is equivalent to agreement by grantee to perform covenant, and such covenant will be given effect in equity.

9. Evidence 🔑14

Court can take judicial knowledge that erection of oil derricks and sinking of oil wells upon a public street constitute a public nuisance and a private nuisance to abutting property owners.

10. Municipal corporations 🔑671(1)

Fact that obstruction in public street constitutes a public nuisance does not prevent adjoining property owner from prosecuting an action.

11. Municipal corporations 🔑659

In determining whether city could be restrained from drilling for oil on land conveyed to city to be used exclusively for street purposes and which was so used, any monetary benefit which city might receive from operation of oil wells on such land could not be considered.

12. Municipal corporations 🔑993(1)

Where deed conveyed strip of land to city exclusively for street purposes and reserved to grantor owning property on both sides of strip right to use land for any public utility, and city council accepted deed by resolution stating that land was received for street purposes, city taxpayer *held* entitled to restrain city and its lessee from drilling for oil on such land which had been used as a street for many years.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Suit by A. D. Marshall against the Standard Oil Company of California, the Huntington Beach Company, the Pacific Electric Railway Company, the Carr Oil Corporation, and the City of Huntington Beach, wherein the Pacific Electric Railway Company and the Huntington Beach Company filed cross-complaints against the City of Huntington Beach and the Carr Oil Corporation. From the judgment rendered, the cross-defendants appeal.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and Ray Overacker, of Huntington Beach, for appellants.

Frank Carr, of Oakland, C. W. Cornell, of Los Angeles, and Forgy, Reinhaus & Forgy, of Santa Ana, for respondent Pacific Electric Ry. Co.

Forgy, Reinhaus & Forgy, of Santa Ana, and Lawler & Degnan, of Los Angeles, for respondents Huntington Beach Co. and Standard Oil Co.

Rutan & Mize, of Santa Ana, for plaintiff A. D. Marshall.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal from the judgment of the trial court perpetually enjoining and restraining the city of Huntington Beach and its lessee, Carr Oil Corporation, from carrying on drilling and oil production operations on and within a portion of that public street or highway known as "Ocean Avenue." The action was begun by A. D. Marshall, a citizen and taxpayer of the city of Huntington Beach, to restrain such operations. Respondents Huntington Beach Company and Pacific Electric Railway Company each filed cross-complaints against the city and its lessee, Carr Oil Corporation.

While many authorities have been cited, and much industry has been shown by the collection of cases having to do with limitations in the habendum clauses of the deeds, the real question to be determined in this cause is whether the premises involved were accepted by the city of Huntington Beach upon trust for the purposes specified in the following instruments:

"This indenture, made the twelfth day of January in the year of our Lord Nineteen Hundred and Sixteen between the Huntington Beach Company, a corporation organized under the laws of the State of California, and having its principal place of business in the City of Huntington Beach, County of Orange, and State of California, the party of the first part, and The City of Huntington Beach, Orange County, California, the party of the second part,

"Witnesseth: That the said party of the first part, for and in consideration of the sum of Ten ($10.00) Dollars, gold coin of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain and sell, convey and confirm unto the said party of the second part, and to its successors and assigns forever, all that certain lot, piece or parcel of land, situate, lying and being in the City of Huntington Beach, County of Orange, and State of California, and particularly described as follows, to-wit: A strip of land one hundred (100) feet in width lying northeasterly of and adjoining throughout its length the right of way of the Los Angeles Inter-Urban Railway Co., as described in the first part of that certain deed recorded at page 260 of Book 155 of Deeds, records of Orange County, California, and extending from the quarter section line running north and south through the center of Section 4, T. 6 S., R. 11 W., S. B. B. & M., to the northwesterly line of Twenty-third Street in the City of Huntington Beach, California.

"The side lines of the herein described strip of land are to be shortened or lengthened as the case may be so as to begin in the above described quarter section line, through the center of said Section 4, and to terminate in the northwesterly line of Twenty-third Street in the City of Huntington Beach, California. The herein described one hundred (100) foot strip of land is more particularly shown colored on the accompanying map.

"The purpose of this deed is to deed the herein described strip of land to the City of Huntington Beach for street purposes to be known as Ocean Avenue.

"Reserving and Providing, however, that the land herein conveyed is to be used exclusively for street purposes, said street to be known as Ocean Avenue, and the grantor reserves unto itself or its assigns the right to use said land for water, sewer, or gas pipes, telephone and electric lines and poles, railroads, conduits, or any other public utility.

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold, all and singular the said premises, together with the appurtenances unto the said party of the second part, and to its successors and assigns forever."

The purpose for which the foregoing instrument was executed and the reservations therein contained do not appear in the habendum clause of the deed, but are inserted in, and annexed to, the granting provisions of the instrument. In this particular the deed under consideration differs materially from practically every case cited by the appellants.

[1] Where the purpose for which the deed is executed appears in the habendum clause, the authorities universally hold that such declaration does not debase the fee, or whatever interest is conveyed in the granting clause. This principle, however, does not apply where the qualifying words appear in the granting clause of the deed. This distinction is made clearly to appear from the following excerpts which we quote from 9 California Jurisprudence, page 274: "An expression of the purposes of the conveyance as to the use of the property conveyed, 'as for the purpose of a public road', or 'for a county high-school ground and premises', or for certain religious and educational purposes, are generally held to be directory only, and not to qualify or limit a grant which is in absolute form. But this principle is not applicable where the qualifying words are in the granting part of the deed, and so clearly connected with the word 'grant' as naturally to suggest that the intention was merely to convey the right to use the property for a certain purpose."

The rule seems to be pretty well settled, also, that if several parts of a grant are irreconcilable, the former prevails. Section 1070, Civ.Code. In the instant case there does not appear anything in the habendum clause contrary or irreconcilable with any of the provisions contained in the granting part of the deed. The habendum clause simply confirms the right in the party of the second part to have and to hold whatever has been conveyed by the granting clause of the instrument. It neither purports to enlarge or diminish any of the rights or privileges so granted.

[2-5] There is also a distinction to be drawn between a covenant and a condition in order to ascertain the true intent and meaning of the instrument under consideration and what the respective parties had in mind at the time of its execution and receipt. A covenant in a deed may create a trust relationship and impose upon the grantee an obligation to use the premises for the purposes set forth in the conveyance. A condition does not impose a trust but is employed for the purpose of enabling the grantor to claim a reversion of the property upon breach of the condition. Covenants will be more liberally construed than conditions. Conditions working a forfeiture are strictly construed. A covenant imposes a trust and raises an implied promise on the part of the grantee to use the premises for the purposes specified.

In Greene v. O'Connor, 18 R. I. 56, 25 A. 692, 19 L.R.A. 262, the Supreme Court of Rhode Island points out this distinction in the following language: "This condition is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose"; that when inserted between the description of the property and the habendum clause, it did not create a condition subsequent; that it was merely a declaration of the purpose for which the land conveyed was to be used and improved; and that such a declaration does not create an estate on condition, but merely imposes a confidence or trust in the land, or raises an implied agreement on the part of the grantee to use the land for the purposes specified. A number of authorities are cited in the case from which we have just quoted, supporting the proposition just stated.

In the particulars which we have heretofore mentioned, the instant case is readily distinguishable from that of Cooper v. Selig, 48 Cal.App. 228, 191 P. 983, and the cases relied upon supporting the decision of the court in that case. Likewise, this is true of the case of Eldridge v. See Yup Co., 17 Cal. 44, 49, one of the earlier cases decided by the Supreme Court, in which it was held that the purpose set out in the habendum clause did not limit the title conveyed in the granting portion of the deed.

The deed under consideration, in the granting part thereof, uses language which we think clearly imparts the intention of the parties at the time of its execution. We refer to the following language contained therein: "Reserving and provided, however, that the land herein conveyed is to be used exclusively for street purposes." Other reservations follow which retain a right and privilege that may subsequently be exercised on the part of the grantor, which we will consider later on this opinion.

The word "exclusively" has a definite and certain meaning. After the execution of the deed it was received and accepted by the city of Huntington Beach, on the 28th day of February, 1916, as appears by the following resolution adopted by the city council of the city of Huntington Beach, to wit: "The following deeds were received from the H. B. Co. * * * Dated 1/12/16. A strip 100 ft. wide paralleling the P. E. Ry. right of way on 23rd St., northwesterly to the city boundary for street and highway purposes. And it was moved by trustee Tarbox, seconded by trustee Helme and carried that deed be accepted and City Clerk be instructed to have same recorded."

This resolution shows the intent of the city of Huntington Beach in the reception of the deed and the acceptance of the trust therein imposed to use the property for an exclusive purpose.

[6] Considerable space has been given by counsel in the discussion of what does and what does not amount to a dedication, and also as to the interest conveyed being a fee simple to the lands and premises described in the deed. We do not need to give any attention to whether the instrument involved did or did not amount to a dedication, nor does it seem to us material to dwell upon the question as to whether the city of Huntington Beach owns all the lands, minerals, etc., contained under the surface within the boundaries set forth in the deed. If the right to the premises or title to the premises was accepted upon trust, the right to have that trust enforced is vested in the grantor. After the execution of the instrument which we have set forth herein, to wit, on the 12th day of August, 1932, the city of Huntington Beach entered into a lease with the Carr Oil Corporation whereby it purported to lease a strip of land 30 feet wide and approximately 6,000 feet long situate and lying along the ocean side of Ocean avenue. There are exceptions in the strip reserved from the lease aggregating approximately 510 feet. The purpose of the lease was to enable the Carr Oil Corporation to erect oil derricks thereon, and to explore the strip of land conveyed for the purposes of developing oil and gases. The lease specified that the Carr Oil Corporation should erect at least 10 oil derricks, sink at least 10 wells in the development of the property, and also sink other wells as might appear convenient or profitable. The Huntington Beach Company owns all the land on the landward side of said Ocean avenue, and also on the oceanside, save and except a 60-foot strip over which is the interurban track of the Pacific Electric Railway Company. The ownership of the minerals lying beneath the surface of the street is not material if the premises were accepted upon trust. We may here state that Ocean avenue has been used by the city of Huntington Beach as a public highway, and devoted exclusively to the uses of the public as a highway, for a great many years preceding the institution of this action. This of itself we think amounts to a dedication to the public of Ocean avenue as a highway for the benefit of the public, and to be used and enjoyed by the public as a highway without unnecessary obstruction placed thereon, or unnecessary limitations of the use thereof. People v. County of Marin, 103 Cal. 223, 37 P. 203, 26 L.R.A. 659. A somewhat similar question was involved in the case of People v. Kerr, 27 N.Y. 188, 189. There the court said: "The title conferred upon this public agent is wholly for public purposes. * * * The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant. * * * Whatever estate or interest it holds * * * is in trust for the public use." To the same effect is the case of Theobold v. Louisville, N. O. & T. Ry. Co., 66 Miss. 279, 6 So. 230, 231, 4 L.R.A. 735, 14 Am.St.Rep. 564. It is there said: "If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust." We quote from the case of Warren v. Mayor of Lyons City, 22 Iowa, 351: "Nothing can be clearer than that if a grant is made for a specific, limited and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him in a court of equity to insist upon the execution of the trust as originally declared and accepted."

The same principle is set forth in the case of Wattson v. Eldridge, 207 Cal. 314, on page 320, 278 P. 236, 238, where the court says in that case as there reported: "Respondents rely upon the universally accepted rule of law that land which has been dedicated to a definite and specific purpose must be used in conformity with the terms of the dedication, and not diverted to any other purpose or use." (Citing a number of authorities.)

[7] That the intention of the parties and the construction to be given to a deed is to be ascertained from a consideration of the whole instrument is supported by the case of Boyer et al. v. Murphy, 202 Cal. 23, 259 P. 38. The cases which we have cited, and also which we shall hereafter cite, make a distinction between lands which have been conveyed to a city for a specific purpose, and lands the title to which has been acquired by a city through eminent domain proceedings.

The right to maintain an action to enjoin the use of premises for purposes other than those specified in the deed of conveyance is affirmed in the case of Barker v. Hazel-Fain Oil Co. (Tex.Civ. App.) 219 S.W. 874. In this case an attempt was made by trustees of a church to lease a portion of a cemetery to an oil company. The use of the premises for such purpose was enjoined.

To the same effect is the case of Herald v. Board of Education, 65 W.Va. 765, 65 S. E. 102, 31 L.R.A.(N.S.) 588.

In the case of Spinks v. City of Los Angeles, 220 Cal. 366, 31 P.(2d) 193, the distinction between the rule to be applied where land has been conveyed by a private donor and a dedication of land made by a city otherwise acquiring title, is pointed out. In the former, strict construction will apply, while a liberal construction will be applied where the city has otherwise acquired title.

There is also another reason to be considered when construing the reservation contained in the granted portion of the deed, and that is the fact that the grantor owned the premises on both sides of the right of way conveyed, and therefore limited the purpose for which the premises could be used, in view of the fact that oil wells sunk on the narrow strip would drain oil from the adjoining premises owned by the grantor. This question was decided in favor of the grantor in the case of Barker v. Hazel-Fain Oil Co., supra. See, also, School District v. Barnes, 110 Kan. 25, 202 P. 849.

In Slavich v. Hamilton, 201 Cal. 299, 257 P. 60, 62, the limitation in the deed there under consideration was contained in the granting portion of the instrument. We quote from the opinion as follows: "The description in the deed of parcel 1 is followed by the declaration that: 'Conveyance is made only upon the express condition that said property shall be used forever for the purpose of a public water park, and said property shall be entirely dredged up to the line of the property of the parties of the first part on the southeast, so that the same shall abut upon said water park.'" The purpose of the deed there considered was to convey a highway for the use of small boats and pleasure crafts. The court held, while giving effect to the different provisions contained in the instrument of conveyance, that the filling in of the dredged channel so that it could be used as a highway or as a street is commonly used for the conveyance of vehicles, was not a departure from the real intent of the instrument or a violation of the trust imposed upon, and accepted by the city upon receipt of the deed of conveyance.

[8] That the acceptance of a deed containing a covenant on the part of a grantee is equivalent to an agreement on the part of the grantee to perform the same is supported by the text in 15 C.J. 1211. See also, 3 Thompson on Real Property, page 77; Pedro v. Humboldt County, 217 Cal. 493, 19 P.(2d) 776. It is not a question of damages; it is a question of whether the trust provisions shall be enforced, and if the covenant appears in the deed it will be given effect in equity. The grantor has a right to insist upon the observance of the trust provisions. Walker v. Haslett, 44 Cal.App. 394, 186 P. 622. See, also, Edwards v. West Woodbridge Theater Co., 60 App.D.C. 362, 55 F.(2d) 524.

The Ontario cases cited by the appellants are not pertinent here by reason of the fact that they are based upon legislative acts dissimilar from any that prevail in this state.

[9, 10] That the erection of oil derricks and the sinking of oil wells upon a public street constitute a public nuisance and a private nuisance to abutting property owners seems to us a question that admits of no argument, and one of which the court can take judicial knowledge. The fact that the obstruction constitutes a public nuisance does not prevent an owner of adjoining property from prosecuting an action. Fitzgerald v. Smith, 94 Cal.App. 480, 271 P. 507; Lane v. San Diego Electric Ry. Co., 208 Cal. 29, 280 P. 109.

In the case of Brown v. Spilman, 155 U.S. 665, 15 S.Ct. 245, 247, 39 L. Ed. 304, the following language appears: "To operate the machinery used in boring an oil well, it is necessary to erect a derrick, which is a structure of considerable height, and occupies a large space of ground. This derrick is also used, if oil be found, in connection with the pumping machinery. A very strong odor proceeds from a gas or oil well, and the noise of a well in operation can be heard for a long distance. * * * These are matters within the common experience or knowledge of all men living in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction."

[11, 12] Any monetary benefit which the city of Huntington Beach might receive by reason of the operation of the oil wells along the strip attempted to be leased to the Carr Oil Corporation cannot be taken into consideration. City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; Western States G. & E. Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735. The cases cited by the appellants relative to the public interests in oil and gas wells have no bearing upon the issues here presented for consideration. The language of the Supreme Court of Illinois in the case of Smith et al. v. McDowell, 148 Ill. 51, 35 N. E. 141, 145, 22 L.R.A. 393, we think controlling here: "The permanent encroachment upon a public highway or street, unauthorized by the legislature, and the creation of a purpresture therein, which obstructs the free and uninterrupted passage of the public, is, as a matter of law, a public nuisance. The matter of inconvenience to the public, or that sufficient of the street may remain unobstructed to still accommodate the public travel, cannot be considered."

In addition to what we have said, the deed to the city of Huntington Beach contains the following reservation, retaining rights in the grantor, to wit: "And the grantor reserves unto itself, or its assigns, the right to use said land for water, sewer or gas pipes, telephone and electric lights and poles, railroads, conduits, or any other public utility." This reserves the right to use any portion of the 30-foot strip attempted to be leased to the Carr Oil Corporation for the purposes therein mentioned, and that right exists in, and belongs to, the grantor, irrespective of whether it is or is not making a present use thereof.

Other cases might be cited showing that the erection and use of the 30-foot strip along side the oceanside portion of the highway would constitute a nuisance which equity will enjoin, but what we have said in cases cited we think sufficient.

Respondent urges further that the lease is violative of section 14 of article 1 of the Constitution of the state of California, and also of section 10 of article 1 of the Federal Constitution. In view of what we have said, we think it unnecessary to consider constitutional objections.

We have not overlooked, but do not deem important, the question as to what the pleadings allege and what the pleadings admit, for the reason that the construction of the deed which we have given seems decisive and necessitates an affirmance of the judgment; and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.App.2d 184

MINOR v. JONES et al.

Civ. 5638.

District Court of Appeal, Third District, California.

Oct. 20, 1936.

Deeds 🔑211(3)

Evidence *held* to require cancellation of deed on ground of fraud practiced upon grantor.

Evidence disclosed that the grantor was an ignorant colored man; that he was confined in jail on a criminal charge; that the grantees were attorneys whom the grantor employed to represent in the criminal proceeding, agreeing to pay the sum of $150 for their services; that immediately prior to trial of the criminal case the attorneys fraudulently presented to the grantor in jail a document which they had previously prepared without grantor's knowledge, and falsely represented to him that it was a mere lien; that the document was held in the hand of one of the attorneys, folded so as to conceal the nature of the instrument; that the grantor signed the document, relying on his confidence in the attorneys;

and that the attorneys subsequently fraudulently procured the acknowledgment of a notary public to be affixed to the instrument out of the presence of the grantor and recorded the deed.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Lawrence H. Minor against Edward V. Jones and John A. Holland, as individuals, and against them as partners. From a portion of a judgment, plaintiff appeals.

Reversed, with directions.

William H. Haupt and Max Schleimer, both of Los Angeles, for appellant.

Buel Wood and Taylor H. Snow, both of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a portion of the judgment which was rendered against him in a suit to cancel a deed of conveyance to real property on the ground that it was procured by fraud and to quiet title thereto in him. The findings and judgment are in conflict with the pleadings and with the uncontradicted evidence which was adduced at the trial. The appeal is presented to this court on a bill of exceptions. The defendants failed to take the witness stand in their own behalf or to adduce any evidence in support of their answer. They have also failed to file a brief or appear in this court on appeal.

The complaint alleges that the plaintiff is the owner of two separate tracts of land in Butte county, Cal., of the value of $2,800; that the defendants procured the plaintiff and his wife to execute a deed of conveyance of these properties to them by the exercise of fraud, and prays for the cancellation of the deed and for a decree quieting title thereto in plaintiff. The answer denies the material allegations of the complaint and affirmatively asserts that the instrument was executed as a grant, bargain, and sale deed in consideration of the sum of $2,500 due and owing to them in payment of an agreed attorney's fee for services performed. The answer further alleges that the land is worth only $1,000, and prays for a decree quieting title in defendants and for a further judgment in their favor of the sum of $1,500. Neither party asks the court to construe the deed as a mortgage to secure a lien for the payment of counsel fees, or otherwise. That relief was not demanded by either party to the suit. It was not an issue in the case. The court adopted findings to the effect that the plaintiff is the owner of the land in question; that the execution of the deed was procured "through inadvertence and misunderstanding"; that the plaintiffs had knowledge of the nature of the deed which they executed, and that it was the intention of the parties thereto to thereby execute a mortgage on one of the tracts of land, instead of a deed, to secure the payment of $150 attorneys' fees due to the defendants. The court thereupon rendered judgment against the plaintiff, declaring the deed is a mortgage to secure a lien on lots 3 and 6 of block 90 of the Palermo Citrus Tract of Butte county, Cal., according to the map thereof on file in the office of the county recorder of that county. From that judgment the plaintiff has appealed. The respondents neither adduced evidence on their own behalf, nor have they filed a brief or made any appearance on appeal. Evidently they concede the findings and judgment are in conflict with the pleadings and with the uncontradicted evidence of the case.

The evidence is clear, concise, and undisputed. It shows without conflict that plaintiff owns the land in question; that he is an ignorant colored man; that he was arrested and confined in jail on a criminal charge; that the defendants are copartners engaged as attorneys in the practice of the law at Los Angeles; that plaintiff employed them as his attorneys to represent him in the criminal proceeding, agreeing to pay them the sum of $150 for their services; that he was ignorant of the law and of the nature of legal documents, and that he had absolute confidence in their honesty and integrity; that they occupied a confidential relationship toward him in that transaction; that immediately prior to the trial of the criminal case the defendants fraudulently presented to plaintiff in jail a document which they had previously prepared without his knowledge or consent, and falsely represented to him that it was a mere lien only upon lots 3 and 6 to secure the payment of the agreed fee of $150; that the document was held in the hand of one of the defendants, folded so as to conceal the nature of the instrument, except that plaintiff did notice it contained a description of both pieces of property, to which he objected; that the defendants thereupon crossed out the second description of property, with a lead pencil, but refused to permit plaintiff to take or read the instrument, and asserted that he must sign the document at once, as it was necessary for them to immediately attend court; that he thereupon signed the document, relying on his faith and confidence in them as his attorneys and believing they would protect his interests therein; that no notary public was present and the deed was never acknowledged by the plaintiff; that the defendants subsequently fraudulently procured the acknowledgment of the notary public to be affixed to the instrument out of the presence of the plaintiff and recorded the deed of conveyance to both pieces of property with the notation by the notary fraudulently inscribed on the margin of the instrument to the effect that both pieces of property were conveyed thereby.

This transaction was a palpable fraud on an ignorant colored man, and should not be permitted to stand. Even though it be conceded the plaintiff intended to execute a mortgage on one piece of property to secure the payment of an attorneys' fee of $150, the deed was procured by fraud and is void. It was never acknowledged. It includes a description of one piece of property upon which the court finds the plaintiff did not intend to create a lien. There are neither pleadings, findings, nor proof to authorize a reformation of the instrument. The decree does not purport to reform the instrument so as to eliminate the piece of property which was fraudulently described therein. Having been procured by fraud, the deed is absolutely void, and under the pleadings and record of this case on appeal, as it exists, the deed may not be deemed to constitute a mortgage upon any of the property described therein to secure a debt. It should be canceled and set aside as void.

Pursuant to section 956a of the Code of Civil Procedure, this court accordingly adopts the following findings of facts based upon the uncontradicted evidence appearing in the bill of exceptions, to wit:

It is true that the plaintiff was, at the time of the commencement of this action and now is the owner and entitled to the possession of the two separate parcels of land in Butte county, Cal., described in the complaint, of the value of $2,800; that the defendants, and neither of them, have any right, title, or interest in either of said tracts of land; that the purported deed of conveyance to said land was procured by the fraud and misrepresentation of the grantees therein named; that the purported deed was never lawfully acknowledged and was not entitled to be recorded; that at the time of the signing of the instrument the grantees therein named sustained a confidential relationship toward the grantor as his attorneys; that the grantor did not intend to execute the instrument as a mortgage or lien upon the two parcels of land therein described to secure the payment of a $150 attorneys' fee, or otherwise; that the purported deed is therefore void and should be canceled and set aside, and the plaintiff is entitled to a decree canceling the deed and quieting title to the two parcels of land described in the complaint, in plaintiff.

That portion of the judgment from which this appeal is taken is reversed, and the court is directed to render judgment in favor of plaintiff canceling the deed as void and quieting title in him to the two parcels of land described in the complaint.

We concur: PULLEN, P. J.; PLUMMER, J.

16 Cal.App.2d 751

PETIT et al. v. BLENKIRON et al.

Civ. 10747.

District Court of Appeal, Second District, Division 1, California.

Oct. 8, 1936.

1. Mortgages 🔑33(1)

Deed absolute in form followed by declaration of trust whereby property is made security for a debt should be construed together, and, as so construed, constitute a "deed of trust."

[Ed. Note.—For other definitions of "Deed of Trust," see Words & Phrases.]

2. Mortgages 🔑375

Execution of two deeds, followed by execution of two notes and trust indenture providing that trustee was holding property in trust to secure full payment of notes and authorizing trustee to subdivide parcels, *held* to constitute a "deed of trust" as respects applicability of statute shortening period within which to bring action for deficiency after foreclosure sale (Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116).

3. Mortgages ⚷375

Where execution of two deeds was followed by execution of two notes and trust indenture, which notes were given as part of purchase price of parcels of realty, sale of realty on default of payment was for purpose of satisfying both notes, although there was agreement that note for smaller amount should have priority in application of proceeds, and hence action to recover on other note which was commenced more than three months after sale was an action to recover a deficiency after sale of realty under deed of trust, and hence was barred by limitation (Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116).

4. Appeal and error ⚷110

Order denying motion for new trial in action to recover on notes, wherein defense was that action was barred by limitation, *held* not appealable.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by W. J. Petit and another against William L. Blenkiron and others. From a judgment, and from an order denying a motion for new trial, Alonzo J. Wolter and others appeal.

Judgment reversed, and appeal from order denying motion for new trial dismissed.

Donald R. Peck, of Los Angeles, for appellants.

Wendell P. Hubbard, of Los Angeles, for respondents.

YORK, Justice.

On June 25, 1926, defendants William Blenkiron and Frederick C. Wolter executed two promissory notes, one in the sum of $16,500 in favor of Title Guarantee & Trust Company, due three years after date; the other in the sum of $40,000 in favor of Joseph N. Hanson and Helen M. Hanson, due five years after date. This latter note, upon which a payment of $10,000 was subsequently made, was assigned to the plaintiffs, and is the subject of the present action. On the same day, and as a part of the same transaction, these two defendants executed a declaration of trust in the nature of a subdivision trust naming the Title Guarantee & Trust Company, as trustee. From this declaration of trust it appears that both notes were given as part of the purchase price of two separate parcels of real property which had theretofore been transferred to said title company by two deeds executed on June 15 and June 22, 1926, as security for the payment of the two notes. At the time of the execution of the trust indenture, the two named defendants were the owners in equal shares of the entire beneficial interest therein. Default was subsequently made in the payment of principal and interest due on the notes, and declaration of default was made by the holder of the $16,500 note. Notice of default and election to sell was recorded by the trustee on December 7, 1933, and at the trustee's sale of the property held on May 5, 1934, the property was bid in by the Title Guarantee & Trust Company for the full amount of its $16,500 note with costs. The complaint in this action was filed on December 4, 1934. Nineteen assignments of beneficial interests in the trust were alleged in the complaint, and judgment was sought against William L. Blenkiron and Frederick C. Wolter for the full unpaid balance of $30,000 and interest due upon the note in favor of Joseph N. Hanson and Helen M. Hanson, and against the remaining defendants in proportion to the beneficial interests assigned to them. Judgment was rendered as prayed for in the complaint, and from this judgment defendants Frederick C. Wolter, Alonzo J. Wolter, and Dora Louise Wolter have appealed.

Appellants contend (a) that plaintiffs' action is barred by the provisions of subdivision 1, section 337, Code of Civil Procedure; and (b) that "the sale and assignment of beneficial interests to Alonzo J. Wolter and Dora Louise Wolter were void for the reason that no permit for their issuance was procured from the commissioner of corporations of the state of California: Hence, no rights accrued thereunder to the holders of the promissory note sued upon."

Respondents, on the other hand, contend that subdivision 1, section 337, supra, does not apply to the facts in issue because, first, the trust indenture is a subdivision trust and not a trust deed; and, second, that the right to foreclose was exercised only by the owner of the $16,500 note, which was a first lien; that no mention was made of the $40,000 note secured by a second lien, and therefore this is not an action for the balance due upon a note secured by a deed of trust after a sale under a power of sale thereunder, but is an action upon a note by the holder of a junior encumbrance after the foreclosure of a prior encumbrance has exhausted the security.

In the instant case the two parcels of property were conveyed to the Title Guarantee & Trust Company prior to the date of execution of the two notes and the declaration of trust, the latter document declaring that "each of said conveyances, though absolute in form, were nevertheless made in trust under the provisions hereof, no consideration for either of said conveyances having been paid by said Title Guarantee and Trust Company"; and that "trustee holds and shall continue to hold title to said parcels * * * in trust * * * to secure the full payment of the promissory note for $16,500.00 * * * to secure the full payment of the promissory note for $40,000.00 * * * to permit the trustee * * * to subdivide * * * said parcels * * * and to subscribe to a map or maps of such subdivision or subdivisions dedicating to public use all streets and alleys; * * * to release from the lien of said indebtedness, being the promissory notes * * * any parcel of said property, or any lot or lots included in the present or future subdivision of said property, upon payment * * * of a fixed release price for such parcel * * * so released."

Said trust indenture also provides: "Should a breach or default be made in any payment of any of the sums secured hereby, or herein provided to be paid or repaid by the Buyers or the Beneficiaries hereunder, * * * then the Trustee or the Lender or the Sellers hereunder may declare all sums secured hereby immediately due and payable, and the Trustee is hereby authorized and shall on demand of the Lender or the Sellers, sell the property aforesaid so held in trust in the manner hereinafter provided, and out of the proceeds realized from such sale, after paying the expenses thereof, including Trustee's fees and attorney's fees, to pay the amount of the unpaid remainder of the promissory note of the Lender (the $16,500 note) and the promissory note of the Sellers (the $40,000 note) together with interest accrued and unpaid thereon. * * *"

[1, 2] It is the law in this state that a deed absolute in form followed by a declaration of trust whereby the property is made security for a debt should be construed together, and as so construed constitute a deed of trust. Younger v. Moore, 155 Cal. 767, 103 P. 221; Cortelyou v. Vogel, 51 Cal.App. 785, 197 P. 968; Withers v. Bousfield, 42 Cal.App. 304, 183 P 855, and Doane v. California Land Co., (C.C.A.) 243 F. 67. We are therefore impelled to the conclusion that the execution of the two deeds, followed by execution of the two notes and the trust indenture here involved, constitute a deed of trust.

[3] Answering respondents' second point, we are satisfied that under the trust indenture there was but one transfer in trust with one power of sale, and that such sale was for the purpose of satisfying both notes, although there was an agreement that one note (the $16,500 note) should have priority in the application of the proceeds of the sale. In the absence of such agreement, the general rule is that the proceeds shall be divided ratably between the several obligations. 41 Cor.Jur. 1013. It therefore seems to us that this is an action to recover a deficiency after sale of real property under a deed of trust, and that subdivision 1, § 337, of the Code of Civil Procedure is applicable, as contended by appellants.

Prior to 1933 the section referred to provided that an action upon any contract obligation or liability founded upon an instrument in writing must be brought within four years. The Legislature by amendment in 1933 (St.1933, p. 2116) added to said section the following: "Provided that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage." In the instant case the sale took place on May 5, 1934, and suit was not commenced until after seven months had elapsed, or until December 4, 1934.

In consonance with the decision by this court in the case of Reynolds v. Jensen, 58 P.(2d) 687 (hearing denied by the Supreme Court on August 10, 1936), we are of the opinion that the instant action was barred by the limitation imposed by the cited Code section. This being so, we find it unnecessary to pass upon appellants' remaining point, i. e., that sales of beneficial interests were void because no permit for such sales was procured from the state corporation commissioner.

[4] The judgment therefore should be, and it is, hereby reversed. The appeal from the order denying motion for new trial is dismissed, such an appeal being unauthorized except in certain cases of which this is not one.

We concur: HOUSER, P. J.; DORAN, J.

17 Cal.App.2d 114

BENNETT v. BRADY et al.

Civ. 9968.

District Court of Appeal, First District,
Division 1, California.
Oct. 16, 1936.

1. Mandamus 🔑154(2)

Transcript of evidence taken at hearing before retirement board of city and county employees' retirement system, which denied pension to widow of deceased police officer, could not be considered for purpose of supplying any deficiency in allegations of widow's petition for writ of mandate to compel board to grant pension (San Francisco Charter, art. 8, c. 10, § 4, as amended by St.1917, p. 1727).

2. Mandamus 🔑154(2)

Petition by widow of deceased police officer for writ of mandate to compel retirement board of city and county employees' retirement system to grant widow a pension must set forth facts showing pension ought to have been allowed and that refusal to allow it was abuse of discretion (San Francisco Charter, art. 8, c. 10, § 4, as amended by St.1917, p. 1727).

3. Mandamus 🔑154(2)

Petition of widow of deceased police officer for writ of mandate to compel retirement board of city and county employees' retirement system to grant widow pension, which alleged that widow's evidence established and proved allegations of her application for pension, but did not allege that all of the evidence proved such allegations, *held* demurrable (San Francisco Charter, art. 8, c. 10, § 4, as amended by St.1917, p. 1727).

4. Municipal corporations 🔑187

In proceeding by widow of deceased police officer for pension, argument that expert testimony as to cause of officer's death was not in conflict could be addressed to retirement board of city and county employees' retirement system as trier of facts, but could not be considered by a court as proof that opinions were not in conflict (San Francisco Charter, art. 8, c. 10, § 4, as amended by St. 1917, p. 1727).

5. Evidence 🔑571(9)

In proceeding by widow of deceased police officer for pension, retirement board of city and county employees' retirement system was not concluded by opinion of expert as to cause of death of officer, but could draw its own conclusions from the facts shown by testimony (San Francisco Charter, art. 8, c. 10, § 4, as amended by St. 1917, p. 1727).

6. Evidence 🔑383(4)

In proceeding by widow of deceased police officer for pension, death certificate was prima facie evidence of cause of officer's death (San Francisco Charter, art. 8, c. 10, § 4, as amended by St.1917, p. 1727).

7. Mandamus 🔑73(1)

Mandamus *held* not to lie to compel retirement board of city and county retirement system to grant widow of deceased police officer a pension, where evidence was in conflict as to whether officer while in performance of his duty received an injury which, by aggravating pre-existing heart disease, hastened his death, since fact question for retirement board was presented (San Francisco Charter, art. 8, c. 10, § 4, as amended by St. 1917, p. 1727).

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Mandamus action by Eva K. Bennett against John H. Brady and others, as members of and constituting the Retirement

Board of the San Francisco City and County Employees' Retirement System. From an adverse judgment, plaintiff appeals.

Affirmed.

Thomas & Sullivan, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

GRAY, Justice pro tem.

The widow of a deceased police officer petitioned for the issuance of a writ of mandate compelling respondents to grant her a pension under the provisions of section 4, chapter 10, article 8, of the former San Francisco Charter. St.1917, pp. 1708, 1727. A judgment denying her such writ was entered after a general demurrer to her petition had been sustained without leave to amend. Her appeal presents the question as to whether or not her petition states a cause of action.

Briefly stating its essentials, her petition alleges that she is the unmarried widow of William M. Bennett, who, at the time of his death, had been a member of the San Francisco police department continuously since 1914 and had held the rank of lieutenant since December, 1929; that on October 30, 1931, while in the performance of his duties as such lieutenant, he had received injuries which directly and proximately caused his death on March 2, 1934; and that she had previously filed with respondents an application stating such facts and requesting the pension allowed by the charter. Her petition further states that respondents had heard her application; that she had presented to them evidence "which established and proved all of the allegations" of her application; but that, notwithstanding the presentation of such evidence, respondents had refused to award her the pension. Copies of her application and of the transcript of the evidence taken at the hearings are attached to, and by reference incorporated in, the petition.

[1-3] In passing upon the sufficiency of the petition to state a cause of action, the attached transcript of evidence cannot be considered for the purpose of supplying any deficiency in its allegations. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. A petition in substantially the same form was held in Hogan v. Retirement Board (Cal.App.) 57 P.(2d) 520, not to state a cause of action because it failed to show respondents had acted arbitrarily, capriciously, fraudulently, or without due regard for the applicant's rights. To state a cause of action, the petition must set forth facts showing that a pension ought to have been allowed, and that respondents' refusal to do so was an abuse of their discretion. 16 Cal.Jur. 861. If all the evidence produced at the hearings was susceptible of the sole construction that petitioner was entitled to a pension, respondents abused their discretion in refusing to award it and can be compelled by mandate to do so. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784. However, the petition fails to bring itself within this rule, for it merely alleges that petitioner's evidence, not all the evidence, established and proved the allegations of her application. For aught that appears, her evidence may have conflicted with other evidence or supported different inferences. The general demurrer was properly sustained.

The parties, upon an erroneous assumption that the transcript of evidence aids the allegations of the petition, principally argue whether such evidence indisputably proves that the deceased, while in the performance of his duties, received an injury, which, by aggravating a pre-existing heart disease, hastened his death. They correctly agree that, if it does, petitioner is entitled to a pension. Buckley v. Roche, 214 Cal. 241, 4 P.(2d) 929. In order to give their arguments the attention which counsel's zeal and industry in their presentation merit, it will be necessary to discuss such evidence, and, in order to do so, to make the same erroneous assumption. At the first hearing his widow and sister each testified that deceased had been injured on May 25, 1914, in a collision between a motorcycle on which he was riding in the discharge of his duties and an automobile, and that thereafter until his death he had continuously complained of pain in the region of his liver and had been treated unsuccessfully therefor by numerous doctors.

At the second hearing, a police captain testified that the department, on October 30, 1931, had held a drill, preparatory to annual inspection, which consisted of walking and standing in military formation over a period of several hours. His wife testified that on his return home from this drill he appeared pale and complained of shortness of breath and terrible pains around his heart. She further stated that on the same day he consulted a physician under whose care he continued until the former's death in 1933, and that this physician gave him digitalis and had him rest in bed for three months after December 6, 1931. X-rays of his heart, taken on this date, and a department record showing his absence from duty for four months after this date were introduced into evidence. Two certificates of the departmental physician were also read into the record. The first dated March 29, 1932, stated that deceased had been absent from duty for 120 days because of heart and liver trouble and would be able to return for station duty on April 4, 1932. The second, under date of September 12, 1932, reported that deceased was suffering from a chronic heart condition and should be excused from drill. The death certificate gave cirrhosis of the liver, arteriosclerosis, and myocarditis as the principal causes of death, and chronic nephritis as a contributing cause.

[4] Petitioner called a medical expert who testified that the X-rays showed a heart so enormously enlarged as to have no reserve for further dilation in case of exertion. He expressed the opinion, based upon his examination of the X-rays and the hearing of the testimony of the police captain and petitioner at the second hearing, that the exertion of the drill had irreparably damaged deceased's heart by causing an acute decompensation or failure from which he never recovered, and that thereby his life was shortened. Another medical expert, in testifying at respondents' request, considered the death certificate, the two certificates of the departmental physician, the departmental report and petitioner's testimony at the first hearing, as well as the X-rays and the testimony of the second hearing. From these he was of the opinion that the death was caused by a chronic cardiovascular-renal disease and that, while the drill had caused decompensation, the medical treatment of rest and digitalis had fully restored compensation and left only the original disease. Petitioner, upon a detailed analysis of each expert's reasons for his opinion, in which she stresses agreements and minimizes differences, argues that, while the literal wording of the second expert's conclusion as to the cause of death differs from that expressed by the first, yet in reality his opinion accords with that of the first. Such argument, in that it involves the weight and effect of testimony and its interpretation, might properly be addressed to respondents as the triers of fact, but cannot be considered by a court as proof that the two opinions did not conflict.

[5-7] Respondents, however, were not concluded by the opinion of either expert, but could draw their own conclusions from the facts shown by the testimony. Bach v. C. Swanston & Son, 105 Cal.App. 72, 286 P. 1097. The death certificate was prima facie evidence of the cause of death. Longuy v. La Societe Francaise, 52 Cal.App. 370, 198 P. 1011. Deceased's recovery from the heart injury received in the drill could be reasonably inferred from the length of time elapsing between his return to duty and his death. The case of Buckley v. Roche, supra, is readily distinguishable from the instant case because there the evidence did not present a conflict as to the cause of death, since the parties had stipulated that the police officer's death was caused by a heart spasm resulting from his ascension of a stairway in the performance of his duty. Since the evidence as to the cause of death was conflicting, respondents were authorized to decide such conflict and their decision cannot be controlled by mandate. Klevesahl v. Byington, 1 Cal.App (2d) 671, 37 P.(2d) 179.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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16 Cal.App.2d 726

PEOPLE v. HICKEY.

Cr. 2901.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1936.

Hearing Denied by Supreme Court Nov. 5, 1936.

1. Perjury ⚷11(2)

Alleged false testimony, given at hearing on mother's petition for change of custody of children, regarding mother's alleged misconduct which assertedly had occurred prior to date of original order in divorce action awarding custody of children to maternal grandmother *held* available as basis for charge of perjury against witness, as against contention that question of mother's fitness became res judicata as of date of original order (Code Civ.Proc. § 1963, subd. 32).

2. Perjury 🔑**33(1)**

Evidence *held* sufficient to sustain conviction for perjury.

3. Criminal law 🔑**1130(2)**

Objection that court erred in giving and refusing instructions *held* not reviewable where appellant did not comply with court rule regarding inclusion of instructions in brief (Supreme Court and District Courts of Appeal Rules, rule 8).

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Raymond J. Hickey was convicted of perjury, and he appeals.

Affirmed.

S. Ward Sullivan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From the files in a certain suit for divorce that was instituted in the superior court, it appears that a woman plaintiff brought an action against her husband, and that on the occurrence of the default of the latter therein, and the subsequent hearing of said suit, a minute order was made by the trial court by which, on September 17, 1934, the plaintiff was "granted an interlocutory decree of divorce and awarded custody of minor children." Two days later, by an order that was made by the trial court, the former order was "set aside"; and instead thereof, although as before, the plaintiff was granted an interlocutory decree of divorce, the custody of the minor children was awarded to the maternal grandmother of the said children "until further order of court"; which latter order was incorporated in the interlocutory decree which some days later was signed by the trial court. On November 9 of the following year the mother of the children presented to the trial court her petition for an order to the effect that the custody of said children be taken from their grandmother and thereupon be awarded to said mother; which petition was contested by the father of the children, particularly on the ground of moral misconduct of the mother. On the hearing of that petition, defendant in the instant action was called as a witness and therein gave certain testimony—in pursuance and on account of which he was prosecuted for and thereupon convicted of the commission by him of the crime of perjury. From a subsequent order made by the trial court by which defendant's motion for a new trial was denied, he has appealed to this court.

The information that was filed against defendant consisted of but one count, which, however, contained eleven specifications, as to each of which it was alleged that defendant had given false testimony—the greater part of which related to asserted misconduct on the part of the plaintiff in the divorce suit, in which misconduct it was alleged that defendant herein had participated, and which misconduct assertedly had occurred prior to the date when the interlocutory decree of divorce had been granted.

[1] Appellant urges the point that, notwithstanding the fact that by the terms of the interlocutory decree, the custody of the children was awarded to the grandmother, their custody having been originally awarded to the mother, as shown by the minutes of the court, the question of her fitness to have their custody was settled and became res adjudicata as of the date of that order; and that consequently on the hearing of the subsequent petition presented to the court by the mother, by which she sought a change in the custody of the children, and wherein her fitness as a custodian was made an issue, any testimony, however false, that related to her alleged misconduct which assertedly had occurred prior to the date of the original order, was wholly irrelevant and immaterial; and for that reason was unavailable as a basis for a charge of perjury against the witness, who is defendant herein, and who had given such alleged false testimony.

Without meaning to be considered as herein attempting to fully and accurately express a governing legal principle of law, it may be conceded that, generally speaking, as between parties to an action, in a subsequent proceeding or action between the same parties, a decision that was rendered on any issue in the first action becomes a settled fact which may not properly be litigated anew in the second action or proceeding.

In the instant matter (again from the files of the superior court), it appears that the complaint in the divorce suit did contain an allegation regarding the fitness of the mother to have the control and custody of the minor children of the parties, and that the prayer of the complaint was appropriately inclusive of a proposed award to the plaintiff which might be made in the said suit. The issue was thus fairly tendered to the defendant therein; and the fact that he suffered his default to be taken in the suit did not alter that situation; nor, ordinarily, would it affect the conclusiveness of the decree with respect to the fitness of the mother to have the custody of the children—not as of the date of the decree, but only as of the date of the commencement of the suit. Brown v. Brown, 170 Cal. 1, 147 P. 1168. However, according to testimony given in the instant matter, no evidence was introduced in the divorce suit regarding the issue of the fitness of the mother to be awarded such custody; besides which, although by the terms of the original minute order in the divorce suit, the custody of the minor children was awarded to the mother, two days thereafter that order was "set aside," and both by the new order and the interlocutory decree, the custody of said children was awarded to the grandmother—from which facts, coupled with the additional fact alleged in the complaint, that theretofore the property rights of the parties had been settled by them, it might be surmised that the parties had mutually agreed also on the question of the custody of the children, and consequently, that that issue had been withdrawn from the litigation. But however that may be in fact, it is evident that as far as the thing adjudged by the interlocutory decree was concerned, it was not *in favor* of, but inferentially, was *against*, the allegation that the mother was a fit and proper person to have the care and custody of the said children.

In the case of Kettelle v. Kettelle, 110 Cal.App. 310, 312, 294 P. 453, 454, a similar situation was before the District Court of Appeal for its consideration. With respect thereto, in part, the court said: "As stated in the case cited [Brown v. Brown, 170 Cal. 1, 147 P. 1168]: 'The general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, *is not always applicable literally.*' And it does not apply to new rights acquired pending the action *which might have been,* but *which were not, required to be litigated.* Brown v. Brown, supra; Metropolis, etc., Sav. Bank v. Barnet, 165 Cal. 449, 132 P. 833. As provided by the Code, that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. Code Civ.Proc. § 1911."

It is obvious that in the divorce suit, the issue not having been clearly determined either the one way or the other, the decree that was rendered therein may not properly be said to have been res adjudicata as to the point here under consideration. But even if it might be ruled that the issue was adjudicated, nevertheless, notwithstanding the effect of the general weight of authority, in substance, that evidence which might relate to a thing or matter theretofore adjudicated in an action is immaterial and consequently inadmissible in a subsequent action between parties who are identical with those in the first action, it should be apparent that an exception to that rule should be noted in a situation such as is here presented, wherein it appears that the determination of the issue depended upon a decision regarding the then or the former moral delinquency of the mother. The materiality of evidence of the fact that prior to the date when the interlocutory decree of divorce was granted, the mother had conducted herself in such an indiscreet manner that no inference was reasonably deducible therefrom other than that she had been unfaithful to her marriage vows with the identical individual with respect to whom, in the subsequent proceeding she likewise was accused, is most obvious. It is a presumption of law "that a thing once proved to exist continues as long as is usual with things of that nature." Subdivision 32, § 1963, Code Civ.Proc. Consequently, if on the hearing of the petition it could be established by evidence that within any reasonable time preceding the date of such hearing, even including a period not too remotely antecedent to the date of the interlocutory decree, the mother of the children had sustained meretricious relations with one who was then accused of the commission of lascivious conduct in which the mother had participated, it would be but a fair inference that at an opportune moment, and in favorable conditions thereafter, a repetition of such immoral conduct would ensue. It is a matter of common observation that once, contrary to the conventions, a woman has willingly submitted to the embraces of a man, thereafter she more willingly yields herself to him. It also should be noted that the purpose of the introduction of the evidence to which appellant here objects was not to retry the issue as of the date of the interlocutory decree, and thus to establish a fact contrary to any implied finding upon which the decision as to that issue was or possibly might have been based; rather, its relevancy and materiality was to forcefully suggest the likelihood that a condition shown to have once existed, taken together with other and subsequent facts established by competent evidence, was continuous and actually then existent. It follows that the point suggested by appellant cannot be sustained.

[2] Appellant also complains that as to none of the several specifications that were contained in the information that had been filed against defendant with reference to the giving of false testimony by him was the evidence sufficient to support the verdict of conviction.

It is unnecessary to consider more than one of the several statements that were made by defendant under his oath as a witness, and upon which the charge of perjury in part was predicated. In that regard, in substance, defendant testified that he "never did sleep with the plaintiff * * * at any time." With reference to the falsity of that statement, on the trial of the instant action one of the daughters of the plaintiff in the divorce suit testified substantially as follows: "My two sisters—I mean my middle sister, * * * and myself, slept in the car; and my little sister and mother and Mr. Hickey [defendant] slept on the mattress out on the ground."

That statement referred to an automobile trip which lasted about six weeks that was made by defendant in company with the mother and her minor children. Defendant did not deny the fact that this trip was taken, nor that he and the mother did occupy the same bed. With reference to a second situation, the testimony of another of the children in part was as follows: "Well, my two sisters and my mother and myself—we all went to bed in the middle room, and Mr. Hickey [defendant] would sleep out on the couch in the front room; but, then, in the morning my mother was always in bed with him, when we got up"—which testimony related to a period of about three weeks during which defendant, with the mother and the minor children, lived in a house on Baldwin street, in the city of Los Angeles, which house had been rented and paid for by defendant, as was established by the owner of the premises. In addition to the foregoing, the record contains an abundance of corroboratory evidence with reference to the alleged false testimony given by defendant, from all of which but the one conclusion reasonably could have been reached by the jury, to wit, that the statement alleged to have been made by defendant was false.

[3] Finally, appellant asserts that prejudicial error was committed by the trial court in giving certain instructions to the jury; also in refusing to give to the jury one other instruction that was offered by defendant.

Rule VIII of the Supreme Court and District Courts of Appeal in part provides as follows: "* * * but where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief. If it be claimed that instructions requested were erroneously refused, the refused instructions must be printed in full in appellant's brief, and all instructions given, bearing upon the subjects covered by the refused instruction, must be printed in appellant's brief in full, or the substance thereof clearly stated, with citation to the line and page of the transcript where such instructions may be found."

For the reason that in his brief herein appellant has failed to comply with the requirements of that rule, this court is under no obligation to search the record for the purpose of ascertaining therefrom whether appellant has any real cause for complaint. However, by respondent's brief the fact is clearly pointed out that as to each of the criticized instructions to which appellant has directed attention, the particular excerpt therein to which he has objected was not only carefully and correctly guarded by other language contained within the same instruction, but as well, was repeated in other instructions that were given to the jury; and that as to the instruction that was offered by defendant, but refused to be given by the trial court to the jury, other instructions were given that fully embraced the point of law which was attempted to be covered by the refused instruction.

No prejudicial error appearing in the record, it is ordered that the order from which the appeal herein is taken be, and it is, affirmed.

We concur: YORK, J.; DORAN, J.

17 Cal.App.2d 107

ASSOCIATED PIPING & ENGINEERING CO., Limited, v. JONES et al.

Civ. 10901.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1936.

As Modified on Denial of Rehearing Nov. 13, 1936.

1. **Partnership ⚷55**

That contract created debtor-creditor relationship between parties thereto *held* not to establish that parties did not intend to create partnership between themselves or as to third persons (Civ.Code, § 2400).

2. **Partnership ⚷55**

Declaration in contract that one of parties "agreed to loan" various sums of money to the other parties *held* not to establish that parties did not intend to create partnership between themselves or as to third persons (Civ.Code, § 2400).

3. **Partnership ⚷17**

Expressed intent of parties to contract that their relationship should not be classed as partnership will not prevent partnership from arising if contract by its terms establishes partnership (Civ.Code, § 2400).

4. **Partnership ⚷17**

Intent to do things which constitute partnership usually determines whether partnership relation exists (Civ.Code, § 2400).

5. **Partnership ⚷14**

Provision in contract that certain parties thereto should retain full control of management of business *held* not to prevent partnership (Civ.Code, § 2400).

6. **Partnership ⚷29**

Contract, together with conduct and dealings with the world of parties to it, determines existence of partnership, especially where rights of third person are involved (Civ.Code, § 2400).

7. **Partnership ⚷29**

Parties to contract have duties and liabilities of partners so far as third parties with whom they have had dealings are concerned, if contract and dealings so far as world is concerned measure up to partnership relation (Civ.Code, § 2400).

8. **Partnership ⚷20**

Whether contract creates partnership relation is determined by letter of contract, and conduct under contract of contracting parties to each other, where rights of third persons are not involved (Civ.Code, § 2400).

9. **Partnership ⚷29**

Whether contract creates partnership relation in respect to third parties is determined by what third parties had right to believe from language of contract, and from conduct of contracting parties as affecting third parties (Civ.Code, § 2400).

10. **Appeal and error ⚷1008(1)**

Whether acts and conduct of contracting party were sufficient to lead third person to believe contracting party was a copartner and assumed responsibility as such *held* for trial court (Civ.Code, § 2400).

11. **Partnership ⚷55**

Evidence that defendant advancing money to business enterprise pursuant to contract had right to apply all collections in repayment of his advances or permit them to be used in conduct of business, and that he permitted plaintiff to deal with enterprise in belief that defendant was partner therein, *held* to support finding that defendant was partner who was jointly liable to plaintiff (Civ.Code, § 2410).

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Associated Piping & Engineering Company, Limited, a corporation, against C. E. Jones, George A. Mott, and A. E. Austin, copartners doing business as J & M Manufacturing Company, and the copartners individually. From a judgment for the plaintiff, A. E. Austin appeals.

Affirmed.

Samuel J. Crawford, of Santa Monica, for appellant.

Francis B. Cobb, of Los Angeles, for respondent.

WHITE, Justice pro tem.

The plaintiff brought this action against C. E. Jones, George A. Mott, and A. E. Austin, individually and as copartners doing business under the firm name of J & M Manufacturing Company, to recover a balance due for merchandise sold and delivered, money advanced to, and services performed for, defendants. From a judgment rendered in favor of the plaintiff, defendant A. E. Austin appeals.

On the 12th day of December, 1934, the defendants entered into an agreement which reads as follows:

"This agreement made and entered into this 12th day of December, 1934, by and between Aubrey E. Auston of Santa Monica, California, hereinafter referred to as party of the first part, and George A. Mott, and Charles C. Jones, both of Santa Monica, California, hereinafter referred to as parties of the second part.

"Witnesseth:

"Whereas, heretofore, to-wit, on or about the 7th day of November, 1934, the said parties of the second part did apply through Victor J. Evans & Company, patent attorneys of Washington, D. C., and of San Francisco, California, for letters patent on a certain device known as the J. M. Extractor, being application #757027 United States Patent Office, which said device is used for the purpose of extracting solvent from dry cleaners muck.

"Whereas, it is the desire of parties of the second part to procure financial assistance from party of the first part for the purpose of exploiting and promoting the manufacture and sale of said J. M. Extractor, and also of territorial rights for the promotion and sale of said extractor when and if rights patent have been issued.

"It is now, therefore, agreed:

"Party of the first part agrees to loan to parties of the second part, from time to time, various sums of money, which said sums shall not exceed a total of Ten Thousand Dollars ($10,000.00).

"In consideration of all the singular the above, parties of the second part do hereby transfer, assign, set over and sell to party of the first part a one-third (⅓) interest in and to any and all contracts, profits and/or benefits derived from the exploitation and/or sale of said J. M. Extractor, or from the sale of any territorial rights appertaining thereto, including the one-third (⅓) interest in and to any and all patent rights now pending in the United States Patent Office, as well as in and to all rights to any improvement thereon hereafter obtained.

"It is further agreed by and between the parties hereto that, as advances of funds are made, parties of the second part will, at the option of the party of the first part, secure the same by either promissory notes executed by parties of the second part or by the deposit with party of the first part of contracts for the sale of J. M. Extractors, it being understood that any and all funds and/or receipts derived from the sale of said J. M. Extractor, or from the sale of territorial rights appertaining thereto shall be collected by party of the first part, and the said party of the first part shall have the right to retain any and all funds collected on said contracts and to apply the same in repayment of any sums theretofore advanced.

"It is further understood and agreed that parties of the second part shall retain full control of the management and operation of said business, subject, however, to the rights of the party of the first part, as hereinabove set forth, it being understood and agreed that it is the desire of all parties hereto to exploit and promote the sale and distribution of said J. M. Extractor, and to this end all parties agree to lend their best efforts, it being understood, however, that party of the first part shall not be required to render service other than as herein set forth.

"This agreement shall be binding upon the successors, heirs, executors, administrators and assigns of the respective parties hereto.

"In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

"Aubrey E. Austin
"Party of the First Part
"George A. Mott
"Charles C. Jones
"Parties of the Second Part."

On and before December, 1934, the J & M Manufacturing Company was engaged in selling and installing a device known as the J. M. Extractor, which device cleaned fluids used by dry cleaning establishments. Prior to December, 1934, the plaintiff, Associated Piping & Engineering Co., Limited, manufactured and installed some of these devices for the J. & M Manufacturing Company, but required that the articles be delivered direct to the place of installation, thus preserving to plaintiff its lien rights in the event of nonpayment. Plaintiff contends that subsequent to December, 1934, after being informed of the arrangement between the appellant, Austin, and J & M Manufacturing Company, and being advised by defendant Mott that appellant Austin had acquired a one-third interest in the business of J & M Manufacturing Company, and that Austin was a man of financial worth and was to put up as much money as was needed to promote the J & M Manufacturing Company business, that the arrangement between plaintiff and J & M Manufacturing Company was changed so that the merchandise was delivered direct to the place of business of the J & M Manufacturing Company, under which plan plaintiff lost any recourse to its lien rights thereon.

Appellant urges a reversal of the judgment mainly upon the ground that the finding of the court that he was a partner by virtue of the foregoing contract is without support in the evidence, and that the contract here in question establishes the relationship of debtor and creditor, and nothing further.

[1-7] We are of the opinion that, notwithstanding the provisions of the contract under which appellant "agrees to loan to the parties of the second part, from time to time, various sums of money," he was in fact a member of the partnership. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." Section 2400, Civ. Code. We may concede that a relationship of debtor and creditor is shown, and also that the contract expressly declares that appellant "agrees to loan" various sums of money to the other parties. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership. However, their intention in this respect is immaterial (San Joaquin L. & P. Corporation v. Costaloupes, 96 Cal.App. 322, 332, 274 P. 84); and if the contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail. It is the intent to do the things which constitute a partnership that usually determines whether or not that relation exists between the parties. Chapman v. Hughes, 104 Cal. 302, 37 P. 1048, 38 P. 109. The provision in the contract that Mott and Jones "shall retain full control of the management and operation of said business, subject, however, to the rights of the party of the first part," (appellant herein) does not prevent a partnership, because the fact that by agreement between the parties one or more of them is given the management of the partnership enterprise does not prevent a partnership from arising. Westcott v. Gilman, 170 Cal. 562, 567, 150 P. 777, Ann. Cas.1916E, 437. A partnership, especially where, as here, the rights of third persons are involved, is to be determined by the contract, taken with the conduct and dealings with the world of those who are parties to it. If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third parties are concerned who have had dealings with them, they are partners. Westcott v. Gilman, supra, 170 Cal. 562, at page 568, 150 P. 777, Ann.Cas.1916E, 437.

[8-11] As between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is: What had those parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them, and not as affecting each other? Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities. That is precisely the case at bar; the question being as to whether appellant permitted himself to be represented as a partner and the reliance by third parties upon such representation. There is ample evidence in the record that respondent extended further credit to the J & M Manufacturing Company in view of the fact that appellant Austin was identified with the business. Representatives of respondent so testified. This being so, the only question remaining is whether or not the acts and conduct of appellant Austin

were sufficient to lead respondent to believe he was a copartner and assumed responsibility as such. This was a question of fact, to be determined by the trial court upon the hearing; and in our opinion the findings of the trial court are amply supported by the evidence, which shows that appellant Austin was to be repaid for his advances out of the first moneys coming in from all contracts, which constituted the only returns to the business enterprise. He had the right to make collections and had the option to apply all of the money collected in repayment of his advances, or to permit all or any part of it to be used in the conduct of the business. In addition to the foregoing, Fred G. Humiston, president of the respondent corporation, testified that his company had been dealing with Mott and Jones for some time before appellant came into the picture. Humiston knew, he said, that they had little capital, and he took precautions to protect his corporation by requiring advancements covering the cost of material and requiring further payment at the time of delivery of the extractors at the place of installation. After being informed by either Mott or Jones that they had secured financial backing, and that Austin was a partner in the enterprise, the respondent extended almost unlimited credit. Mr. Humiston further testified that he had a conversation with appellant Austin relative to a check given by Mott which had been returned by the bank unpaid. He called appellant by telephone, and the latter said to put the check through the bank again and "he would take care of it." Again, when payments fell behind, Mr. Humiston called appellant by telephone and asked for $1,500 on account, to which the latter said, "We will give you a thousand," and this was done. In a later conversation, Humiston talked with Austin about payment, in connection with which Humiston testified: "I told him * * * we were personally willing to not press then too hard for the account if it was handled all right and if he was going to continue to put up some money. * * * He said that that was all right with him, he was glad to see the stand we were taking, and he thought it just a question of time before it worked out and the business went over." This course of conduct, to our mind, indicates that the status of appellant Austin in the business was not that of a money lender; and also, in our opinion, establishes the fact that Austin was aware that respondent was continuing to manufacture and deliver equipment on credit due to a belief in appellant's financial integrity. It might also here be noted that during the time of these conversations appellant Austin would personally benefit from the manufacture and delivery of equipment by respondent on credit, to the detriment of the latter. We are satisfied that the conduct of appellant clearly brings him within the provisions of section 2410 of the Civil Code, defining a partner by estoppel. As was said in San Joaquin L. & P. Corporation v. Costaloupes, supra, 96 Cal.App. 322, at page 334, 274 P. 84, 89: "The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership, without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership. 20 Ruling Case Law, 833, and cases cited; 18 L.R.A. (N.S.) 1084." In our opinion, both the contract and the conduct of appellant indicates both ownership and joint liability, as well as a purpose to jointly carry on the business.

The decision above indicated on the questions stated is sufficient to dispose of the case; and the other questions presented need not be considered.

The judgment is affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.

17 Cal.App.2d 153

MARTIN v. SILLER.

Civ. 5665.

District Court of Appeal, Third District, California.

Oct. 19, 1936.

1. Municipal corporations ⚷808(7)

Maintenance of awning overhanging sidewalk at elevation much less than that prescribed by city ordinance *held* negligence per se.

2. Municipal corporations ⚷819(4)

Pedestrian who struck eye against rough edge of one-half inch hollow iron pipe comprising portion of awning overhanging sidewalk at elevation less than that prescribed by city ordinance *held* entitled to recover from owner of awning for injury to eye claimed by owner to have been caused by small projecting object, notwithstanding absence of testimony that there were small projecting spines on end of pipe.

3. Damages ⚷185(1)

In action for injury to plaintiff's eye when struck by end of hollow pipe, expert testimony as to exact character of injury *held* unnecessary to determination that pipe end caused injury.

4. Evidence ⚷528(1)

In action for injury to eye struck by rough edge of hollow iron pipe, permitting physician to answer question as to whether collision between eye and end of pipe having a small, sharp protrusion would cause injury complained of *held* not error, where witnesses testified that end of pipe was rough and had not been filed down.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Theodore E. Martin against L. G. Siller. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gerald M. Desmond, of Sacramento, for appellant.

H. N. Mitchell and George E. Foote, both of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff had judgment in the sum of $5,000 for an injury to his left eye causing the entire loss of sight thereof, by reason of coming into collision with an iron pipe in a curtain which rolled down over a marquee along the west side of premises belonging to the defendant known as the Lenhart Hotel. From this judgment the defendant appeals.

The complaint alleges and the testimony of the plaintiff is to the effect that on the afternoon of the 24th day of August, 1935, he and one Harry Newcombe were walking in a southerly direction along the sidewalk on the east side of Ninth street between streets known as K and L in the city of Sacramento; that the building and premises of the defendant known as the Lenhart Hotel front on the sidewalk upon which plaintiff was walking. Attached to the front of the hotel premises at some distance above the sidewalk and extending out about three-quarters of the width of the sidewalk was a solid marquee. This marquee extended along the entire front of the hotel premises. At the outer edge a canvas curtain was installed which rolled up and down upon a roller attached to the marquee. At the lower edge of the curtain was a hem, and inside the hem was a one-half inch hollow iron pipe.

The plaintiff's testimony is, further, that he and Harry Newcombe were walking along engaged in conversation; he was suddenly stopped short by the lower corner of the curtain and end of the pipe striking his left eye. The canvas over the end of the pipe was worn, so that a portion of the pipe was exposed. The plaintiff testified that his eye was injured to such an extent by his contact with the exposed portion of the pipe that he lost the sight thereof.

There is no denial of the fact that the curtain just referred to maintained by the defendant was in contravention of an ordinance of the city of Sacramento, in that it came within the prohibited distance of the sidewalk. No question is made that the damages awarded are excessive, and no issue is raised as to the fact that the plaintiff has lost the sight of his left eye. The only real question presented by the record is based upon the theory that the injury could not have been caused by the left eye of the plaintiff coming in contact with the iron pipe. This theory is based upon the testimony of some physicians, to the effect that the injury must have been caused by some slight projecting metal or instrumentality not over the size of a pinhead. The total depth of the injury to the eye is not over one-fifth of an inch, and the testimony of the physicians was to the effect that the instrument with which the plaintiff came in contact must have had what was called a "spine" or "spicule" of the size of an ordinary pinhead. It was argued from this that, as there was no specific testimony to the effect that there was a spine or spicule of the size of a pinhead on the end of the iron pipe, therefore the injury to the plaintiff's eye must have been occasioned by some other instrumentality. This is illustrated by the following question and answer:

"Q. And into the lens itself, Doctor, and, this wound wasn't made by a pipe unless it was—unless there was a sharp prong or pin or nail or something of that sort in the pipe, was it, Doctor? A. No."

The same witness further testified that the wound was a triangular puncture. Two witnesses who examined the pipe with which the plaintiff claimed to have come in contact testified in substance as follows: That the end of the pipe was jagged, sort of triangular shape; that the pipe had been cut and left with the edges rough, not filed down or smoothed in any way. There is further testimony in the record to the effect that an instrument less than one-fifth of an inch in length would cause a penetration of the eye farther than that distance. The testimony in the record further shows that the wound to the eye was perhaps the size of a pinhead. One of the doctors, after testifying that a blunt substance would not produce the injury, testified as follows:

"Q. Doctor, assuming that the patient did collide with a blunt substance such as the end of a pipe (we will call that blunt), and that upon the end of that pipe there was a small, sharp protrusion of some kind, would that have caused the injury complained of in that case? A. If there were a sharp, pointed substance on the end of that pipe it could produce this injury."

One of the witnesses testifying as to the condition of the pipe testified as follows:

"Q. What was the condition of this pipe? Was it rounded or was it dull or was it sharp? A. No, it was sharp, as though it had been cut off and not filed round in any way.

"Q. Just as though it had been cut off with a pipe-cutter? A. Yes, sir."

There seems to be no controversy in the testimony that the edges of the pipe were rough, and that they had not been filed down or smoothed in any manner whatsoever.

The testimony of the plaintiff is as follows: "I am thirty years of age. On the afternoon of the 24th of August, 1935, in company with Harry Newcombe, I was walking down Ninth Street when something struck me; it struck me in the left eye. I put my hand up over my eye; then I saw the awning immediately in front of me. I reached out and took hold of the rod or pole at the bottom of the awning. I am about five feet in height, five feet and five inches. Then I went into the house and I applied some hot towels to my eye, but got no relief." The witness then stated that he went into the house where he was living, where there were two families; that he could not hold his eye open; it was too painful. Then, in about twenty minutes afterwards, he went back to the Lenhart Hotel to see Mr. Siller and have him furnish a doctor. "I asked for Mr. Siller, and then explained to Mr. Siller what had happened. Mr. Siller told me he did not know any doctor and suggested that I go over to the Land Hotel and find Dr. Baird. Not finding him in, I went down to the Emergency Hospital. It was then about seven o'clock. I waited for about ten minutes and then I was laid on a table by Dr. Teall." The witness then stated where he had spent some time on the afternoon of August 24th, before receiving the injury to his left eye, which is not material.

[1] The witness Newcombe testified as follows: "I was with the plaintiff on August 24, 1935, between the hours of five and six o'clock in the afternoon. I know where the Hotel Lenhart is. We were walking down Ninth Street on the east side of Ninth Street going south. I was walking on the side next to the hotel. We were walking along in a natural manner. All at once Mr. Martin let out an exclamation. I asked him what was the matter. He said he bumped that awning, and stood there and wiped his eye. I looked at it. We stopped a couple of minutes and then went down the street. Immediately after Mr. Martin collided with the awning, I observed it. It was about five feet above the level of the sidewalk. We went down to the room where we were living at 809 M Street, and he held his handkerchief over his eye all the way home. I walked in the room with him and he went in there and bathed the eye and put packs on it." As we have stated, the awning overhanging

the sidewalk was at an elevation much less than that prescribed by a city ordinance and therefore, that its maintenance was negligence per se.

Dr. Teall testified that, when the plaintiff came to the hospital, he examined the wound and found that it was a recent one.

[2] We have thus presented for consideration the positive testimony of witnesses that the plaintiff came in contact with the jagged edge of a hollow pipe on the 24th day of August, 1935, as alleged in his complaint, and, as we have said, that pipe was being maintained at a place prohibited by an ordinance of the city of Sacramento. The pipe was hollow, and where it had been sawed off the edges were left rough. The size of the wound required a projection not greater than that of a pinhead. The theory upon which appellant bases his appeal is that there should have been some testimony to the effect that on the ragged or jagged edges of the iron pipe there was observed a spine or spicule of that size; that the ragged edge of the pipe would not cause such a wound does not appear to be denied by any of the expert witnesses. The questions propounded to them were limited to an instrument having a blunt end. The jury, by their verdict, undoubtedly accepted the positive testimony as to the manner in which the injury had been occasioned, and rejected the theoretical defense advanced by the appellant that the blunt instrument, in addition to being ragged and jagged, must have had what is called a projecting spine or spicule of the size hereinbefore stated. We think the jury was amply justified in accepting the positive testimony and disregarding the theoretical assumptions that the injury must have been caused in a different manner.

[3] The appellant in his brief makes this statement: "Where the eye strikes the pipe end and an injury to the eye results, expert testimony is required to determine the exact character of the injury before it can be decided that the pipe end produced the injury." Neither authority nor logic supports this statement. Common reasoning tells us that, if the eye strikes the end of a pipe, and an injury to the eye results, expert testimony is unnecessary.

[4] Appellant contends, further, that the court erred in permitting Dr. Jones to answer the following question, to wit: "Q. Assuming that the patient did collide with a blunt substance such as the end of a pipe (we will call that blunt), and that upon the end of the pipe there was a small, sharp protrusion of some kind, would that have caused the injury complained of in this case?" The doctor answered as follows: "If there were a sharp pointed substance at the end of that pipe it could produce this injury." Two witnesses testified, as we have stated, that the end of the pipe was rough or jagged and had not been filed down. No injury could possibly have resulted from the allowance of the question and the answer given by the witness. That the injury to the plaintiff was proximately caused by the negligence of the defendant in allowing an instrument, like the end of a pipe described herein, to hang over a sidewalk in such a position as to come in contact with a pedestrian's eyes, we think admits of no controversy.

The trial court heard all the witnesses, and denied the appellant's motion for a new trial. We of course are confined only to the record before us, but, as we read the record, we think it shows no merit in the appeal, and therefore the judgment must be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

7 Cal.2d 515

DUNBAR et al. v. REDFIELD et al.

L. A. 15122.

Supreme Court of California.

Oct. 19, 1936.

Rehearing Denied Nov. 16, 1936.

1. Mines and minerals 🔑101

Evidence *held* to sustain finding that there was sufficient disclosure of material facts regarding trustees' conduct concerning oil syndicate to subsequent unit holders, that profits taken by trustees could not be required to be returned on ground that they were secret.

2. Mines and minerals 🔑101

Where original trustees had agreed on general plan before acquiring oil lease and had come to understanding with owner and lease was recorded and corporation commissioner's permit fully set forth amount one trustee was to receive, subsequent unit holders *held* not injured because such trustee made division with other trustees.

3. Mines and minerals 🔑101

Where trust agreement, regarding oil development of specific property, was amended to authorize trustees to develop other property, fact that new projects failed to produce oil did not render trustees liable on ground that they exceeded their power.

4. Mines and minerals 🔑101

Where oil trust agreement imposed no duty on trustees to sell units, fact that each trustee collected salary during time he was selling units *held* not to require trustees to return to trust estate commissions for making sales of units, especially where trustees had given portions of commissions to buyers of units in order to induce purchase.

5. Mines and minerals 🔑101

Evidence *held* to sustain finding that amounts taken as compensation by trustees of oil syndicate did not exceed reasonable value of services rendered.

6. Mines and minerals 🔑101

Resolution of trustees of oil syndicate fixing salaries of trustees *held* not to preclude trustees from taking additional compensation where additional compensation was within terms of trust agreement and entire compensation was reasonable and purpose of resolution was only to equalize compensation and to compensate trustees for extraordinary services.

7. Mines and minerals 🔑101

Oil trust agreement authorizing trustees to use not to exceed 10 per cent. of all moneys received to defray expenses *held* to fix limitation at 10 per cent. of gross and not net income.

8. Mines and minerals 🔑101

Oil syndicate trustees' settlement of unit holder's action against trustees *held* not to constitute fraud necessitating their removal, where settlement was made with understanding that trustees should bring action for declaratory relief and agreement was at once carried into execution.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Hooper C. Dunbar and others against L. V. Redfield and others, wherein defendants filed a cross-complaint. From an adverse judgment, defendants appeal. Affirmed.

Prior opinion of the District Court of Appeal, 54 P.(2d) 523.

Joseph L. Lewinson, Morris E. Cohn, Erwin P. Werner, and George L. Hampton, all of Los Angeles, J. W. Falkner, of El Monte, and W. R. Law and August Weyman, both of Los Angeles, for appellants.

Walter F. Haas, Harold C. Johnston, Stanley F. Maurseth, Gerald E. Kerrin, and Haas, Johnston, Maurseth & Kerrin, all of Los Angeles, Cullinan, Hickey & Sweigert, of San Francisco, Haight, Trippett & Syvertson, Raymond L. Haight, and Arthur L. Syvertson, all of Los Angeles, Eustace Cullinan and William T. Sweigert, both of San Francisco, and Evans, Pearce & Campbell, and Albert D. Pearce, all of Los Angeles, for respondents.

THOMPSON, Justice.

A hearing was granted in this case, after decision by the District Court of Appeal, Fourth Appellate District, in order to give further consideration to two questions involved, which are discussed hereinafter. We were and are in accord with the remainder of the opinion rendered by the District Court of Appeal, and it is hereby adopted as a portion of our opinion and is as follows:

"This is an action for declaratory relief brought by the trustees of a common-law trust for the purpose of establishing the meaning and intent of the declaration of trust upon which the association was founded.

"The Bell View Oil Syndicate, which will hereinafter be referred to as the syndicate, was organized on January 20, 1922, for the purpose of drilling for oil on a town lot in Santa Fé Springs consisting of about one-third of an acre. The declaration of trust which was signed on that day by the five organizers appointed the signers thereof as trustees with the power to fill any vacancies. One of these trustees resigned shortly thereafter and the plaintiff Morris took his place. Two of the trustees died in 1925 and, without filling the vacancies, the three plaintiffs have continued to administer the affairs of the trust.

"The declaration of trust, after providing that the trust estate should consist of 5,000 units of the par value of $100 each, provided that 1,000 of these units should be given to H. W. McFarlane, one of the original trustees, in consideration of the transfer to the trust estate of a lease on this town lot. It was then provided that the trustees were to sell such additional units as might be necessary to provide funds for carrying out the objects of the trust, subject to the approval of the commissioner of corporations. The lease was transferred to the trust by McFarlane and 1,000 units were issued to him. In order to secure funds with which to drill for oil the trustees sold units of beneficial interest in this trust and at the time of the trial of this action there were outstanding such units of the par value of $300,000, of which the three plaintiffs owned nearly one-fifth. The venture was highly successful, and, at the time of the trial, more than $5,000,000 had been received for oil produced from this lot and the dividends paid to the unit holders averaged 64 per cent. a year on the par value of the units.

"A number of suits were brought against the trustees by various unit holders, and finally this action was brought by the trustees for the purpose of having an adjudication as to the meaning and intent of the declaration of trust and as to their rights under this instrument. The complaint sets out all of the claims that had theretofore been raised by any unit holders with regard to the manner in which the trust had been administered, with a statement of the trustees' contentions with respect thereto. Cross-complaints were filed by certain of the unit holders alleging that the trustees had taken secret profits, that they had wasted funds of the trust in wildcat operations, that they had taken compensation as trustees to which they were not entitled, that in various other respects they had been guilty of mismanagement of the trust and praying for their removal as such trustees. The trial court found in all respects in favor of the plaintiff trustees and this appeal followed.

"The first point raised is that the units issued to McFarlane in exchange for the lease were divided among the five original trustees and constituted a secret profit which, under the law, must be returned to the trust estate, together with all income therefrom. It is argued that the original trustees planned the organization of this syndicate before they secured the lease in question, that they became trustees from that moment, and that anything done by them thereafter must accrue to the benefit of all subsequent unit holders, since there was no disclosure of the facts.

"The appellants rely upon Burbank v. Dennis, 101 Cal. 90, 35 P. 444, and Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243. In the first of these cases the promoters of a corporation falsely represented to the proposed stockholders that they were conveying lands to the corporation at cost, when in fact they turned in the land at an increased price and took the resulting profit out of the cash paid by purchasers of stock. In the second case, one of the promoters concealed the facts that he was making a profit from a similar transaction and that he was one of the organizers of the corporation. It was there held that after starting such an enterprise one of the organizers thereof could not purchase property and sell it to the company at an advance in price in the absence of a full disclosure of the facts. It was further held that this duty if disclosure was owed to those persons who were induced to come into the enterprise and that, in that case, a subscription agreement which was signed by subsequent purchasers of stock failed to make such a disclosure.

"The appellants rely upon the following facts as bringing this case within the rules laid down in the cases just referred to: On January 10, 1922, the five persons who later became the original trustees in this syndicate signed a written agreement setting forth that they were desirous of forming a syndicate for the purpose of acquiring an oil lease from H. W. McFarlane, one of the five, covering this lot in Santa Fé Springs; that it was essential to this plan to secure a lease of the property; that they authorized McFarlane to take the lease in his own name for the purpose of transferring it to a syndicate to be organized; that such a syndicate should be capitalized on a unit basis with 5,000 units of $100 par value each; that the parties to this agreement should constitute the trustees; that each party thereto would subscribe for ten units at $100 each when the syndicate was organized; that 1,000 of these units should be taken as promotion stock for and in consideration of the lease; that a portion of the thousand shares should be given as a bonus to the first purchasers of units in the syndicate; and that 20 units out of the 1,000 should be given to certain persons named for services already rendered. On January 12, 1922, McFarlane secured a written lease, providing that the lessor should receive one-third of all oil produced and should receive, within fifteen days, $4,000 in cash to be treated as an advance on his first royalty. This $4,000 was later paid out of the proceeds of the sale of units, each trustee paying in $1,000 for ten units in accordance with their agreement. It should also be observed that, in accordance with the agreement, 245 of the units exchanged for the lease were given as bonuses to the first purchasers of units and the remaining 755 of these units were divided among the five trustees.

"The controlling question is whether there was such a disclosure of the essential facts to subsequent purchasers of units as is required by the rule laid down in the cases above referred to. Certain other facts have a bearing on this question. The respondent Horton spent three months looking over the Santa Fé Springs field in search of a lease which he might develop. He found the property in question, and before associating himself with any one else he agreed with the owner of the land on the terms of the lease. He then selected the persons who became the other trustees to assist him in raising funds with which to develop the property. The agreement of January 10, 1922, the securing of a written lease, and the organization of the syndicate followed. For convenience the lease was taken in the name of McFarlane and transferred by him to the syndicate. The agreement of January 10, 1922, was kept at all times in the office of the syndicate in a file marked 'Trust Papers,' was always available, was handed with the other papers to an auditor examining the records of the syndicate on behalf of certain unit holders and was produced at the trial.

"A permit to issue and sell units was obtained from the commissioner of corporations, copies of the declaration of trust and the lease being attached to the application therefor. The application set forth that McFarlane, as owner of the lease, was to transfer it to the syndicate, in exchange for 1,000 units, subject to the approval of the commissioner, and that each of the applicants had subscribed for ten units and had paid $1,000 into the treasury, out of which it was proposed to pay the $4,000 called for by the lease. Permission was asked for the issuance of 1,000 units to Mc-

Farlane in exchange for the lease and for the sale of other units to be sold so as to net 80 per cent. of the selling price. The commissioner was also asked to approve the plan of using a portion of the units to be issued to McFarlane for the purpose of giving a 50 per cent. bonus in units on the first 300 units actually sold and a 25 per cent. bonus on the next 300 units sold. A permit was issued, reciting the general facts outlined in the application, and granting permission to sell units as requested and to issue 1,000 units to McFarlane in exchange for the lease, describing the same and giving the book and page where it was recorded. The permit further provided that these units should be placed in escrow and not released until the further order of the commissioner, and that a copy of the permit be delivered to each prospective purchaser of units. The McFarlane units were placed in escrow and were later released and divided among the five trustees, after a showing as to the amount already paid to other investors. The certificates of beneficial interest issued to purchasers contained a reference to the declaration of trust, with a statement that it was recorded in the office of the county recorder of Los Angeles county, and each purchaser signed a written acknowledgment that he had received and read a copy of the permit. Other permits were later issued with relation to which similar facts appear.

[1, 2] "Assuming that these persons were acting as trustees from the date of their original agreement, January 10, 1922, we think the evidence sustains the court's finding that there was a sufficient disclosure of the material facts to subsequent unit holders, and that it cannot be said that secret profits were taken which must be returned to the trust estate. Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 P. 838. The original trustees acquired the lease before this syndicate was organized and before any other unit holder acquired any interest therein. While they agreed upon the general plan to be followed before acquiring a written lease, they had sought out and discovered the property and come to an understanding with the owner thereof before entering into the agreement of January 10, 1922. The lease was on record, its exact terms were set forth in the declaration of trust, and both were furnished to the corporation commissioner. The permit fully referred to both instruments and clearly set forth what McFarlane, one of the trustees, was to receive. So far as subsequent unit holders were concerned, the material fact was that such a consideration was to be paid. This being well understood and agreed to, a subsequent unit holder was in no way injured by the fact that the consideration he was willing to pay in order to acquire an interest in the lease was to be divided with the other organizers of the syndicate. Victor Oil Co. v. Drum, supra.

"It is contended that the trustees secured an amendment to the trust agreement by false representations and that the amendment is invalid. The trust agreement provided that it might be amended with the consent of two-thirds of the unit holders. In 1925, it was so amended as to permit the trustees to build up a reserve fund and to invest in new ventures aside from the original lease. It is argued that a letter which the trustees sent out asking consent to this amendment gave certain reasons therefor, whereas their testimony discloses other reasons. It is also argued that this letter was fraudulent because it contained a dividend check for 10 per cent. which was calculated to put the unit holders in a mellow frame of mind, and because it falsely stated that the trust estate had lost valuable opportunities, and held out the hope that other lucrative properties in the Santa Fé Springs field might be obtained if the trustees were permitted to build up a reserve which might be used for that purpose. More than two-thirds of the unit holders consented in writing to this amendment and the trial court found against the appellants on all allegations of fraud with respect to this transaction. The evidence fully sustains these findings, and we find nothing therein which would have sustained a finding to the contrary.

[3] "It is next contended that the trustees exceeded their powers by investing portions of the trust funds in leases and properties other than in the Santa Fé Springs field. It is claimed that the trustees spent approximately $400,000 in an effort to develop oil on some fifteen leases or projects outside of that field, without success except for one in the Signal Hill field which was only moderately successful. This entire project was started for the purpose of discovering and developing oil wells, and, after a considerable measure of success had been obtained, the unit holders amended the trust agreement for the specific purpose of authorizing and enabling the trustees to extend their operations and attempt to develop and produce oil on other

properties. The fact that most of the later ventures were not successful in no way indicates that the trustees exceeded the authority thus given in attempting to carry out the wishes of the unit holders. The appellants argue that the trustees were only authorized 'to develop * * * oil properties,' that most of the new projects failed to produce oil, and that, therefore, they were not developing oil properties and were acting in excess of their power. The trustees made a full and complete report of all of these transactions to the successive annual meetings of unit holders, the trust agreement was amended to permit them to do just such things, and the entire circumstances, as shown by the evidence, do not support the narrow construction now sought to be placed upon the power granted.

"Some contention is made that the trustees improperly accumulated a large reserve and that the original provision that 90 per cent. of the income should be paid out in dividends must be taken as showing the real intention of the parties. We are unable to follow this line of reasoning in view of the amendment adopted and the subsequent conduct of all of the parties."

[4] It is also asserted that the trustees should return certain commissions they paid themselves on the sale of units. It appears that each of the original trustees sold units on which he was given the 20 per cent. commission allowed by the terms of the permit. The trial court found that these trustees were licensed brokers, that the sales upon which they received commissions were made by them in their individual capacities and not as trustees, nor within the scope of their duties as trustees, or in the handling of the trust estate, nor were they "in derogation of said trust estate." It is specifically found that they "were not called upon or required by the terms and provisions of said Declaration of Trust to make such sales as trustees thereof and/or without compensation therefor." The court also found that the trustees at all times endeavored faithfully to perform all of their duties as trustees for the best interests of the trust estate. There is ample testimony to the effect that, although the trustees were charged with the responsibility of getting a well drilled on the property and, after losing the first one at a depth of about 2,900 feet, with the obligation of starting another, in order to maintain the good standing of the lease; and that it was practically impossible to secure salesmen at the percentage of 20 per cent. allowed by the permit to cover commissions and costs, because they were among the first in the Santa Fé Springs field, which was not only a deep field, but also the leases covered small lots, to which the public was not then accustomed, and also because other operators were finding means by which they were paying more than 20 per cent. In order to prevent the undertaking from becoming a failure, the trustees were obliged to sell a good many units personally and, in order to do this, were obliged in effect to remit to the purchaser the commission taken, so that, while they are charged with commissions on the books, a large portion thereof was not in fact collected by them. It is also to be observed that the declaration of trust provides that the trustees shall fix the compensation of all agents and "pay to themselves such compensation for their own service as they may deem reasonable."

The question at this juncture is whether, under these circumstances and the findings of the trial court, the respondents were bound to account for the compensation they received by way of commissions. The trial court held that they were not. We feel compelled by reason and the authorities to sustain this conclusion. In a comparatively early case, Graves v. Mining Co., 81 Cal. 303, 22 P. 665, 670, this court announced what we conceive to be the true rule which should govern trustees of corporations or business trusts. It is there held that a contract adopted by a board of directors, to which the vote of the interested director or directors is necessary, is voidable at the instance of the corporation or, in the event of its failure to act, at the election of a minority of the stockholders "without regard to whether they [the resolutions] were fair and honest or not." However, the court was careful to point out in that case that no question of the value of the services rendered was involved, and quoted with approval from Gardner v. Butler, 30 N.J. Eq. 702, as follows: "The rule is that the trustee cannot fortify himself by a contract which he makes with himself, or for his own benefit, and set it up, either at law or in equity, as a valid obligation. * * * But, while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents, or employees, and for such services the law will enable them to recover a just and reasonable compensation. * * * No claim which they may make against their company can acquire any support or validity from the fact that they have expressly sanctioned it. It must rest exclusively upon its fairness and justice, and be enforced upon the quantum meruit." To the same general effect reference may be had to San Leandro Canning Co. v. Perillo, 84 Cal.App. 635, 639, 258 P. 670; Bassett v. Fairchild, 132 Cal. 637, 643, 64 P. 1082, 52 L.R.A. 611, and cases there cited. In Voorhees v. Mason, 245 Ill. 256, 91 N.E. 1056, 1059, where a similar question was involved, it was held that a resolution allowing the directors commissions could not govern, but it was said: "The services of the secretary and other officers of the corporation in making sales of stock and income certificates were of value to the corporation, and upon proof of the value of such sales, regardless of the resolution, they may rightfully be allowed compensation for making such sales." See, also, Palmer v. Taylor, 168 Ark. 127, 269 S.W. 996, 1001.

[5, 6] The other question is quite similar to the one just discussed. The appellants contend that the trustees took compensation for themselves, which was unreasonable and not justified by the terms of the trust agreement, after they had fixed their compensation in lesser amounts. There is a clause of the agreement which provides as follows: "Said trustees are hereby vested with the sole power and discretion to discern what will constitute principal and what will constitute gross income and net income available for payment or distribution under the terms of this trust, provided, however, that not to exceed ten (10) per cent of all moneys received by the trustees shall be used to defray office expenses, officers' salaries and all overhead expenses." As we have already observed, the trust provided that, subject to the limitation just quoted, the trustees were authorized to pay themselves such compensation as they deemed reasonable. On April 7, 1922, the board fixed a salary for respondent Horton, as secretary, of $350 a month, and, on April 22, 1924, they voted themselves a salary of $150 a month from January 20, 1922, to April 20, 1924, "in consideration of the time given by each of the trustees to the affairs of the syndicate, and of the value of the services rendered." Beginning August 8, 1929, Horton was raised to $500 a month and respondent Dunbar was paid $350 a month. Beginning January, 1932, Morris was given a salary of $100 a month. In addition to the amounts thus paid and beginning in December, 1924, and at intervals thereafter, the trustees paid to themselves as compensation considerable sums of money, but kept within the limit of 10 per cent. of the moneys received, after deducting other office expenses and overhead.

Two of the trustees died in 1925, and the vacancies were not filled.

The trial court found that the respondent trustees had not taken more compensation than allowed by the terms of the trust agreement and had taken less than the 10 per cent. named in the trust agreement, after deducting office and other overhead expenses. It also found that the salaries which we have mentioned were not intended to compensate the trustees for their services in full, but "were fixed in such amounts among the trustees alone for extraordinary services rendered said Trust as such officers as aforesaid, in equalizing their total compensation and the drawing thereof as between themselves." And more important still, the court found that the sums taken by respondents as compensation did not exceed the reasonable value of the services rendered by them to the Bell View Oil Syndicate.

The appellants contend that the resolutions fixing the salaries preclude the respondents from paying other compensation, but the answer to this assertion is contained in the finding to the effect that such resolutions were intended only to equalize the compensation as between the trustees. It cannot be denied that the testimony of the trustees amply supports the finding of the court in this regard. Nor can it be denied that the court's finding that the compensation was reasonable was abundantly supported. Starting with nothing, the trustees, in the course of 12 years, with an issued capital of $300,000, paid out in dividends to the unit holders practically $2,000,000, at the same time accumulating physical assets valued in round figures at $500,000. Undoubtedly the court took into consideration that, while in times when the income of the trust was large, the compensation of the trustees was large, in times when the income was small, the compensation would be small and perhaps, under the limitation, nothing at all. Averaging the total compensation over the period in question, Horton received approximately $1,200 a month and Dunbar about $962 a month, while Morris received an average of around $842 a month. We cannot say that the court was not justified in concluding that the compensation was reasonable. In fact, as the record appears to us, it would hardly have been possible for the court to have decided otherwise. We should mention, however, that, in our opinion, the trustees must not only be restrained by the 10 per cent. limitation, but also by the reasonable value of the services rendered.

[7] It is also argued that the limitation of 10 per cent. was intended to apply to net income instead of gross income. After an exhaustive hearing, the trial court concluded otherwise, and we are not inclined, under the circumstances, to disagree therewith. The language of the trust agreement indicates that it was intended to mean a percentage of the gross—"all moneys received by the trustees." Indeed, we doubt that it could be construed differently.

[8] "The last point raised is that the respondent trustees were guilty of such fraud in settling a prior action brought against them as necessitates their removal. An action was brought against the respondents by one Penn, raising most of the claims which are involved in the present action. That action was tried, and the judge entered a minute order finding in favor of the trustees on all points except with respect to the matter of the compensation taken by them. On that point he found against them and ordered that judgment be entered against them in the sum of $247,500. Before findings were made and formal judgment entered the attorneys for all parties to that action entered into a compromise agreement under which that action was dismissed. These three trustees agreed to pay $25,000 to Penn's attorneys for attorney fees and costs, some $6,000 of which was paid by the trustees personally, the rest to be paid after a successful termination of this action. It was further agreed that the trustees would bring an action for declaratory relief, raising the question of compensation and all other claims that had been made against them by any of the unit holders, and for the purpose of obtaining an adjudication as to the meaning of the trust agreement on all disputed points. This action followed immediately. The former judgment had not become final and, in any event, applied only to the parties thereto and left unsettled the claims of many other unit holders. There is much to be said in favor of having the entire controversy between the various parties settled in one action in an orderly manner. This plan having been agreed upon, and at once carried into execution, it does not conclusively appear that the trustees were actuated by fraudulent motives. After a full hearing on this point the trial court found in favor of the respondents and we see no reason for setting aside that finding."

It follows that the judgment should be, and it is hereby, affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

7 Cal.2d 561

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION (WESTMORELAND et al.).

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION (RUBIO et al.).

S. F. 15338, 15339.

Supreme Court of California.

Oct. 23, 1936.

Master and servant 🔑397

Industrial Accident Commission *held* without jurisdiction to hold surety on foreign insurance carrier's bond liable for defaults which occurred subsequent to expiration of bond and after insurance carrier had filed new bond with another surety with approval of insurance commissioner (St.1917, pp. 292, 293, §§ 2, 3).

In Bank.

Proceedings under the Workmen's Compensation Act by Sophronia A. Westmoreland, and others, claimants, and by Mrs. Sebastiana Rubio, and others, claimants, against the American Mine Owners Casualty Corporation, insurance carrier, wherein the State Insurance Commissioner intervened as trustee for claimants against the Pacific Indemnity Company, as surety. The Industrial Accident Commission made awards in favor of insurance commissioner as trustee, and the Pacific Indemnity Company petitions for review.

Awards annulled.

Prior opinion, 5 Cal.(2d) 785, 56 P.(2d) 533.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten, and Emmet J. Seawell, both of San Francisco, for respondents.

SHENK, Justice.

The petitioner, Pacific Indemnity Company, seeks on review an annulment of the decision and order of the Industrial Accident Commission in two cases. The first involved an award of compensation made to Sophronia A. Westmoreland and Roy Westmoreland, the dependent surviving wife and minor child of Ambrose R. Westmoreland who, on February 17, 1931, suffered an injury in the course of his employment with Belmont Metals Corporation, and from which he died. The award to the dependents was made on November 18, 1932.

The insurance carrier of the employer at the time of the injury was American Mine Owners Casualty Corporation, a Pennsylvania corporation, duly licensed to issue policies of workmen's compensation insurance in this state. The statute enacted to protect beneficiaries of workmen's compensation insurance policies from the defaults or insolvency of insurance carriers (Stats.1917, p. 292), requires such insurance carriers annually to deposit securities or file a bond approved by the insurance commissioner. By section 2 of the act the bond must provide that in the event the carrier becomes insolvent or fails for a period of thirty days to pay any award rendered against it by the Industrial Accident Commission, the surety will pay forthwith the award to the extent of its liability under the bond. Section 3 (page 293) contemplates the filing of a new bond on or prior to the first day of July of each year. That section in part reads: "Upon the filing of said new bond, approved as herein required, and not until such filing and approval, all liability under the previous bond shall thereby terminate. Said new bond shall embrace the entire liability of said previous bond except in so far as the same may have been paid or discharged."

At the time of the injury to Westmoreland and until June 30, 1931, the petitioner herein was the surety on the bond filed by American Mine Owners Casualty Company. Previous to the expiration date of its bond, and about May 27, 1931, the American Mine Owners Casualty Company merged with Commonwealth Casualty Company, which thereupon and on June 1, 1931, merged with Independence Indemnity Company, a Pennsylvania corporation. One month later, at the expiration date of the Pacific Indemnity Company's bond, the Columbia Casualty Company's bond was filed and approved by the insurance commissioner as a new bond in place of the Pacific Indemnity Company's bond. On September 16, 1931, the Independence Indemnity Company transferred its assets and liabilities to another corporation also having the title Independence Indemnity Company, a Pennsylvania corporation. On July 1, 1932, Columbia Casualty Company renewed its bond for the Independence Indemnity Company for the period July 1, 1932, to June 30, 1933. On October 31, 1932, the new Independence Indemnity Company sold out to International Reinsurance Corporation, which on the same date procured the filing of a bond on its behalf by Union Indemnity Company. The International Reinsurance Corporation became insolvent in March, 1933.

Upon the default of the insurance carrier, the insurance commissioner, acting as trustee for the beneficiaries Westmoreland, pursuant to the statute, intervened in the proceedings before the respondent commission which ordered an award against the Pacific Indemnity Company, the Columbia Casualty and the Union Indemnity Company, as sureties on the bonds of the various consolidating carriers. The Pacific Indemnity Company instituted this proceeding to annul the award as against it on the ground that the commission had exceeded its jurisdiction.

Heretofore on March 31, 1936, this court filed its decision in the case of Columbia Casualty Company v. Industrial Accident Commission, Bertha R. Ridgway et al. (S. F. No. 15335) 5 Cal.(2d) 770, 56 P.(2d) 1527, in which the principal questions involved herein are stated and determined. That decision disposes of all the contentions presented here with the exception of the question whether the Pacific Indemnity Company is liable on its bond for a default which occurred subsequent to the expiration date thereof and after a new bond had been filed to replace it. As hereinabove noted, although the injury to Westmoreland occurred during the period when the Pacific Indemnity Company's bond was on file, the default of the carrier in the payment of the Westmoreland award occurred subsequent to the expiration date of the Pacific Indemnity Company's bond and when the bond of the Columbia Casualty Company replacing it was on file with the approval of the insurance commissioner.

It is held to be the general rule in Lawrence v. American Surety Co., 263 Mich. 586, 249 N.W. 3, citing numerous authorities, that liability on the first bond continues when a subsequent bond is furnished until such second bond is approved as a substitute for the first; but where a bond is accepted in lieu of a previous bond the former surety is released when the substitution becomes effective. That a new bond filed and approved as provided supersedes all previous bonds as to all future defaults is indicated by our decision in the case of Columbia Casualty Company v. Industrial Accident Commission and Ridgway, supra, and by the decision in In re International Reinsurance Corporation, 271 N.Y. 381, 3 N.E.(2d) 518, decided July 8, 1936, citing with approval People v. Columbia Casualty Company, 155 Misc. 91, 278 N.Y.S. 792, which is to the same effect. It follows from the foregoing that the Industrial Accident Commission was without power to impose liability on the Pacific Indemnity Company for the default of the insurance carrier in the matter of the Westmoreland award.

The second case involved in these proceedings has to do with an award of compensation to the dependents of John Rubio, whose employer at the date of his injury and death was also insured by American Mine Owners Casualty Company. The award of compensation in that case was not made until September 30, 1933, but pursuant to the statute the default of the carriers occurred when the International Reinsurance Company became insolvent in March, 1933, which also was subsequent to the period when the Pacific Indemnity Company's bond was on file and unreplaced by a new bond. Likewise in that matter the insurance commissioner intervened before the Industrial Accident Commission and secured an award in its favor as trustee of the beneficiaries against all of the sureties herein mentioned. The Pacific Indemnity Company petitioned this court for a review and annulment of the commission's award against it. The same conclusion follows, viz., that the commission has exceeded its jurisdiction in fastening liability for the default of the carriers upon this petitioner.

There is no inconsistency between the disposition of the awards against the petitioner in these cases and the affirmance of the awards against the Columbia Casualty Company therein. Columbia Casualty Company v. Ind. Acc. Comm., Mrs. Sebastiana Rubio et al. (S. F. No. 15336) and Columbia Casualty Company v. Ind. Acc. Comm., Sophronia A. Westmoreland et al. (S. F. No. 15337) 56 P.(2d) 533. In conformity with our decision in the case of Columbia Casualty Company v. Ind. Accident Commission and Ridgway, supra, the defaults of the carriers occurred during the period prior to June, 1933, and when the bond of the Columbia Casualty Company was on file and unreplaced by any bond of another surety. Also the result in that case that both the Independence Indemnity Company and the International Reinsurance Corporation were liable as carriers, and that each thereof had on file a bond protecting beneficiaries against its default, does not militate against the correctness of the result on the present proceedings.

The awards against the Pacific Indemnity Company for the defaults of the insurance carrier with respect to the payment of the awards of compensation to the Westmoreland and Rubio dependents are and each is annulled.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; NOURSE, Justice pro tem.

7 Cal.2d 570

McCAFFERTY et al. v. JONES et al.

S. F. 15564.

Supreme Court of California.

Oct. 23, 1936.

1. Appeal and error 🔑**1010(1)**

Reviewing court in action to establish a trust interest in property was bound by findings that plaintiffs had no interest in such property, where findings were amply supported by substantial evidence.

2. Trusts 🔑**44(1)**

Evidence *held* to support findings that two of children seeking to establish trust interest in their parents' property based on alleged agreement to give children an interest, provided they turned over their earnings for investment purposes, had no interest in property, and that their father had never received or invested any of their funds.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Frank McCafferty and another against John W. Jones and another. Judgment for named defendant, and plaintiffs appeal.

Affirmed.

Marshall Nuckolls and Raymond J. O'-Connor, both of San Francisco, for appellants.

Harry I. Stafford, of San Francisco (Daniel R. Shoemaker, of San Francisco, of counsel), for respondent John W. Jones.

Lloyd J. Cosgrove and Royal E. Handlos, both of San Francisco, for other respondents.

WASTE, Chief Justice.

This is an action to establish a trust as to a one-sixth interest in each of the plaintiffs in two parcels of real property and in an alleged accumulation of money in a sum in excess of $10,000. It appears that the defendants intermarried in the year 1894. At the time, the defendant Ellen A. Jones had a 3 year old son by a former marriage, one of the plaintiffs herein. As a result of this union, three children were born to the defendants. All four children were raised together in the family household. Throughout the many years of their married lives the defendants purchased and sold several parcels of real property, realizing a profit on each transaction. The two parcels of real property and the accumulation of money here involved represent the culmination of defendants' real estate deals. In 1929, after 35 years of married life, the defendant John Jones left home because of marital difficulties. Before doing so, however, he and the defendant Ellen A. Jones withdrew the disputed fund of money from a bank account standing in their joint names and divided the same equally between them, each taking approximately $5,500. Shortly thereafter the defendant John Jones instituted an action for divorce against the defendant herein, Ellen Jones. During the pendency of the divorce action the defendant Ellen Jones recorded a deed of gift covering the two parcels of real property which had been executed by her husband, the defendant John Jones, to her, and followed this by executing a deed covering both parcels to one of the plaintiffs herein, Beatrice A. La Vigne, one of the daughters of the parties. Upon learning of this, the defendant John Jones commenced an action against his estranged spouse, the defendant Ellen Jones, and the grantee-daughter, to have the deeds to them set aside. In that action it was found that the deed executed by John Jones to Ellen Jones, his wife, and covering the two parcels here involved, was one of two mutually executed deeds of gift, that it had not been delivered by the grantor and was therefore ineffective for all purposes. It was also found that the deed from the defendant wife to the daughter of the parties failed to convey any right, title, or interest in or to said grantee. Judgment was accordingly entered decreeing that John Jones was the owner in fee simple as community property of the two parcels of real property involved in this action, that Ellen Jones, the wife, had a community interest therein, and that the defendant Beatrice A. La Vigne, the daughter of the two parties and one of the plaintiffs herein, had no right, title, or interest therein. This judgment became final without any appeal being taken therefrom.

Thereafter the divorce action proceeded to trial, an interlocutory decree of divorce was entered wherein the two parcels of real property here involved were divided between the spouses, one parcel to each. It was stipulated that the property provisions of said decree have become final. Therefore, at the commencement of this action by the two children (one a stepson of John Jones), to impress a one-sixth trust interest in favor of each on the parcels of real property and the money above mentioned, all of said property had been divided either by court decree or voluntarily between the defendants herein, John and Ellen Jones.

The defendant John Jones by his answer to this action denied that the plaintiffs had any trust or other interest in any property or money standing in his name and, as to the plaintiff Beatrice A. La Vigne, pleaded by way of bar and estoppel the judgment entered in the quiet title suit referred to above. The defendant Ellen Jones did not defend against the claims of plaintiffs, but her default was not taken. Her only appearance in the action was as a witness for the plaintiffs. Though called under section 2055 of the Code of Civil Procedure, her testimony tends to substantiate the claims of plaintiffs.

In support of their respective claims that the parcels of real property and the money are impressed with a one-sixth trust interest in favor of each, the plaintiffs offered evidence tending to establish that the defendants orally agreed with the plaintiffs when the latter reached their majority that both plaintiffs, along with the four other members of the family, should have a one-sixth interest in all properties acquired by the family providing that they turned over their earnings for investment purposes. Plaintiffs also offered evidence tending to show that acting upon such understanding and agreement they had turned over their earnings to the defendants to be invested by them.

In opposition to this showing the defendant John Jones testified, in substance, that there never had been any understanding or agreement between the parties hereto as to a trust in favor of the plaintiffs and that he had never received any earnings or funds from the plaintiffs for investment and had never learned of any having been contributed by them for such purpose. In other words, he flatly denied and refuted the claims advanced by the plaintiffs.

The trial court found upon such conflicting evidence that there never had been any trust agreement between the parties hereto, that the defendant John Jones had never received or invested any funds of the plaintiffs, and that plaintiffs have no right, title, or interest in or to the properties here involved. Judgment was accordingly entered in favor of the defendant John W. Jones, and the plaintiffs appealed.

[1, 2] Under settled principles of appellate procedure, we are bound by the findings of the court below which, in our opinion, are amply supported by substantial evidence. The few discrepancies or inconsistencies in the testimony of the defendant John W. Jones, pointed to by the appellants, are not such as to destroy his entire testimony and render the same inherently improbable. We are satisfied that the court below acted well within its province in finding against the plaintiffs.

Our conclusion that the findings are supported by substantial evidence is determinative of the case. We do not find it necessary, therefore, to pass upon the propriety of the ruling admitting the judgment roll in the quiet title suit above mentioned. Even if erroneously admitted, a point we do not decide, the error would not have been prejudicial in the face of the record now before us.

Judgment affirmed.

We concur: CURTIS, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.; NOURSE, Justice pro tem.

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7 Cal.2d 565

CHENEY v. CITY AND COUNTY OF SAN FRANCISCO EMPLOYEES RETIREMENT SYSTEM et al.

S. F. 15466.

Supreme Court of California.

Oct. 23, 1936.

1. Appeal and error 🔑181

Reviewing court would not consider ground for reversal which was presented for first time on appeal (Code Civ.Proc. § 434).

2. Divorce 🔑156

On death of husband before entry of a final decree of divorce in absence of any adjudication of parties' property rights by interlocutory decree or settlement of such rights by other existing contract, interlocutory decree is an adjudication only of the rights of prevailing party to a divorce and the wife becomes the surviving widow with all the vested rights attendant thereon.

3. Municipal corporations 🔑220(9)

As regards right of widow of employee to amount payable on employee's death from employees' retirement system fund, act of setting aside such amount at beginning of employment *held* not to vest in employee a property right therein, since that right did not accrue until his death.

4. Husband and wife 🔑266

Written contract entered into by husband and wife after marriage, to effect that earnings of each should be separate property of spouse so earning and that neither would make any claim against earnings of the other, *held* valid (Civ.Code, §§ 158, 159).

5. Husband and wife 🔑263

In action by widow of deceased employee to quiet title to amount payable from employees' retirement system fund where widow claimed that contract that neither of them would claim earnings of other had been mutually rescinded, evidence that widow was compelled to make good checks issued by employee *held* properly rejected as irrelevant.

6. Municipal corporations 🔑220(9)

Where deceased employee and his widow had entered into written agreement after marriage that neither would make any claim against earnings of the other, widow *held* not entitled to any part of amount payable from employees' retirement system fund on employee's death as against claim of beneficiary nominated by employee (Civ.Code, §§ 158, 159).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Elise Cheney, as administratrix, etc., against the City and County of San Francisco Employees Retirement System, Florence Cheney, and others, wherein defendant Florence Cheney filed a cross-complaint. From the judgment rendered, cross-complainant appeals.

Reversed.

Morris M. Grupp and Arthur D. Klang, both of San Francisco (Morgan V. Spicer, of San Francisco, of counsel), for appellant.

Thomas P. Slevin and John J. O'Toole, both of San Francisco, for defendant City and County of San Francisco Employees Retirement System.

Antonio Gaudio, of San Francisco, for respondent.

SHENK, Justice.

The plaintiff, as administratrix of the estate of Thomas Walter Cheney, deceased, commenced an action to quiet title to a fund payable by the city and county of San Francisco out of the employees retirement system fund, pursuant to Ordinance No. 9134, effective January 8, 1932. The defendant Florence Cheney, the mother of the decedent, filed a cross-complaint alleging that as the named beneficiary of the fund she was entitled to the whole thereof. The plaintiff alleged that the fund was the community property of the decedent and herself and pressed her right thereto as the surviving widow. The trial court by its judgment awarded one half of the fund to the plaintiff and the other half to the cross-complainant. The latter prosecuted this appeal from the judgment.

The decedent, Thomas Walter Cheney, entered the employ of the city and county of San Francisco on March 17, 1929, and continued therein up to the time of his death on December 15, 1933. The employees retirement system, in effect at the time of his employment and as subsequently amended on January 8, 1932, provided that on the death of the employee his estate or the beneficiary nominated by him should receive his accumulated contributions to the fund and a sum equal to the compensation earnable by him during the six months immediately preceding his death. Cheney married the plaintiff on February 5, 1932. On the same day the spouses entered into a written agreement that any existing debts of one should not be collectible out of any of the property of the other whether acquired or earned before or after their marriage, and that the earnings of each after the marriage should continue to be the separate property of the one so earning. On August 7, 1933, Cheney filed an action for divorce against the plaintiff in which the wife cross-complained. Both the complaint and cross-complaint contained the allegation that there was no community property belonging to the spouses. The court in the divorce action made no finding relative to community property and the interlocutory decree adjudging the right of the wife to a divorce did not include an adjudication relative to community property rights. The interlocutory decree was entered in October, 1933, and in the following December Cheney died. Upon his death there became payable from the employees retirement fund a death benefit of $1,200 plus the accumulated contributions of the decedent amounting to $398.82. The resulting sum of $1,598.82 was sought by the mother of the decedent as the nominated beneficiary and by the wife as the surviving widow who claimed that the fund was community property. The trial court found the existence of the prenuptial agreement of the spouses, but also found that the same had been mutually rescinded. It concluded that said sum was community property and that the defendant Florence Cheney was entitled to one half as the beneficiary named by the decedent and that the plaintiff was entitled to the other half thereof as the surviving widow.

[1] As one of the grounds for reversal it is contended that the plaintiff as administratrix, was not the proper party to sue and has not the legal right to maintain the action. Aside from the merits of this point, it is presented for the first time on the appeal and for that reason should be disregarded. Code Civ.Proc. § 434; Bollinger v. Bollinger, 154 Cal. 695, 699, 99 P. 196.

[2-6] It is the appellant's theory that the sum of $1,200 was, as found by the court, "set aside" by the city and county upon the admission of Cheney into its employ on March 17, 1929, and thus that that sum constituted property of the decedent acquired prior to his marriage. The act of "setting aside" such fund did

not thereupon vest in the decedent a property right therein. That right did not accrue until the event upon which payment was contingent had occurred. Clarke v. Reis, 87 Cal. 543, 25 P. 759; Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426. In the present case the contingent event was the death of the employee Cheney. The question, therefore, is whether the interlocutory decree or the written contract of the spouses precludes the plaintiff from pressing her claim to that portion of the fund which was not subject to disposal by the decedent. We are not called upon to determine the effect of a final decree had one been entered in the divorce action. On the death of the husband before the entry of a final decree of divorce, in the absence of any adjudication of the property rights of the parties by the interlocutory decree, or the settlement of such rights by other existing contract, the interlocutory decree becomes an adjudication only of the right of the prevailing party to a divorce, and the wife becomes the surviving widow with all of the vested rights attendant thereon. In re Estate of Dargie, 162 Cal. 51, 121 P. 320; Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154; Gloyd v. Superior Court, 44 Cal.App. 39, 185 P. 995. However, in the present case the plaintiff and the decedent had entered into a written contract that after marriage the earnings of each should be the separate property of the spouse so earning, and that neither would make any claim against the earnings of the other. Such a contract is valid and binding on the spouses. Civ.Code, §§ 158, 159; Siberell v. Siberell, 214 Cal. 767, 770, 7 P.(2d) 1003. That such is the force of the contract and that the wife has no right to any part of the fund involved if that contract remained effective at the death of the husband appear to be unquestioned. We are perforce committed to the view that the amount payable from the employees retirement system upon the husband's death represented earnings. As such it was community property unless the agreement executed by the husband and wife providing otherwise was still in force. The defendant Florence Cheney contends that there was no evidence to support the finding that the contract had been mutually rescinded. There is no evidence in the record of any rescission of the contract. There appears only the bare conclusion of the witness Elise Cheney, the plaintiff, that the decedent "did not carry out the terms of the agreement." In support of this conclusion proof was offered that checks issued by the husband in payment of "provisions and purchases" were refused payment by the bank and that the wife was compelled to make them good. The ruling of the court sustaining an objection to the introduction of that evidence was proper. That fact did not bear upon the question of mutual rescission or tend to prove a violation of any of the terms of the agreement. The written contract of the spouses stands uncontradicted in the record and in full force at the death of the husband. It therefore determines the character of the fund here involved as the separate property of the decedent. The nominated beneficiary is therefore, on the record here presented, entitled to the whole thereof.

The judgment is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; NOURSE, Justice pro tem.

7 Cal.2d 547

ERLIN v. NATIONAL UNION FIRE INS. CO.

S. F. 15644.

Supreme Court of California.

Oct. 21, 1936.

1. Appeal and error 🔑1099(7)

Supreme Court's statement, in opinion on former appeal, that question whether plaintiff was entitled to sue would not be considered because "on the merits plaintiff is not entitled to recover," *held* to mean that plaintiff could not recover on evidence then before court.

2. Appeal and error 🔑1210(1)

Supreme Court's reversal of judgment without direction to trial court remands case for new trial and places parties in same position as if case had never been tried.

3. Appeal and error 🔑1097(1)

On retrial, decision of appellate court becomes law of case on facts as then presented.

4. Appeal and error 🔑1099(7)

Decision of appellate court as to question of fact does not become law of case.

5. Appeal and error ⚿=1210(1)

Constitutional prohibition against new trial, unless after examination of evidence it appears that errors complained of have resulted in miscarriage of justice, does not preclude new trial upon reversal of judgment without direction (Const. art. 6, § 4½).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George E. Erlin against the National Union Fire Insurance Company. From the judgment, the plaintiff appeals.

Reversed.

Harry I. Stafford and Edward A. Cunha, both of San Francisco (Daniel R. Shoemaker, of San Francisco, of counsel), for appellant.

Courtney L. Moore, of San Francisco, for respondent.

EDMONDS, Justice pro tem.

The effect of the reversal of a judgment by this court without further order or direction to the trial court is the sole question presented by this appeal.

Plaintiff recovered judgment in the superior court. The defendant appealed and this court reversed the judgment. Erlin v. National Union Fire Ins. Co., 217 Cal. 374, 18 P.(2d) 660. Plaintiff thereafter brought the case on for trial in the superior court, which refused to hear it. The judgment entered for the defendant recites: "That the Supreme Court of the State of California did not intend to grant said plaintiff and did not intend that this Court should grant to said plaintiff a new or retrial of said action."

The controversy concerns the right of the plaintiff to recover commissions from the defendant. He alleges that the commissions were due to him for his services by which he brought about and consummated an agreement between the defendant and a finance company. This court held that there is no evidence in the record sufficient to support this allegation. It also held that certain findings were not supported by the evidence. The opinion then states that it is an admitted fact that the plaintiff, during the time of his negotiations with the insurance company did not have an insurance broker's license nor did he have a license to act for the defendant company and concludes with the following: "There is much argument in the briefs as to whether, under these facts, the plaintiff was entitled to sue. These questions it is unnecessary to determine, because, on the merits, the plaintiff is not entitled to recover." 217 Cal. 374, at page 377, 18 P.(2d) 660, 662.

The position of the defendant is that by its decision on the former appeal this court finally determined the case upon its merits. In upholding this position the trial court in the judgment from which the present appeal is taken states that this court refused to pass upon the question of whether the plaintiff was entitled to sue "and assigned as the reason for its failure to pass upon said issue that it was unnecessary to determine the same because on the merits the plaintiff is not entitled to recover; and * * * that said decision and opinion of said Supreme Court is final and conclusive and binding on this Court. * * *"

[1-4] The statement by this court in its opinion upon the former appeal that, "on the merits, the plaintiff is not entitled to recover," could only refer to evidence then before the court. The reversal of the judgment was unqualified; that is to say, without direction to the trial court. Such a reversal remands the case for a new trial and places the parties in the same position as if the case had never been tried. Central Sav. Bank v. Lake, 201 Cal. 438, 443, 257 P. 521; Monson v. Fischer, 219 Cal. 290, 291, 26 P.(2d) 6. Of course, upon a retrial the decision of the appellate court becomes the law of the case upon the facts as then presented. But that law must be applied by the trial court to the evidence presented upon the second trial. "It is settled beyond controversy that a decision of this court on appeal, as to a question of fact, does not become the law of the case." Mattingly v. Pennie, 105 Cal. 514, 517, 39 P. 200, 201, 45 Am.St. Rep. 87.

[5] Section 4½ of article 6 of the Constitution can have no application to the present situation. This court cannot say what evidence the plaintiff may produce upon another trial. Upon the reversal of the judgment in his favor he became entitled to a new trial and the opportunity to present evidence in support of the allegations of his complaint.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.

7 Cal.2d 556

CRIST v. HOUSE & OSMONSON, Inc., et al.

S. F. 15575.

Supreme Court of California.

Oct. 23, 1936.

1. Mortgages ⚷369(2)

Sale of land covered by trust deed will not be set aside, because of misdescription including land which trustee had no power to sell, in absence of evidence that trustors suffered actual prejudice, unless misdescription is so substantial that prejudice is likely to result to trustors.

2. Mortgages ⚷369(2)

Where trustees sold land covered by trust deed under misdescription, which included section which had been released from trust deed and which totaled one-nineteenth of advertised property and had practically no value, and there was no evidence of actual prejudice to trustor, sale would not be set aside.

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Frank L. Crist against House & Osmonson, Incorporated, and others, wherein Harriett L. Cowell filed cross-complaint. From a judgment in favor of plaintiff, Harriett L. Cowell appeals.

Affirmed.

Charles A. Christin and T. J. Keegan, both of San Francisco, for appellant.

Frank L. Crist and Adron A. Beene, both of Palo Alto, for respondent.

SHENK, Justice.

The plaintiff sued to quiet title to certain improved real property purchased by him at a trustee's sale. From a judgment in his favor, the defendant Harriett L. Cowell appealed.

The property is situated in Palo Alto in Santa Clara county. Harriett L. Cowell was the owner thereof prior to December 12, 1929. On that date she deeded it to the defendant House & Osmonson, Inc. The latter executed a first deed of trust of the property to secure a note for $6,000, also a second deed of trust to secure a note for $3,000. The property deeded to the company and as described in the deeds of trust was irregular in shape, and for purposes of illustration its boundaries may be called briefly as follows: From the point of beginning northerly 57½ feet; easterly 112½ feet; southerly 14 feet; easterly 12½ feet; southerly 25 feet; westerly 50 feet; southerly 18 feet; and westerly 75 feet to the point of beginning. The small rectangular portion measuring 12½ by 25 feet on the easterly end of the property was purchased by the United Artists Theatre for $750 in January, 1931, for the purpose of adding it to the adjoining lot. The holders of the first and second deeds of trust duly executed reconveyances, thus releasing the piece sold from the lien of the trust deeds.

In April, 1932, the plaintiff purchased the $3,000 note and second deed of trust. Upon default in the payment of that note the trustee under the second trust deed pursuant to the provisions thereof sold the property to the plaintiff for the sum of $300 subject to the lien of the first deed of trust. On the sale proceedings, however, the trustee erroneously advertised for sale the entire property including the 12½ by 25 foot strip theretofore released.

In the meantime in February, 1932, Harriett L. Cowell, the former owner, had commenced an action against her grantee to have the deed canceled on the ground of fraud, and at the same time she filed for record a notice of lis pendens. After the sale of the property to him the plaintiff brought the present action to quiet title to the property involved exclusive of the 12½ by 25 foot strip sold to the theater. Harriett L. Cowell, the only defendant answering, sought by a cross-complaint to have title quieted in the defendant House & Osmonson, Inc., subject to her equitable claims. Judgment went for the plaintiff and this appeal followed.

The only question presented by the appeal is as to the correctness of the judgment for the plaintiff in view of the erroneous inclusion in the sale proceedings of the strip sold to the theater. By the trustee's sale, if it was effective and valid, the plaintiff acquired only the property which the trustee had the power to sell, viz., the property remaining subject to the lien of the trust deeds after the reconveyance of the easterly strip.

The leading case considering the question of the validity of the sale where the description advertised contains property not subject to the lien appears to be Fenner v. Tucker, 6 R.I. 551. As in this case, a portion of the property had been released from the mortgage. But there the portion released consisted of four acres which was one-half the mortgaged land. It was held that the misdescription avoided the sale because of the tendency consequent thereon of deterring persons from attending the sale who might otherwise have bid, to the prejudice of the mortgagor. The case is relied upon by the defendant as establishing a rule that whenever there is advertised in the sale proceedings a parcel of land which the trustee had no power to sell, prejudice to the mortgagors or trustors must be presumed and the sale held void. But that is not the rule to be deduced from the decided cases. In the Fenner Case there were additional circumstances occurring at the sale and during the bidding which caused actual prejudice to the mortgagor and resulted in the property being sold for much less than its value. The court in that case expressly recognized that a mistake, such as there involved, would invalidate the sale if it was "adapted to mislead" to the prejudice of those who were entitled to protection in the matter of the price to be obtained for the property.

Likewise in People's Savings Bank of Woonsocket v. Wunderlich, 178 Mass. 453, 59 N.E. 1040, 86 Am.St.Rep. 493, the advertisement included a lot (one of four originally mortgaged), which had been released from the mortgage and on which there subsequently had been constructed expensive improvements. The three lots remaining which the mortgagee had power to sell were of comparatively little value. It was held that the real estate advertised was "substantially different from what the mortgagee sold or had a right to sell, and the sale was not a valid execution of the power given him," citing Fenner v. Tucker, supra. In Chace v. Morse, 189 Mass. 559, 76 N.E. 142, however, the same court expressly narrowed its inquiry to whether a sale was void or voidable which was had pursuant to notice describing more land than the mortgagee had power to sell. It was stated that the decision in People's Savings Bank v. Wunderlich, supra, did not compel a holding that such a sale was void as distinguished from voidable. It concluded that regardless of the question whether the notice was or was not calculated to create prejudice to the mortgagor, the laches of the latter had intervened as a bar to a suit to have the sale invalidated.

Other authorities recognize the rule that such inaccuracies which are not calculated to mislead or work injury or prejudice are to be disregarded. Stephenson v. January, 49 Mo. 465; Schoch v. Birdsall, 48 Minn. 441, 51 N.W. 382, 383; 3 Jones on Mortgages (8th Ed.) p. 893 et seq., § 2380; p. 908, § 2393.

In Schoch v. Birdsall, supra, where the notice failed to exclude a 25-foot strip which was one-eighth the size of the lot, the court's concern was with the question "whether there is such a variance as to influence bidders unfavorably." It concluded that upon the record the omission should not be considered as having been misleading or prejudicial to any interested party.

Finally we are referred to the case of Baca v. Chavez, 32 N.M. 210, 252 P. 987, 990. There the court reviewed the cases of Fenner v. Tucker, Schoch v. Birdsall, and People's Savings Bank v. Wunderlich, supra, and stated: "In the foregoing cases the result was based, or the principle declared, in view of actual or possible fraud upon, or prejudice to, the donor of the power." It concluded that the possibility of prejudice by reason of the failure in the notice to inform the public that only a two-thirds interest rather than the whole interest was to be sold was too remote to furnish a practical basis for intervention by a court in a suit to enjoin the sale.

[1, 2] The rule is therefore sufficiently well settled that in the absence of any evidence that actual prejudice was suffered, the misdescription by the inclusion of property theretofore released must be of such a substantial nature that prejudice is likely to result to the trustors. The record before us does not contain evidence that actual prejudice resulted by reason of the inclusion in the sale proceedings of the small strip which theretofore had been released. Nor does the record show that any prejudice was likely to result to the trustors from the erroneous inclusion of the small area release. That parcel was but one-nineteenth of the advertised property and lay vacant immediately adjacent to the rear line of garages built thereon. It did not appear naturally to be a portion of the improved parcel. Alone or as a part of the main property it had practically no value. The only factor which gave it a possible substantial market value was the likelihood that owners of property adjoining on the east, of which it appeared to be more naturally a part, might desire it as an addition thereto. Therefore, the court could

have inferred that the effect of its actual inclusion in the advertised sale would more normally have been to attract rather than deter bidders, and that the plaintiff was the only one who was likely to suffer prejudice thereby. The trial court correctly concluded that the sale should not be invalidated by reason of the erroneous description.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; NOURSE, Justice pro tem.

7 Cal.2d 537

BARBERI v. ROTHCHILD et al.

S. F. 15573.

Supreme Court of California.

Oct. 21, 1936.

1. Mortgages 🔑131

Sections of Code, providing that subsequently acquired title inures to grantee, or mortgagee, or their successors, also apply to trust deed, which is a conveyance, since characteristics and purposes of trust deed and mortgage are similar, except that under trust deed title passes to trustee (Civ.Code, §§ 1106, 1215, 2930).

2. Mortgages 🔑131

Where grantor made two trust deeds, and later purchased trust property which had been sold on foreclosure under deed first recorded, title so acquired by grantor inured to benefit of one holding under second trust deed (Civ.Code, §§ 1106, 1215, 2930).

3. Mortgages 🔑131

Where grantor made two trust deeds and later purchased trust property which had been sold under deed first recorded, and beneficiary of second trust deed had no knowledge of first trust deed until after recording of first trust deed, when grantor warranted title under second trust deed, grantor *held* estopped to set up claim adverse to beneficiary holding under second trust deed.

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Suit by Antonio Barberi against Walter Rothchild and others. From a judgment in favor of the defendants the plaintiff appeals.

Affirmed.

Owen D. Richardson and Harvey C. Miller, both of San Jose, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, and Fry & Jenkins, of San Jose, for respondents.

NOURSE, Justice pro tem.

Plaintiff sued to enjoin a sale of real property under a deed of trust and to quiet title to the property. In a trial upon an agreed statement of facts the defendants had judgment.

The pertinent facts are: Plaintiff, while owner of the fee, made two deeds of trust on August 9, 1920; one was recorded at 3:06 p. m. and the other at 3:07 p. m. of the day of execution. On October 1, 1924, the property was sold under the deed first recorded to a brother of the plaintiff. On July 12, 1926, plaintiff filed a petition in bankruptcy and obtained his discharge on October 20th of that year. On January 5, 1928, the plaintiff purchased the trust property from his brother. The defendant Rothchild is the executor of the estate of Abraham Rosenberg, the beneficiary under the deed of trust second recorded. The defendants Jenkins and Fry are the trustees named in that deed. On May 22, 1934, after notice duly given, the property was sold under this second deed of trust to the defendant Rothchild.

The first question presented on the appeal is whether the title acquired by the plaintiff through the sale under the first deed inures to the beneficiary under the second deed. The precise question is one which has not been determined in any authority brought to our attention. The case most closely touching it is Jensen v. Duke, 71 Cal.App. 210, 234 P. 876. There the plaintiff, having executed a deed of trust covering certain real property, sold the land to Margaret Duke and took from her a mortgage to secure the purchase price. The property was sold under the deed of trust, and Duke subsequently acquired it from the purchaser. She sold to the defendants, and the question raised was whether the mortgage lien admittedly extinguished by the trustees' deed was revivified by the purchaser's deed to Duke, the mortgagor. Relying upon section 2930 of the Civil Code, which reads: "Subsequently acquired title inures to mortgagee. Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution," the court held: "Though defendant Margaret Duke lost title by reason of the trust sale to Abbott, she again acquired title under Abbott's deed to her, and the title thus acquired, inures 'to the mortgagee as security for the debt in like manner as if acquired before the execution,' i. e., of the mortgage." It was also suggested in the opinion that the reason of the rule extinguishing junior mortgage liens following foreclosure under senior liens should not apply as to the mortgagor acquiring title from foreclosure of the first mortgage either directly as purchaser or indirectly as the grantee of a third party foreclosure purchaser. In Ahern v. Tulare Lake Co., 115 Cal.App. 93, 101, 1 P.(2d) 490, the same rule was applied in a case where corporate stock had been pledged as security for a debt, sold for delinquent assessments, and then redeemed by the pledgor. There is nothing to the contrary in any of the California cases cited by the appellant. In Plum v. Studebaker Bros. Mfg. Co., 89 Mo. 162, 1 S.W. 217, the trustor had failed to sign either of the notes covered by the first or the second deed of trust and was therefore under no obligation to pay the debt secured by either. It should be noted also that the Plum Case was relied on in the Jensen Case, and the court expressly declined to follow it

Appellant, though conceding the equity of the rule of section 2930, argues that its application should be limited to mortgages alone. In Clark v. Baker, 14 Cal. 612, 627–631, 76 Am.Dec. 449, this court reviewed the early cases adopting the common-law rule that after-acquired title did not inure to the benefit of the mortgagee and therein expressly rejected that rule because of the provisions of sections 33 and 36 of Conveyance Act. (Stats.1850, p. 249). Section 33 of that act provided that: "If any person shall convey any real estate, by conveyance purporting to convey the same in fee simple absolute," and shall subsequently acquire the full legal estate, that shall inure to the benefit of the original grantee. Section 36 defined a conveyance as embracing "every instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged, or assigned, except wills * * *."

[1, 2] Since the adoption of the Civil Code, section 1106 has read: "Subsequently acquired title passes by operation of law Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." Section 1215 has defined "conveyance" to embrace every instrument in writing "by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills." The difference in the language used in the Conveyance Act and that used in section 1106 of the Civil Code is that the former relates to the one who "shall convey any real estate" and the latter to one who "purports by proper instrument to grant." Though both statutes add the words "in fee simple," it was said in the Clark Case that this did not affect the plain purpose of the statute which was "to provide that the subsequently-acquired estate shall be as completely covered by the instrument, whether conveyance or mortgage, as if originally possessed by the grantor or mortgagor." Section 2930 has no parallel in the Conveyance Act, but the correlative provisions of section 1106 were held to apply to a mortgagee. We can see no reason why the Code sections should not apply to a deed of trust which is a "conveyance" and, "with the exception that under a trust deed title passes to the trustee, the characteristics and purposes of a trust deed and a mortgage as they exist in this state have been held to be similar. Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 655, 657, 20 P.(2d) 940." Snyder v. Western Loan & Bldg. Co., 1 Cal.(2d) 697, 701, 37 P.(2d) 86, 88.

[3] But the judgment must be affirmed for the further reason that plaintiff expressly warranted the title to the property in his deed of trust. The deeds were executed on the same day, and the second was recorded one minute after the first. The beneficiary under the second deed had no knowledge of the execution of the first until after the recordation of the second deed. When the grantor in the second deed warranted "the title to said premises," he covenanted to defend it against all lawful claims and thereby effectively estopped himself from setting up any adverse claims in his own behalf. This is the principle announced in Clark v. Baker, 14 Cal. 612, 630, 76 Am. Dec. 449, where it is said: "A deed with a covenant of warranty operates upon future acquired interest, not as in fact passing such interest, but by way of estoppel upon the

grantor against its assertion. He is not permitted to attack a title the validity of which he has covenanted to maintain. If he could succeed in defeating the title, he would, by his success, immediately become liable to the grantee upon his covenant; and hence, to avoid circuity of action and to enforce complete justice without delay and further litigation, the doctrine of estoppel is applied." Merchants Nat. Bank v. Miller, 59 N.D. 273, 229 N.W. 357, 359; 7 R.C.L., p. 1130; 10 R.C.L., p. 677; 7 Cal. Jur., p. 761.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.

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7 Cal.2d 544

BERK et ux. v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES et al.

L. A. 15941.

Supreme Court of California.

Oct. 21, 1936.

1. Mortgages 🔑338

Mortgagors seeking stay of trustee's sale under moratorium statute had duty of bringing trust deed to attention of court either in their pleadings or by evidence (St.1935, p. 1208).

2. Mortgages 🔑338

Finding that realty covered by trust deed was subject to junior liens *held* not prejudicial to mortgagors seeking stay of trustee's sale under moratorium statute, in view of finding that fair market value of realty was less than amount of indebtedness due under trust deed (St.1935, p. 1208).

3. Mortgages 🔑338

Mortgagors who failed to object to admission of evidence respecting fair market value of realty subject to trust deed at trial of action under moratorium statute for stay of trustee's sale could not question admissibility of such evidence on appeal, nor complain that it fixed value of realty subsequent to date of filing of complaint and not at date of such filing, particularly where evidence could reasonably be construed as referring to date on which complaint was filed (St.1935, p. 1208).

4. Appeal and error 🔑966(1)
Continuance 🔑7

Grant or refusal of application for continuance is largely within discretion of trial court, and its action upon such application will not be disturbed without clear showing that it has abused such discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Meyer S. Berk and Beatrice Berk, husband and wife, against the Equitable Life Assurance Society of the United States, and another, as trustee. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Alfred J. Smallberg, of Los Angeles, for appellants.

Newlin & Ashburn and Ray J. Coleman, all of Los Angeles, for respondents.

PER CURIAM.

Motion to dismiss appeal or affirm judgment on the ground that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The action was one brought under the Mortgage and Trust Deed Moratorium of 1935 (Stats.1935, p. 1208; Deering's Code, Laws and Constitutional Amendments, 1935 Supplement, p. 1336, Act 5104a) for the purpose of obtaining a postponement and stay of a trustee's sale of real property under a trust deed executed by the plaintiffs to the defendants as beneficiary and trustee respectively. The trial was had upon plaintiffs' complaint or petition and the answer thereto of the beneficiary, the Equitable Life Assurance Society of the United States, and resulted in a judgment of the trial court in favor of the defendants dismissing the proceedings. From this judgment the plaintiffs appealed, and have filed their opening brief.

We agree with respondents that the questions raised by the appellants in their brief are so unsubstantial as to require no further argument. We will proceed to discuss them briefly.

[1] The first point raised by appellants is that the court could not pass upon the rights of the parties before it where the same are embodied in a written document (the trust deed) which is not set out in the pleadings, nor introduced in evidence. Conceding appellants are correct in this contention, it was their duty, as they were asking for relief from the strict terms of the trust deed, to bring to the attention of the court either in their pleadings or by evidence, the document which was the basis of their claim for relief.

[2] It was stipulated at the trial that the real property described in the trust deed was subject also to certain junior liens. Appellants now contend that the judgment of the court with reference to the equity which appellants had in said real property was influenced by the consideration of said junior liens. The court found that the fair market value of said real property was less than the amount of the indebtedness due under the trust deed. The effect of this finding was that the appellants had no equity in said real property, over and above the amount due under the trust deed. The court could not therefore have been influenced to any appreciable extent, if at all, in finding that the appellants had no equity in said real property by reason of the fact that there were other subsequent liens against it. The appellants were in no way prejudiced by a finding of the court that the real property covered by the trust deed was subject to said junior liens. At most it was a finding upon an immaterial issue, which did not affect any right of appellants.

[3, 4] As appellants made no objection to the evidence respecting the fair market value of said real property, they cannot now question the admissibility or competency of the evidence, nor complain that it fixed the value of said real property at a time subsequent to the filing of the complaint in said action, and not at the date of such filing. This is particularly true when the evidence in the present instance may reasonably be construed as referring to the date on which complaint was filed. The contention of appellants that the court erred in considering this evidence is without merit, as also is the contention that the court erred in refusing to grant appellants' request for a continuance of the trial. The granting or refusal of an application for a continuance is largely within the discretion of the trial court, and its action upon such application will not be disturbed without a clear showing that it has abused such discretion. No such showing has been made in this action.

The motion to dismiss the appeal is denied. The judgment is affirmed.

7 Cal.2d 541

PEOPLE v. JOVEN.

Cr. 4045.

Supreme Court of California.

Oct. 21, 1936.

1. Witnesses 🔑277(3)

In murder prosecution, cross-examining accused as to whether he had an iron pipe on certain days *held* proper for impeachment of direct testimony of accused that he did not carry a pipe into deceased's restaurant as a weapon but that he had found the one used in striking deceased in the yard of another place after he had been threatened by deceased.

2. Criminal law 🔑1170½(2)

In murder prosecution, questions which related to accused's purpose in carrying an iron pipe at certain times *held* not prejudicial, where to each question accused answered that pipe was used for self-protection.

3. Witnesses 🔑277(3)

In murder prosecution, questions which related to accused's purpose in carrying an iron pipe at certain times *held* properly permitted for purpose of rebutting accused's denial of statements made to witnesses relative to efficacy of piece of pipe as weapon in commission of robbery.

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Joe Joven, alias Benny Jacob, true name Joe Joven, was convicted of murder in the first degree without recommendation, and he appeals.

Affirmed.

James F. Boccardo and Bohnett, Hill, Cottrell & Boccardo, all of San Jose, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Fred L. Thomas, Dist. Atty., and H. S. Bridges, Asst. Dist. Atty., both of San Jose, for the People.

NOURSE, Justice pro tem.

Upon a trial by jury, the defendant was convicted of murder in the first degree without recommendation. A new trial was not requested, and the appeal is automatic under the provisions of section 1239 of the Penal Code (as amended by St.1935, p. 1868).

The single point raised on the appeal is that the cross-examination of the appellant was unfair because it tended to show the commission of crimes other than that charged in the information. The state's evidence is clear. On at least three separate occasions the appellant made a complete confession. He admitted the killing in his testimony before the jury, but claimed that it was done in self-defense. The undisputed evidence is that at about 10:30 p. m. he entered a restaurant in Mountain View operated by the deceased, ordered a meal, and, while the deceased was preparing the meal, the appellant entered the kitchen and beat the deceased upon the head with a piece of iron pipe about ten inches long and about three-quarters of an inch thick. He then broke open the cash drawer, disposed of his weapon, and was found about three hours later in the kitchen of his home in San Mateo endeavoring to wash blood from his shoes and clothing. The autopsy showed four fractures of the skull behind the ear and near the spine for a distance of about five and one-half inches long going from the frontal bone through the parietal and into the occipital. It also showed that the coverings of the brain were badly hemorrhagic.

The state relied upon this evidence of the condition of the deceased to show that he had been severely beaten and to offset the appellant's plea that he had merely struck in self-defense. As a part of this showing, testimony was given by two witnesses that the appellant had, prior to the homicide, told them that he always carried a piece of pipe with him when committing a robbery because it was noiseless and when wrapped in newspaper left no fingerprints.

The defendant took the stand in his own defense and testified that, after he had given his order to the deceased, he went into the kitchen to watch the cooking and had an argument with the deceased; that he then went outside, picked up the pipe, and returned to the kitchen, where he struck the deceased after the latter had picked up a butcher knife. On cross-examination the appellant denied that he had carried a piece of pipe or that he had told either of the two witnesses that he was in the habit of using such an instrument. He was then asked if he had a pipe on a certain day at Gilroy, on another day at San Fernando, on another day at "the Japanese fisherman's store" in San Jose, and on another day when he had trouble with a man in Watsonville. He admitted the use of a piece of pipe on each occasion, but explained that it was always a different piece of pipe that he used.

[1] No objection was made to any of the questions relative to the possession of pipes on these other occasions. Some objections were made to the questions relative to the purpose for which he carried them. We find no error in the admission of any of this testimony. Those questions which went to the possession at other times were admissible for impeachment of the direct testimony of appellant that he did not carry a pipe into the restaurant as a weapon, but that he had found the one used in the yard of another place after he had been threatened by the deceased.

[2, 3] The questions which related to appellant's purpose of carrying a pipe at other times could not have been prejudicial to him because, to each question, he answered that the pipe was for self-protection. They were admissible for the purpose of rebutting his denial of the statements made to the witnesses relative to the efficacy of a piece of pipe as a weapon in the commission of a robbery.

The judgment is affirmed.

We concur: CURTIS, J.; WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; LANGDON, J.

SETHMANN v. BULKLEY et al.*

S. F. 15358.

Supreme Court of California.

Oct. 20, 1936.

Rehearing Granted Nov. 19, 1936.

1. Evidence 🔑273(3)

Recital in will is not evidence of extraneous contract between executrix and third person.

2. Evidence 🔑318(2)

In son's action to impress trust on property conveyed by his mother prior to her death to his sisters, letter addressed to son and found with will, stating that mother had arranged with sisters to have them make certain payments to son, *held* inadmissible (Code Civ.Proc. §§ 1870, 1946).

3. Executors and administrators 🔑96

Where mother's will directed payments to be made to son in accordance with letter and letter stated that mother had made arrangements with his sisters to make payments, agreement signed by a sister as executrix, reciting that it was given for purpose of carrying out will, did not bind sister to do more than her already existing duties as executrix and did not bind her to make payments, although mother had conveyed all her property to the sisters.

4. Trusts 🔑44(2)

In son's action to impress trust on property conveyed by mother prior to her death to his two sisters, although will made bequest to son payable in accordance with certain letter and letter stated that mother had arranged with sisters to have them make payments to son, evidence as to sisters' promise *held* insufficient to authorize personal money judgment for son or judgment impressing trust on property received by sisters.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Suit by Charles J. Sethmann against Alvina F. Bulkley and another. From an adverse judgment, defendants appeal.

Reversed.

G. H. Van Harvey and Harold E. Haven, both of San Francisco, for appellants.

Morris, Jaffa & Sumski, of San Francisco, for respondent.

THOMPSON, Justice.

Charles J. Sethmann brought this action to impress a trust on property conveyed by his mother prior to her death to his two sisters, Alvina F. Bulkley and Louise M. Broad. The trial court found that the conveyances were made by Mrs. Sethmann without consideration and in reliance upon the oral promise of defendants that they would pay to the plaintiff $500 on her death and $25 a month for 160 months or until his death or the death of his wife, and in the last event, to pay to the plaintiff in a lump sum the entire balance of the 160 monthly payments. Judgment was entered for the plaintiff in the sum of $1,150, being the $500 due him on the death of his mother and the first 26 payments of $25, for the sum of $25 on the ninth day of each succeeding month for 134 months or the entire unpaid balance in the event of the death of the plaintiff's wife and providing that upon the plaintiff's death all liability for payments should terminate. It was further decreed that the property transferred by Mrs. Sethmann to the defendants should be impressed with a trust for the purpose of securing the payment of these sums from the rents, issues and profits thereof. From this judgment the defendants have taken an appeal, their principal contention being that the evidence does not sustain the findings of a promise and the making of the conveyances in reliance thereon and without other consideration.

On February 18, 1926, Mrs. Sethmann conveyed a parcel of real property in San Francisco separately to each of the defendants, her daughters Alvina F. Bulkley and Louise M. Broad. She also transferred to them jointly during the period between February, 1926, and October, 1931, other real property and various trust deeds and mortgages. Mrs. Sethmann executed a will on January 10, 1927, making her daughters residuary legatees. The sole bequest was made to her son, the plaintiff, and was contained in the fourth clause, which is as follows: "I give and bequeath to my said son, Charles J. Sethmann, the sum of $500.00 on my death, and thereafter the sum of $25.00 monthly for a period of 160 months. In the event of the death of Nellie F. Sethmann, the present wife of my said son, before said monthly payments have all been paid my said son, then my said son shall forthwith be paid in a lump sum the balance remaining unpaid hereunder. Should my said son either predecease me or predecease his said wife, then all payments to be made him hereunder shall forthwith cease and the provisions therefor shall be null and void and of no force or effect. This gift and bequest to my said son is also made *in accordance with the terms of that certain letter dated San Francisco, February 18th, 1926, directed to my said son and signed by me as his loving mother, Cathrina Sethmann, which said gift and bequest and said letter in no sense provide for separate payments, but constitute solely one and the same payment, said gift and bequest being limited by the terms hereof and of said letter.*" The daughters were made executrices of the will. On the same day the deceased executed a deed in joint tenancy to the two sisters covering all the property she then had.

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*For subsequent opinion see 68 P.2d 961.

After the death of Mrs. Sethmann, on April 9, 1932, the will was found in the safety deposit box held jointly by herself and Mrs. Bulkley. With it was found the following letter, dated February 18, 1926, and signed by the decedent:

"I have arranged with your sisters Alvina and Louise to have them pay you the sum of Five Hundred Dollars ($500.00) immediately after my death, and thereafter the sum of Twenty-Five Dollars ($25.00) monthly for a period of One Hundred and Sixty (160) months. Should you pass away before such time, all payments are to cease.

"Should your present wife die before said monthly payments have all been paid you, they will pay you immediately in a lump sum the balance remaining."

It appears from the evidence that Henry Sethmann, the husband of decedent, left home in 1898 and the plaintiff in 1907; that neither contributed to the support of Mrs. Sethmann after his departure; that the daughters worked from an early age, contributing from their earnings to the support of their mother and to the payment of taxes, interest, costs of improvement, and even the acquisition of the properties transferred to them; and that Mrs. Bulkley had had the sole handling of her mother's affairs for a long period. The trial court found the existence of a fiduciary relationship between the mother and the daughters.

The only evidence in the record which supports a promise on the part of the sisters to make such payments to the brother consists of the fourth provision in the will, the letter, and a claimed agreement by Mrs. Bulkley, entered into after the death of the mother and the reading of the will and letter, to make the payment specified in the will. Respondent himself admits he knew nothing of any such promise until after his mother's death, the defendants deny the making of the promise, and the attorney who drew the will, which refers to the letter, testified that he asked the testatrix at that time whether any such arrangement had been made with her daughters and that she said none had been.

[1] There were no funds in the estate with which to pay the bequest to the son. The recital in the will is no evidence of an extraneous contract between the testatrix and third person. Rowe v. Hibernia Savings & Loan Society, 134 Cal. 403, 407, 66 P. 569; Potter v. Smith, 48 Cal.App. 162, 169, 191 P. 1023; In re Estate of McCarthy, 127 Cal.App. 80, 86, 15 P.(2d) 223; In re Estate of Fritz, 130 Cal.App. 725, 730, 20 P.(2d) 361.

[2] Nor is the letter itself admissible under any exception to the rule against hearsay evidence which has been called to our attention by the respondent. The mere death of the declarant does not allow the admission of a declaration which is not against interest (Poorman v. Miller, 44 Cal. 269; Rulofson v. Billings, 140 Cal. 452, 74 P. 35; Steinberger v. Young, 175 Cal. 81, 165 P. 432; Johnson v. Davidson, 54 Cal.App. 251, 202 P. 159), or otherwise within the recognized exceptions to the hearsay rule (Jones, Commentaries on Evidence, vol. 2, § 297, p. 634) or the provisions of sections 1870 and 1946 of the Code of Civil Procedure. It cannot be seriously contended that the letter was a part of the res gestæ, since the statements therein were not disclosed to anyone until long after the conveyances were made, nor were they made in such a manner as to exclude the element of deliberation or calculation and are in no sense a part of those transactions. In truth they purport only to give the effect of past events.

[3] As to the agreement prepared by the attorney for the executrix Bulkley and signed by her but refused by the plaintiff, but which he now relies upon, it is therein recited that it was given for the purpose of carrying out the will and "it is understood that this agreement will follow and be governed by the terms of the

will of said Catherina Sethmann." Mrs. Bulkley was therefore bound to no more than her already existing duties as executrix and it is not even suggested that Mrs. Broad was ever asked to join in it.

[4] It follows that there is no competent evidence in the record to sustain the finding upon which the trial court based its declaration of a trust in favor of the plaintiff or the personal judgment for money, and that the case must be reversed. It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

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7 Cal.2d 529

JOHNSON v. CLARK.

L. A. 15106.

Supreme Court of California.

Oct. 20, 1936.

1. Trusts 🔑91

Constructive trusts are implied by law to prevent fraud in absence of agreement for a trust.

2. Deeds 🔑19

Ordinarily, grantor who has executed a deed absolute or other executed transfer in consideration of promise of grantee is not entitled to rescind upon failure of consideration arising from grantee's failure to fulfill his promises, but is limited to his right of action for damages for breach of contract, except where consideration for deed or transfer is grantee's promise to support the grantor.

3. Trusts 🔑107

Relation between sisters is not presumed to be confidential, but a confidential relation between sisters may be shown to exist, blood relationship being important factor in determining existence of confidential relationship.

4. Trusts 🔑107

Where confidential relation between sisters is established, rules governing confidential relations apply, and presumption of undue influence arises from transaction by which person in superior position gains advantage over the other, and such transactions are constructively fraudulent, burden resting on party who has gained advantage to show fairness and good faith in all respects (Civ.Code, § 2235).

5. Pleading 🔑214(1)

In passing on demurrer to complaint, allegations thereof must be given full credence.

6. Trusts 🔑371(2)

Complaint alleging that in consideration of transfer of business to sister, sister agreed to pay plaintiff monthly allowance but reserved right to lower allowance upon 30 days' notice, and that sister retained proceeds of sale of business with intent to defraud plaintiff, *held* to show presumptive fraud, since presumptions of law need not be averred in complaint.

7. Trusts 🔑359(1)

Transfer which has been obtained through fraud, actual or constructive, will be set aside at instance of grantor, and grantee will be deemed to hold as constructive trustee for grantor, and where property has been sold, grantor may hold grantee for proceeds of sale, or he may sue for reasonable value of trust property (Civ.Code, § 2237).

8. Pleading 🔑193(5)

Complaint is invulnerable to general demurrer if on any theory complaint states a cause of action.

9. Pleading 🔑208

Specification must be made of grounds on which a complaint is subject to special demurrer.

10. Trusts 🔑371(2)

Complaint alleging that in consideration of transfer of business to sister, sister agreed to pay monthly allowance to plaintiff but reserved right to curtail allowance upon 30 days' notice, and reciting agreement whereby sister in consideration of affection agreed to provide monthly allowance to plaintiff, and that sister retained proceeds of sale of business with intent to defraud plaintiff, *held* to state cause of action as against general demurrer, notwithstanding plaintiff did not allege whether sister had given notice of curtailment of allowance.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Jessica A. Johnson against Edith Boydston Clark. From a judgment for defendant, after sustaining her demurrer, plaintiff appeals, and defendant moves to dismiss the appeal.

Judgment reversed.

H. A. I. Wolch, of Los Angeles, for appellant.

Robert J. Sullivan, of Los Angeles, for respondent.

SEAWELL, Justice.

The court below sustained defendant's demurrer to the first cause of action set forth in the second amended complaint without leave to amend. The complaint contained a second cause of action in the form of a common count for money had and received, to which defendant did not demur. From the judgment thereafter entered for defendant that plaintiff take nothing upon her complaint after the demurrer sustained to the first cause of action only, plaintiff prosecutes this appeal.

We are of the view that the first cause of action was good against general demurrer. The allegations of said first cause of action in substance are as follows: Plaintiff and defendant are sisters, and a relation of confidence existed between them, and plaintiff reposed personal confidence in defendant in the transaction detailed in the complaint. Plaintiff owned a retail store, selling women's apparel. She was solvent, she alleges, and she drew from said business the sum of $40 a week as her salary. On March 11, 1931, defendant by written agreement agreed to pay plaintiff $350 a month for the rest of plaintiff's life, or until her marriage, in consideration of plaintiff transferring said business to defendant, in trust to operate and conduct the business for the benefit of plaintiff, thereby relieving plaintiff "from the cares and worries of the said business." The reasonable value of the business, plaintiff alleges, was $15,000 on the date of transfer to defendant.

Concurrently with this transfer, plaintiff and defendant executed the agreement providing for payment of $350 to plaintiff, which agreement was prepared by defendant's attorney, and is set forth hæc verba in the complaint. Said instrument recites that whereas plaintiff has no income, and defendant desires that she should have an allowance, therefore in consideration of love and affection defendant agrees to pay plaintiff, or deposit in a named bank for her account, $350 a month during the lifetime of plaintiff, or until the marriage of plaintiff. Defendant reserved the right to terminate payments if plaintiff solicited a further allowance. The agreement also provided that if defendant's income was curtailed, and she found it necessary to lower said allowance for any period of time, she might do so "without claim of any sort from Second Party [plaintiff] for damages or otherwise, upon giving Second Party thirty days notice that such allowance will be curtailed or lessened."

It is further alleged that defendant, being in possession as trustee for plaintiff, has sold said property to persons unknown to plaintiff. Defendant refuses to disclose to plaintiff the sum received from the sale, "or to make any accounting of the proceeds of the disposition of said trust property and business," but has retained the proceeds with intent "to defraud the plaintiff of said property and the fruits thereof," and of the sum of $350 a month. Ever since January 1, 1933, defendant has failed to pay this sum to plaintiff. The complaint was filed on October 9, 1934.

Plaintiff seeks to hold defendant to account for the proceeds of property which, in the theory of plaintiff, defendant held in trust for her. It is alleged that the business was transferred to defendant by instrument in writing which was composed by defendant and is now in her possession. The terms of the instrument are not described. There is no allegation that it set up a trust.

The agreement for payment of $350 a month to plaintiff is set forth hæc verba in the complaint. We have heretofore summarized its provisions in setting forth the allegations of the complaint. Plaintiff does not seek a reformation of said instrument to express a trust. The only particular in which she alleges it failed to embody their understanding is that the expressed consideration of love and affection for defendant's promise of monthly payments to plaintiff was not the true consideration, which was the transfer by plaintiff of her business to defendant. This agreement does not provide for payment of the $350 from the business. It contains no reference whatsoever to the business. In the light of plaintiff's allegation that the consideration for defendant's agreement was the transfer by plaintiff of her business, the terms of said agreement are inconsistent with a transfer of said business in trust to defendant, and consistent only with an absolute transfer. Plaintiff may have expected that the sum of $350 would in fact be paid in whole or in part from the proceeds of the business. But defendant's agreement was not to hold and manage said business as trustee for plaintiff, but to pay plaintiff $350 a month without reference to the business. The allegations of the complaint to the effect that defendant agreed to hold and operate said business in trust for plaintiff's benefit are negatived by the terms of the written contract to which their agreement was reduced, which is set forth in the complaint.

[1] But it does not follow from the fact that plaintiff fails to allege a trust based on agreement therefor, either written or oral, between her and her sister, that the complaint fails to state a cause of action. Constructive trusts are implied by law to prevent fraud in the absence of an agreement for a trust. Constructive trusts are "fraud rectifying" trusts, and not "intent-enforcing" trusts. Costigan, The Classification of Trusts as Express, Resulting and Constructive. 27 Harvard Law Rev. 437; 3 Bogert, Trusts and Trustees, p. 1453, § 471.

[2] The consideration for the transfer of the business to defendant, as alleged in the complaint, was defendant's promise to pay plaintiff $350 a month for her support. Plaintiff alleges that since January 1, 1933, defendant has failed to pay her said sum. Ordinarily a grantor who has executed a deed absolute or other executed transfer in consideration of promises of the grantee is not entitled to rescind upon failure of consideration arising from the grantee's failure to fulfill his promises, but is limited to his right of action for damages for breach of contract. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St. Rep. 29; Williams v. Reich, 123 Cal.App. 128, 131, 10 P.(2d) 1030; 4 Cal.Jur. 785. However, an exception to this rule is made in many jurisdictions where the consideration for the deed or transfer is the grantee's promise to support the grantor. 5 Pomeroy's Equity Jurisprudence (2d Ed.) p. 4755, § 2108; note, 34 A.L.R. 136; 25 Cal.Jur. 173; 4 R.C.L. 509; 6 Cal.Law Rev. 309. The reasons assigned for this exception are various, that the remedy of legal relief by periodic suits for damages is manifestly inadequate; that the grantee's failure to perform his obligation gives rise to a legal presumption of fraudulent intent at the time of procuring the conveyance; that the grantee's promise is a condition subsequent on breach of which the grantor has the right of re-entry. 5 Pomeroy's Equity Jurisprudence, supra; 6 Cal.Law Rev. 309.

In the instant case defendant's promise to pay plaintiff $350 a month is not unconditional. The agreement expressly provides that if defendant's income is curtailed she may lower the allowance without any claim of plaintiff for damages or otherwise, upon giving plaintiff thirty days' notice. Plaintiff alleges that since January 1, 1933, defendant has failed to pay her the sum of $350 as provided in the agreement. She does not allege whether defendant has given her notice of curtailment of the allowance. If it be conceded that plaintiff, in order to set forth a breach of contract for her support, should have alleged that defendant failed to give notice, and that allegations as to such notice were not a matter of defense, nevertheless we are of the view that the complaint states a cause of action.

[3, 4] Plaintiff and defendant are sisters. The relation between sisters is not presumed to be confidential, as is the relation between husband and wife, parent and child, attorney and client, but a confidential relation between sisters may be shown to exist. Odell v. Moss, 130 Cal. 352, 356, 62 P. 555; Id., 137 Cal. 542, 70 P. 547; Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509; 12 Cal.Jur. 716, 822. Blood relationship is an important factor in determining whether in fact a confidential relationship existed. Odell v. Moss, supra. Where it is established as a fact that a confidential relation exists between sisters, the rules governing confidential relations apply, and a presumption of undue influence arises from any transaction by which the person in the superior position gains an advantage over the other. Odell v. Moss, supra; Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 597, 289 P. 613; 12 Cal.Jur. 711, 818–820; section 2235, Civ.Code. Such transactions are constructively fraudulent, and the burden is cast upon the party who has gained the advantage to show fairness and good faith in all respects. Cox v. Schnerr, supra; Magee v. Brenneman, 188 Cal. 562, 567, 206 P. 37; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336.

[5, 6] In the instant case it is expressly alleged that defendant assumed a relation of personal confidence with plaintiff, and

plaintiff reposed full confidence in defendant. Giving full credence to the allegations of the complaint, as we must in passing on the demurrer thereto, it appears that the effect of the transfer by plaintiff to defendant of a business alleged by plaintiff to be of the reasonable value of $15,000 left plaintiff "with no income of her own." The agreement signed by defendant so recites. In consideration of the transfer to her, defendant did not agree absolutely and unconditionally to pay plaintiff $350 a month, but reserved the right to lower said allowance for any period of time upon giving thirty days' notice, without any claim of any sort from plaintiff for damages or otherwise. It is readily apparent plaintiff must have reposed great confidence in defendant to have been willing to transfer her business to defendant, and thus leave herself without means of support, in reliance on this qualified promise of defendant. Plaintiff alleges that defendant retains the proceeds of the sale of the business, with intent to defraud plaintiff of said property and of the sum of $350 a month. The transaction set forth in the complaint is governed by the rules pertaining to persons occupying confidential relations, and is presumed to be fraudulent without other allegations of fraud in the complaint. Presumptions of law need not be averred in the complaint. Henke v. Eureka Endowment Ass'n of California, 100 Cal. 429, 34 P. 1089; Cuthill v. Peabody, 19 Cal.App. 304, 125 P. 926; Wright v. Western States L. Ins. Co., 61 Cal.App. 488, 214 P. 990. The burden is cast upon defendant to allege and prove the fairness of the transaction.

[7] Where a transfer has been obtained through fraud, actual or constructive, it will be set aside at the instance of the grantor, and the grantee will be deemed to hold as a constructive trustee for the grantor. More v. More, 133 Cal. 489, 65 P. 1044, 66 P. 76; Donnelly v. Rees, 141 Cal. 56, 74 P. 433; Pacific Nat. Bank v. Corona Nat. Bank, 113 Cal.App. 366, 370, 298 P. 144; 3 Bogert, Trusts and Trustees, p. 1456, § 472; p. 1464, § 473; 25 Cal.Jur. 146. Where the property has been sold, as alleged in the instant complaint, the grantor may hold the grantee for the proceeds of the sale. Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235; Corey v. Struve, 170 Cal. 170, 149 P. 48; section 2237, Civ.Code; 25 Cal. Jur. 207. Or he may sue for the reasonable value of the trust property. Lasher v. Faw, 209 Cal. 726, 735, 289 P. 821; Swan v. Talbot, 152 Cal. 142, 94 P. 238. 17 L.R.A.(N.S.) 1066; 25 Cal.Jur. 206; 4 Cal.Jur. 798; 3 Bogert, Trusts and Trustees, p. 1463, § 472.

[8-10] The complaint is framed on the theory of an express agreement by defendant to hold the property in trust for plaintiff, which theory is revealed to be untenable by the written agreement set forth in the complaint, rather than with the object of setting up a constructive trust based on fraud or undue influence in the procurement of the contract. But a complaint is invulnerable to general demurrer if on any theory it states a cause of action. Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Martin v. Hall, 219 Cal. 334, 26 P.(2d) 288; Harris & Hull v. McCarty, etc., Corp., 102 Cal.App. 461, 283 P. 111. In Martin v. Hall, supra, cross-complainant sued to recover damages for breach of contract, with a prayer for general relief. The instrument relied on was too uncertain and incomplete to constitute a binding contract, or give rise to a cause of action for damages for breach of contract. But by reason of this uncertainty cross-complainant was entitled to recover the sum of $5,000 paid upon the incomplete agreement.

Defendant did not demur specially on the ground that the complaint was uncertain or ambiguous in that it was framed on the theory of an express trust, and contained allegations appropriate to such a trust, when in fact it set forth only a constructive trust. Specification must be made of the grounds on which a complaint is subject to special demurrer. 21 Cal.Jur. 113, citing cases. As to the grounds of special demurrer urged by defendant, we are of the view that said grounds are not well taken, and defendant states in her motion to dismiss the appeal taken by plaintiff from the judgment that she "rests solely upon the general demurrer to the complaint. If the complaint states a cause of action respondent concedes that the cause ought to be reversed."

The judgment entered for defendant after sustaining of the demurrer is reversed.

We concur: WASTE, C. J., CURTIS, J.; LANGDON, J.; THOMPSON, J.

17 Cal.App.2d 75

PEOPLE v. SALAS.

Cr. 1504.

District Court of Appeal, Third District, California.

Oct. 14, 1936.

1. Poisons ⚿9

In prosecution for possessing and transporting morphine, under evidence that contents of spoon found in automobile and tablets of morphine sulphate found in box by roadside near point of arrest were the same, and that piece of cotton found in box with tablets was of same grade as piece of cotton found in automobile, whether box found by side of road had been thrown there by defendant *held* for jury.

2. Poisons ⚿9

Evidence *held* to support conviction for possessing and transporting morphine (St. 1935, p. 2204, § 1).

3. Criminal law ⚿481

Determination of qualifications of expert witness is vested in trial court's discretion.

4. Criminal law ⚿478(1)

In prosecution for possessing and transporting morphine, permitting state narcotic inspector to testify as expert concerning methods used by narcotic addicts in use of morphine *held* not abuse of discretion.

5. Criminal law ⚿494

In prosecution for possessing and transporting morphine, weight to be given expert testimony concerning methods used by narcotic addicts in use of morphine *held* for jury.

6. Criminal law ⚿393(3)

In prosecution for possessing and transporting morphine, testimony that defendant's forearm showed scars as though made by hypodermic needle *held* not objectionable as compelling defendant to be witness against himself, where he voluntarily submitted to physical examination.

7. Witnesses ⚿246(1)

Action of trial judge in asking questions of various witnesses or reframing questions which had been asked by counsel *held* not prejudicial misconduct.

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Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Gilbert Salas was convicted of possessing and transporting morphine, and he appeals.

Affirmed.

Barcroft & Barcroft, of Madera, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order denying a new trial and from a judgment of conviction based upon an information in two counts charging the defendant with possession and transportation of morphine.

It is the contention of appellant that the evidence does not support the verdict, that the court erred in the admission of certain evidence, and that the trial judge was guilty of prejudicial misconduct.

The evidence shows that on the evening of March 26, 1936, defendant was arrested while driving an automobile on the main highway about two miles south of the city of Madera. In the automobile after the arrest was found a spoon, a bottle of water, a bottle of antiseptic solution, and some cotton. A chemist called as a witness upon behalf of the people testified that he examined the spoon and analyzed certain deposits found therein and found the same to be morphine.

The appellant, at the time of his arrest, was stopped by two traffic officers who had observed a certain erratic manner in his driving. These officers trailed the car in which appellant alone was riding for some distance and sounded their siren to bring him to a stop. After the siren was sounded by the officers he was seen to be moving about in the car. The morning after the arrest of the defendant a yellow box was found near the side of the highway at a point approximately 120 feet north of the point from where the siren was sounded. Upon examination the box was found to contain tablets of morphine. There is some question raised as to the relation of this box and the contents with the defendant, it having been found first by a witness who examined the same and threw it away, and it was later recovered by a member of the sheriff's office and turned over to that officer.

[1,2] Dr. Twining, called as an expert by the prosecution, testified that the contents of the spoon and the tablets of morphine sulphate found in the box were

the same, and also that a small piece of cotton found in the box with the tablets was of the same grade as that of another piece of cotton found in the car of defendant. With these facts before the jury it then became a question of fact for them to determine from all of the evidence whether or not the box found by the roadside near the point of arrest had been thrown there by the defendant.

In People v. Skoff, 131 Cal.App. 235, 21 P.(2d) 118, 120, this court held the presence of a bottle of liquor found near the roadside where the defendant in that case had stopped his car was a question for the jury in a prosecution for driving an automobile while under the influence of intoxicating liquor. The court there said: "Evidence of the presence of the bottle of jackass brandy was improperly excluded from the jury under the circumstances of this case. A collision had just occurred. The defendant's intoxication was charged as the cause of the accident. There was substantial evidence that the odor of alcohol was upon his breath. The car was standing on the highway in a sparsely settled country district. The bottle was found in the grass within a few feet of the automobile where it was likely to have been thrown by the occupants of the machine. There appears no other reasonable way to account for the presence of the bottle at that particular time and place. In the case of State v. Gondeiro, 82 Mont. 530, 268 P. 507, 508, under similar circumstances, the finding of a bottle of liquor in close proximity to the machine of an accused person was held to be competent evidence upon a charge of manslaughter. The court said: 'It is urged strenuously that the court erred in admitting testimony respecting the bottle found in proximity to the car. We are wholly unable to agree with this argument. Clearly the testimony was relevant.'"

Appellant denied possession of the box, and claimed the quantity of morphine found in the spoon was not of sufficient quantity to support a finding of possession and of the transportation of morphine. Appellant was charged under section 1 of the State Narcotic Act as amended in 1935 (St.1935, p. 2204), which provides in part, "It shall be unlawful for any person * * * to transport * * * or to have in possession any * * * morphine * * * except upon the written order * * * of a physician and surgeon." It will be noted in this section that it is unlawful to possess any morphine and no quantity is specified in order to bring one under the provisions of this act. We therefore believe that in regard to the sufficiency of the evidence there was enough, if believed by the jury, to justify their implied finding.

[3-5] Objection is also made that the court permitted the State Narcotic Inspector to testify concerning methods used by narcotic addicts in the use of morphine, the fact that taken hypodermically a scar was usually left upon the person, and that the usual place for the injection of the drug was in the main vein in the forearm. He also testified that he had seen the defendant's forearm and that it showed scars as though made by a hypodermic needle. In determining the qualifications of one who offers himself as an expert, the trial court is vested with a legal discretion, and from the evidence here it is apparent that there was no abuse of discretion upon the part of the trial court in permitting the witness to testify upon the matters in question. The weight to be given such evidence is of course a matter for the jury to determine. People v. Norton, 138 Cal.App. 70, 31 P.(2d) 809; People v. Goldsworthy, 130 Cal. 600, 62 P. 1074.

[6] Appellant objected also to testimony in regard to the appearance of the arm of appellant, claiming that it compelled him to be a witness against himself. Testimony, however, is admissible in a criminal case concerning the result of a physical examination to which a defendant, as in this case, had voluntarily submitted. People v. Guiterez, 126 Cal.App. 526, 14 P.(2d) 838.

The arresting officers described the appearance of the demeanor of the defendant at the time of his arrest, and the appellant, a witness on his own behalf, did not deny he had used a hypodermic needle on his arm, nor did he deny that he was a drug addict.

[7] The last point urged by appellant is that the trial judge was guilty of prejudicial misconduct in that in a number of instances the judge himself asked questions of the various witnesses or reframed questions which had been asked by counsel. In the case of People v. Golsh, 63 Cal.App. 609, 219 P. 456, 458, the court in passing upon a similar assignment of error, said: "The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine

the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished, when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people. He is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench."

Finding no merit in the contentions of appellant, the judgment and order are affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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17 Cal.App.2d 147

PEOPLE v. PRYOR.

Cr. 1522.

District Court of Appeal, Third District, California.

Oct. 19, 1936.

Rehearing Denied Nov. 2, 1936.

Hearing Denied by Supreme Court Nov. 16, 1936.

1. Indictment and information 🔑154

Information charging that defendant willfully drove motor vehicle in negligent manner and specifically charging violation of statute and negligent homicide *held* not fatally defective for uncertainty or because it charged that act was willfully performed, where defendant neither demurred nor moved in arrest (St.1935, p. 173, § 500).

2. Homicide 🔑74

Offense of negligent homicide does not depend on presence of element of willfulness or intention to violate law (St.1935, p. 173, § 500).

3. Automobiles 🔑352

Where defendant was clearly charged with offense of negligent homicide and there was no attempt at trial to prove that he was also guilty of ordinary crime of manslaughter or that he willfully operated automobile contrary to law, there was no fatal variance (St.1935, p. 173, § 500).

4. Criminal law 🔑1032(7)

Objection on ground of variance could not be made for first time on appeal.

5. Automobiles 🔑355(13)

Evidence that motorist colliding with truck which was stopped on flooded highway drove 50 to 60 miles an hour on rainy night over wet, slippery pavement with such inattention that he failed to see numerous signals displayed, with result that automobile guests were killed, warranted conviction of negligent homicide (St.1935, p. 173, § 500).

6. Constitutional law 🔑61
Homicide 🔑351

Code section penalizing negligent homicide *held* not invalid as unlawfully delegating legislative authority to trial judge to transform felony into misdemeanor because it granted discretion to punish offense by imprisonment in either state prison or county jail (St.1935, p. 173, § 500; Pen.Code, § 17).

7. Criminal law 🔑27

Imposing county jail sentence on motorist convicted of negligent homicide did not change nature of offense (St.1935, p. 173, § 500; Pen.Code, § 17).

8. Criminal law 🔑1177

Defendant convicted of felony could not complain that trial judge was granted by law and exercised discretion of imposing only county jail sentence, or that offense should thereafter be deemed a mere misdemeanor, where defendant could not thereafter be charged with prior conviction of felony (Pen. Code, § 17).

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

H. L. Pryor was convicted of negligent homicide, and he appeals.

Affirmed.

Leo A. Sullivan, of Oakland, and A. G. Thompson, of El Cerrito, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of conviction of negligent homicide as provided by section 500 of the Vehicle Code of California (St.1935, p. 173).

It is contended section 500 of the Vehicle Code is an unlawful delegation of legislative authority, authorizing the trial judge to transform a declared felony into a mere misdemeanor contrary to section 17 of the Penal Code, by fixing a penalty for a felony by imprisonment in a county jail; that the information is fatally defective in alleging that the defendant was guilty of "wilfully" driving his automobile in such a negligent manner as to cause the death of other individuals, as distinguished from mere negligent operation of the machine; that there is a fatal variance between the allegations of the information and the proof of guilt, since there is a total absence of evidence of willfulness on the part of the defendant, and that the judgment is not supported by the evidence.

The cause was heard by the court sitting without a jury. The trial by jury was specifically waived by both parties. On the night of February 23, 1936, the defendant was driving his eight-cylinder Pontiac touring sedan from Oakland to Fresno. He was accompanied by a lady who occupied the front seat by his side. Mr. and Mrs. Foote were in the rear seat of the machine. En route, the members of the party drank some liquor at Oakland, Tracy, and Merced prior to the accident. They stopped at Merced for dinner and drank some liquor there, although there is no evidence that the defendant was intoxicated. During the journey it rained very hard. It was, however, not raining just at the time of the accident. They left Merced for Fresno about 7:30 o'clock p. m. It was dark and rainy. Their lamps were lighted. The machine was in good mechanical condition. At the point where the accident occurred, the highway was straight and level. It was a 20-foot paved roadway with shoulders on either side. The pavement was wet. The valley was flooded with water. The ditches on either side of the road were filled with water almost level with the top of the concrete. Prior to the time of the accident, the flood water extended over the concrete pavement immediately south of the place where the accident occurred. A flagman had been placed in charge of that dangerous locality. At about 8 o'clock the flagman stopped two southbound trucks and a touring car just north of the flooded portion of the highway. They were parked on their proper side of the highway with the outer wheels on the shoulder thereof. They were unable to drive entirely off the concrete on account of the flooded condition of the adjacent ditches. A truck occupied the most northerly position of these parked machines. Its red taillights were burning, as were also its side clearance lights. There is some evidence to the effect that its headlights were also burning. At some distance from the rear of this truck the flagman had placed on either side of the concrete pavement a red lantern suspended from stakes. He also placed a burning flame pot in the center of the highway near the red lanterns. The flagman was stationed about 20 feet from the rear end of the truck with a red lantern in his hand. Under such conditions, he observed the defendant's car a quarter of a mile away approaching from the north at a high rate of speed. He testified that the car was running at the rate of 50 or 60 miles an hour. He immediately began waving his red lantern, and continued to do so until the defendant's car came dangerously near to him. Seeing that the driver apparently paid no attention to his stop signals, the flagman jumped out of the way. When the approaching car reached a point 75 or 80 feet from the truck, the brakes were applied, but the defendant was unable to stop. His machine crashed into the rear end of the truck, and both Mr. and Mrs. Foote were instantly killed.

The cause was tried before the court sitting without a jury. The court found the defendant guilty of negligent homicide under the provisions of section 500 of the Vehicle Code of California, and sentenced him to imprisonment in the county jail for the period of six months. From that judgment the defendant has appealed.

[1, 2] The information which charges that the defendant "did wilfully and unlawfully drive a motor vehicle in a negligent manner, which said driving was the proximate result of the death of C. K. Foote and Jane Doe Foote, human beings," is not fatally defective for uncertainty or because it also charged that the act which caused the death of other individuals was "wilfully" performed. The information specifically charges the commission of a felony, to wit, "violation of section 500 of the Vehicle Code, negligent homicide." It is immaterial and harmless that it may be deemed to have also charged facts which might constitute another offense, to wit, manslaughter. The defendant neither demurred to the information nor moved to arrest the judgment. There is a clear distinction between a willful act which results in injury or death and the performance

of a mere negligent act. Candini v. Hiatt, 9 Cal.App.(2d) 679, 683, 50 P.(2d) 843. A willful act is one which is intentionally performed, while a negligent act may be merely carelessly done from a lack of ordinary prudence. The offense of negligent homicide defined by section 500 of the Vehicle Code (St.1935, p. 173,) does not depend on the presence of the element of willfulness or intention to violate the law. The offense may be complete without any such purpose or intent. It was therefore unnecessary to allege that the acts were performed willfully. The use of that word in the information is surplusage and unnecessary. But it was harmless. The defendant was not prejudiced thereby, and he may not complain of the use of that word in the information for the first time on appeal. We believe the defendant could not be misled by the use of that word regarding the offense with which he was charged. But, if it be deemed that the information was uncertain on that account, that defect was waived by failure to demur to the information or to move in arrest of judgment, for the reason that the information does state a public offense. People v. Stone, 199 Cal. 610, 624, 250 P. 659; 8 Cal.Jur. 499, § 515.

[3, 4] There is no fatal variance between the allegations of the information and the proof which was adduced at the trial. The defendant was clearly charged with the offense of negligent homicide as defined in section 500 of the Vehicle Code. There was no attempt at the trial to prove that he was also guilty of the ordinary crime of manslaughter or that he willfully operated the automobile contrary to law. No objection to the evidence was made at the trial on the ground of variance. The case was tried on the theory that the defendant was merely charged with negligent homicide as provided by section 500 of the Vehicle Code and that he was not being tried for manslaughter. He was certainly not prejudiced by the mere use in the information of the word "wilfully." An objection to evidence on the ground of variance may ordinarily not be made for the first time on appeal. It is waived by failure to raise that objection at the trial. People v. Fuski, 49 Cal.App. 4, 192 P. 552; People v. Woods, 190 Cal. 513, 213 P. 951; 8 Cal.Jur. 500, § 515. In 8 California Jurisprudence last cited it is said in that regard: "An objection to variance between the pleading and proof cannot be made for the first time upon appeal. And when the case is tried on the theory that certain issues are covered by the indictment it is too late to make the point upon appeal, where it does not appear that prejudice resulted to the defendant from any imperfections in the indictment."

[5] There is no merit in the contention that the judgment is not supported by the evidence. The court was amply warranted in finding that the defendant was guilty of negligence proximately causing the death of Mr. and Mrs. Foote from the fact that he drove his machine 50 or 60 miles an hour on a rainy night over wet, slippery pavement with such inattention to the highway that he failed to see the numerous signals which were displayed.

[6] Section 500 of the Vehicle Code does not unlawfully delegate legislative authority to the trial judge to transform a felony into a misdemeanor, merely because it grants a discretion to punish the offense by imprisonment in either the state prison or the county jail. Various statutory provisions recognize that very discretion. Section 17 of the Penal Code, upon which the appellant relies, contemplates the authority and the exercise of that discretion. It provides, in part: "* * * When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

[7, 8] Nor does the imposing of a county jail sentence change the nature of the offense of which he is convicted. It is true, section 500 of the Vehicle Code characterizes the offense as a felony. And it is a felony. The law merely assumes that if, in the discretion of the trial judge, the accused is sentenced to the county jail, for all purposes thereafter, it shall be deemed to constitute a mere misdemeanor. Section 17, Pen.Code; Doble v. Superior Court, 197 Cal. 556, 575, 241 P. 852; In re Miller, 218 Cal. 698, 24 P.(2d) 766; People v. Mitchell, 109 Cal.App. 116, 292 P. 692. Having been convicted of a felony, the defendant may not complain that the trial judge is granted by law and exercises the discretion of imposing only a county jail sentence, or that the offense shall thereafter be deemed to be a mere misdemeanor. One of the effects of that sec-

tion which is favorable to the defendant is that under such circumstances he may not thereafter be charged with a prior conviction of a felony. Section 500 of the Vehicle Code is not inconsistent or void on that account.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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17 Cal.App.2d 188

EVERTS v. BLASCHKO.

Civ. 1957.

District Court of Appeal, Fourth District, California.

Oct. 20, 1936.

1. **Mortgages** 🔑561

Debtor *held* not entitled to dismissal of action for deficiency brought in 1935 after exhaustion of security consisting of trust deed made in 1929 on ground action was not filed within 4-year period of limitation or within time to bring action for deficiency and that there was no compliance with statutes relating to deficiency judgment (Code Civ. Proc. § 582, and §§ 337, 581, and 583, as amended by St.1933, pp. 2116, 1868, and 853; St.1933, p. 1669).

2. **Limitation of actions** 🔑180(1, 7), 182(2)

Bar of statute of limitations should be set up by demurrer or answer and not by motion to dismiss.

3. **Judgment** 🔑570(12)

Judgment of dismissal on motion of defendant for failure to bring action for deficiency to trial within two years *held* not bar to another action for deficiency (Code Civ. Proc. § 582, and §§ 581 and 583, as amended by St.1933, pp. 1868, 853).

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by H. W. Everts against Elsie V. Blaschko. From a judgment entered after granting a motion to dismiss the action, the plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Frank Birkhauser, of El Centro, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered after granting a motion to dismiss the action.

This action was brought to recover judgment against defendant for the deficiency remaining after exhausting the security, consisting of a deed of trust on real property, given to secure the payment of a promissory note from defendant to plaintiff. The complaint was filed September 14, 1935. Defendant appeared by demurrer on October 5, 1935, and also filed her motion to dismiss on the same day. As far as the record shows, the trial judge did not rule on the demurrer.

The notice of motion to dismiss specified the following grounds upon which it would be made:

"1. That said action is barred by the order of this court made heretofore in an action filed in the above entitled court, wherein this plaintiff was the plaintiff and the defendant herein was the defendant, and for the same cause of action in all particulars as the cause set forth in the complaint on file in this action, said action so above mentioned being numbered 15765, filed in the office of the county clerk of Imperial County, California, on August 19, 1933, and an order of dismissal being made by this court therein on September 4th, 1935, upon the motion of this defendant herein, who was the defendant in said action, said order of dismissal being entered in the minutes of this court in Department 2, book 39, page 415.

"2. That said action above entitled was not filed within the time prescribed by sections 337 and 580a, C. C. P. of California, nor has there been any compliance with the requirements of sections 2924 et seq. of the Civil Code of California, and of chapter 642, Statutes of 1933, as shown upon the face of the complaint herein."

[1, 2] The grounds specified in paragraph 2, above quoted, are not included within the grounds upon which a motion to dismiss an action may be made. Section 581, Code Civ.Proc., as amended by St.1933, p. 1868, section 582 and section 583, as amended by St.1933, p. 853. Fur-

thermore, the note and deed of trust were dated October 15, 1929, the foreclosure proceedings were had in 1933, and this action was instituted on September 14, 1935. Under these circumstances the Code sections cited by defendant, except possibly section 337 of the Code of Civil Procedure, as amended by St.1933, p. 2116, the application of which we do not need to decide, cannot avail her in this action. Bennett v. Superior Court, 5 Cal.App.(2d) 13, 42 P.(2d) 80; Brown v. Ferdon, 5 Cal.(2d) 226, 54 P.(2d) 712; Central Bank of Oakland v. Proctor, 5 Cal.(2d) 237, 54 P.(2d) 718. The bar of the statute of limitations to an action (section 337, Code Civ. Proc. as amended) should be set up by demurrer, or in an answer, and not by motion to dismiss.

[3] Plaintiff, on August 19, 1933, instituted an action to recover the identical money due under the deficiency as is sought to be recovered in the instant case. On motion of defendant the first action was dismissed by order of court, under the provisions of section 583 of the Code of Civil Procedure, as amended, for failure to bring it to trial within two years. It is evident that under paragraph 1 of the grounds of the motion to dismiss in the instant case, defendant sought to set up the judgment of dismissal of the first action as a bar to the second. We express no opinion on the question of the propriety of attempting to set up the bar of another judgment by a motion to dismiss a second action.

In the case of Matteson v. Klump, 100 Cal.App. 64, 279 P. 669, the trial court dismissed an action under the provisions of section 581 of the Code of Civil Procedure and incorporated in the judgment of dismissal the words "with prejudice to the commencement of another action." These words were stricken from the judgment for the reason that "As announced by decisions of the Supreme Court of this state, the ordinary rule is that the dismissal of an action does not operate as a bar to another action for the same cause of action as was stated in the action which was dismissed (Westbay v. Gray, 116 Cal. 660, 48 P. 800; Davenport v. Turpin, 43 Cal. 597; Parks v. Dunlap, 86 Cal. 189, 25 P. 916; Rosenthal v. McMann, 93 Cal. 505, 29 P. 121); but specifically, where the dismissal of an action does not purport to go to the merits of the case, the trial court has no authority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated. 18 Cal.Jur. 1201, and cases there cited. The case of Lindblom v. Mayar, 81 Wash. 350, 142 P. 695, is particularly in point." See, also, Steffens v. Rowley, 10 Cal.App.(2d) 628, 52 P.(2d) 493.

The case of Campanella v. Campanella, 204 Cal. 515, 269 P. 433, 435, is decisive of the question raised by paragraph 1 of the notice of motion before us. It is there said:

"'Defendant contends that the judgments of dismissal in the prior action were res adjudicata of the matters involved in this action, and barred and estopped plaintiff from maintaining this action.

"'Plaintiff contends that as neither of the judgments purports to have been made on the merits of the cause, neither is a bar to the present action,' * * *

"It is clear that the judgment is not res adjudicata and therefore not a bar to the present action nor an estoppel upon any issue therein and that the ruling refusing to admit the judgment roll in evidence was proper. The judgment roll not only fails to show a ruling upon the merits but discloses that no such ruling was made. The following from the opinion of the District Court of Appeal is in point:

"'Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits, and do not operate as a bar or estoppel in subsequent proceedings involving the same matters, unless it appears that the judgment necessarily involves those matters. [City of] Oakland v. Oakland Water Front Co., 118 Cal. 160, 222, 50 P. 277; Hubbard v. Superior Court, 9 Cal.App. 166, 98 P. 394; Bell v. Solomons, 162 Cal. 105, 110, 121 P. 377; Johnston v. Baker, 167 Cal. 260, 263, 139 P. 86; 18 Cor.Jur. 1200; Freeman on Judgments, § 753.

"'When a case is dismissed without evidence having been offered it is error to render judgment on the merits. There is nothing before the court on which to base any findings determinative of the issues. The absence of proof on either side could not involve a judicial determination of the merits of the controversy. Freedman v. Sirota, 109 App.Div. 874, 96 N.Y.S. 812.

See, also, Kruger v. Persons, 52 App.Div. 50, 64 N.Y.S. 841. There must have been a right adjudicated or released in the first suit to constitute the judgment a bar or an estoppel. Haldeman v. United States, 91 U.S. 584, 23 L.Ed. 433; Rincon Water & Power Co. v. Anaheim Union Water Co. [C.C.] 115 F. 543, 549 et seq. (Welborn, Dist. J.).

"'If the record of a judgment of dismissal fails to show that the judgment was given upon a consideration of the merits of the controversy, it is not available as an estoppel. The fact that the judgment was made at the instance of the court gives it no greater weight than if it were merely a judgment of nonsuit.'"

See, also, City of Oakland v. Oakland Water Front Co., 118 Cal. 160, at page 195, 50 P. 277.

The judgment is reversed.

We concur: **BARNARD, P. J.; JENNINGS, J.**

17 Cal.App.2d 198

FRYE et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10281.

District Court of Appeal, First District, Division 2, California.

Oct. 22, 1936.

1. Prohibition 🔑3(1)

Remedy of prohibition should be strictly confined to those cases where there is no plain and adequate remedy at law (Code Civ.Proc. § 1103, as amended by St.1935, p. 386).

2. Prohibition 🔑3(5)

Whether remedy by appeal is plain, speedy, and adequate, so as to require denial of application for writ of prohibition, is fact question depending upon circumstances, and determination of question rests largely within discretion of court to which application is made (Code Civ.Proc. § 1103, as amended by St.1935, p. 386).

3. Prohibition 🔑3(3)

Prohibition *held* not to lie to restrain superior court from executing its order directing that illegitimate children who were wards of juvenile court be sent to Canada to be raised in custody of persons there, where there was no showing that there was no plain, speedy, and adequate remedy by appeal (Code Civ.Proc. § 1103, as amended by St. 1935, p. 386; Gen.Laws 1931, Act 3966, § 23).

◆

Proceeding in prohibition by Mary Frye and others to restrain the Superior Court in and for the City and County of San Francisco from executing an order and for making other orders affecting two minor children.

Alternative writ discharged, and peremptory writ denied.

Pauline May Hoffmann, of Los Angeles, for petitioners.

Edward M. Leonard, Asst. Dist. Atty., of San Francisco, for respondent.

SPENCE, Justice.

This is an original application for a writ of prohibition to restrain the respondent court from executing its order made on June 18, 1936, and from making any other orders affecting two minor children. The petitioners herein are Mary Frye, the maternal grandaunt of said minors, and Neil Speer and Jaqueline Speer, the said minors, for whom said Mary Frye was appointed guardian ad litem for the purpose of this proceeding.

Said minors, who are of the ages of 12 and 10 years, respectively, are the illegitimate children of Hazel Speer Kavanaugh, deceased. It is alleged in the petition that each of said minors had a different father, but that the paternity of said minors has never been judicially determined. At some time after the birth of said minors, their mother married Jack Kavanaugh, a Canadian citizen. Two other children were born of this union. During their married life, these parties lived for a time in Canada and for a time in California. Eventually said Jack Kavanaugh obtained a final decree of divorce from the mother of said minors, but, at the time of the death of said mother, the parties were nevertheless living together again. The Kavanaugh children have since been living in Canada with the parents of said Jack Kavanaugh, to wit, Mr. and Mrs. Thomas Kavanaugh.

The two illegitimate children involved in this proceeding were never adopted by said Jack Kavanaugh, although they lived with him and their mother during the married life of said parties. After the death of their mother, said children were declared wards of the juvenile court in 1935, upon petition of the Children's Agency in San Francisco. Thereafter Jack Kavanaugh represented to the juvenile court that his parents, Mr. and Mrs. Thomas Kavanaugh, who were caring for the two legitimate half brothers of these children at their home in Nova Scotia, were willing to assume the care of these two illegitimate children and raise them with the Kavanaugh children. The report of the referee was received by the juvenile court, showing that there was no suitable home available to said children among their numerous relatives in California, practically all of whom have been or are themselves wards of the juvenile court. It further showed that the Kavanaugh home in Nova Scotia was a suitable home for said children.

Said report and the recommendations contained therein were approved by the juvenile court, and an order was made directing that said children be placed in custody of a suitable person to be appointed by the court for transportation to Boston, Mass., said children to be there placed in the custody of Mr. and Mrs. Thomas Kavanaugh. This is the order of June 18, 1936, at which this proceeding is directed. The respondent court has made return herein both by demurrer and answer.

We refrain from discussing certain points raised by the parties for the reason that we are of the opinion that the application for a writ of prohibition should be denied, as petitioners have pursued the wrong remedy. Section 23 of the Juvenile Court Act (Deering's Gen.Laws 1931, Act 3966, p. 2110) provides: "Every judgment or decree of a juvenile court assuming jurisdiction and declaring any person to be a ward of the juvenile court or a person free from the custody and control of his parents may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment; but no such order or judgment shall be stayed by such appeal, unless suitable provision is made for the maintenance, care and custody of such person pending the appeal, to be approved by an order of the said juvenile court. Such appeal shall have precedence in the court to which the appeal is taken over all other cases." The foregoing section gives the right of appeal from the order under attack, and it affirmatively appears that a notice of appeal has been filed.

[1, 2] It is fundamental that the remedy of prohibition should be strictly confined to those cases where there is no "plain, speedy, and adequate remedy in the ordinary course of law." Code Civ.Proc. § 1103, as amended by St.1935, p. 386; Amos v. Superior Court, 196 Cal. 677, 239 P. 317; Leach v. Superior Court, 215 Cal. 531, 12 P.(2d) 1; Struck v. Superior Court, 138 Cal.App. 672, 32 P.(2d) 1110; August Belmont & Co. v. Superior Court, 117 Cal.App. 450, 4 P.(2d) 158; 21 Cal. Jur. 584, § 5. The question of whether the remedy by appeal is plain, speedy, and adequate is a question of fact depending upon the circumstances in the particular case, and the determination of that question rests largely within the discretion of the court to which the application is made. 21 Cal.Jur. 586.

[3] We are of the opinion that the remedy by appeal is plain, speedy, and adequate in the present case. Petitioners have merely made an allegation to the contrary, but have made no showing to sustain that allegation. Under the circumstances before us, said allegation appears to be unfounded.

Nothing that has been said should be construed to imply that we find any error in the order under attack. We refrain from passing upon that question, as we believe that the petition herein should be denied upon the grounds above stated.

The alternative writ is discharged, and the petition for a peremptory writ of prohibition is denied.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

17 Cal.App.2d 161

JENKINS v. NATIONAL PAINT & VARNISH CO.

Civ. 1944.

District Court of Appeal, Fourth District, California.
Oct. 19, 1936.

1. **Automobiles ⚷242(1)**

In action for death of decedent sustained in automobile accident based on negligence only, burden of proving that status of decedent was that of "passenger" in automobile as distinguished from that of guest was upon plaintiff (St.1931, p. 1693, § 141¾).

2. **Appeal and error ⚷927(3)**

On appeal from judgment of dismissal following granting of motion for nonsuit, every inference of fact and intendment of law is liberally construed in favor of sustaining plaintiff's case so that cause shall be determined on merits.

3. **Automobiles ⚷181(2)**

"Passenger" in automobile is one who is rendering value received, in whatever amount, and who gives such recompense for ride as may be regarded by way of compensation therefor, that is, a return which may make worth while the giving of the ride, as distinguished from "guest," who is defined by statute as one accepting ride in vehicle without giving compensation therefor (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

4. **Automobiles ⚷181(2)**

Under statute defining guest as one who accepts ride in any vehicle without giving compensation therefor, "compensation" includes the giving by the rider to the operator of the vehicle of any return which may make it worth the operator's while to furnish the ride, and is not limited specifically to payment of cash (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Compensation," see Words & Phrases.]

5. **Evidence ⚷54**

Inference must have for its foundation a legally proven fact, and is not deducible from another inference.

6. **Automobiles ⚷244(20)**

In action for death of decedent while riding with store manager of paint company in manager's automobile for which company furnished gas and oil, evidence *held* insufficient to establish that decedent was a "passenger" so as to authorize recovery of damages from paint company, where it could not be inferred from evidence that any compensation had moved from decedent to company (Code Civ.Proc. § 1958; St.1931, p. 1693, § 141¾).

7. **Appeal and error ⚷1056(1)**

In action against paint company for death of decedent sustained while riding in automobile of paint company's store manager based solely on negligence, exclusion of evidence attempting to establish status of passenger by showing consideration moving from decedent in return for ride furnished him *held* harmless, if error, where no advantage would be shown moving to paint company even if evidence were admitted (Code Civ. Proc. § 1958; St.1931, p. 1693, § 141¾).

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Willie Jenkins, as administratrix of the Estate of James Lawrence Jenkins, deceased, against the National Paint & Varnish Company, a corporation. From a judgment dismissing the action, the plaintiff appeals.

Affirmed.

Fred Steiner and Robert B. Burch, both of San Diego, for appellant.

Ray M. Harris and Wright, Monroe, Thomas & Glenn, all of San Diego, for respondent.

JENNINGS, Justice.

Plaintiff, as administratrix of her deceased husband's estate, instituted this action to recover damages for his wrongful death alleged to have been caused through the negligence of defendant's employee acting at the time within the scope of his employment. The complaint specifically alleged that plaintiff's intestate was riding as a passenger in an automobile which was being operated by defendant's employee in so negligent and careless a manner that the vehicle was precipitated from a bridge on which it was then traveling into a canyon beneath the bridge, and that as a result of this accident plaintiff's intestate suffered injuries which caused his immediate death. The answer which was filed by the defendant expressly denied that plaintiff's intestate was riding in the automobile as a passenger at the time the accident occurred. The action proceeded to trial before a jury. At the close of plaintiff's case defendant moved the court for a nonsuit. The motion was granted and the court rendered a judgment dismissing the action. This judgment contains a full and specific recitation to the effect that no substantial evidence had been produced which showed that plaintiff's intestate was a passenger in the automobile involved in the accident who had paid or agreed to pay any compensation for his transportation in said vehicle. From the judgment thus rendered in defendant's favor the plaintiff has perfected this appeal.

[1, 2] From the above analysis of the pleadings in the action and the recital contained in the judgment to the effect that the deceased was not a passenger at the time the accident occurred, it is evident that the status of plaintiff's intestate whether as guest or passenger was a most important feature of the case. Plaintiff expressly alleged that her intestate was a passenger in the automobile at the time of the accident. Defendant specifically denied that he was a passenger. On the date of the accident section 141¾ of the California Vehicle Act (St.1923, p. 517, § 141¾, as added by St.1929, p. 1580, as amended by St.1931, p. 1693) defined the term "guest" as being a person who accepts a ride in any vehicle without giving compensation therefor and prohibited recovery for personal injury or death of a guest except where it was shown that such injury or death was proximately caused by the intoxication or willful misconduct of the owner, driver, or person responsible for the operation of the vehicle in which the guest was riding. There was neither pleading nor proof by plaintiff that defendant's employee was intoxicated or that he was guilty of willful misconduct. The action was grounded on negligence alone. Under these circumstances, it is obvious that upon plaintiff rested the burden of proving that her intestate, at the time he received the injuries which resulted in his death, occupied the status of a passenger in the automobile which was being operated by defendant's employee. This must be true because plaintiff's intestate was either a guest in the car or a passenger, and since plaintiff had specifically alleged that he was a passenger, his status as such was a necessary element which she had to establish in order to make out a prima facie case entitling her to recover damages for his alleged wrongful death. This particular element is here emphasized because, although there were other facts which the plaintiff had to establish in order to make out a prima facie case, it is apparent that the status of plaintiff's intestate as a passenger was an essential requisite of her right of recovery, and therefore, if the evidence which she produced failed to establish this necessary element, the trial court's action in granting defendant's motion for a nonsuit was correct, and the judgment of dismissal must be affirmed. Proper consideration of this question requires careful examination of the evidence which had been submitted when the motion for a nonsuit was granted. In this connection, it must be borne in mind that, since we are here considering an appeal which has been taken from a judgment of dismissal following the granting of a motion for nonsuit, the familiar rule of appellate procedure which requires that every inference of fact and intendment of law shall be liberally construed in favor of sustaining plaintiff's case to the end that the cause shall be determined on its merits is applicable. Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Hall v. Southern Cal. Edison Co., Ltd., 137 Cal.App. 449, 452, 30 P.(2d) 1013.

Inspection of the record on appeal discloses that when the appellant had rested, the following evidence bearing on the question of her deceased husband's status as a passenger in the automobile at the time he came to his death was before the court: For about six years prior to November 28, 1933, respondent had maintained a store at Eleventh street and Broadway, in the city of San Diego, where its products were sold. For approximately 16 months preceding the above date and on said date George H. Schrader was employed by respondent as manager of said store at a monthly wage plus a yearly bonus of 5 per cent. on all sales of merchandise exceeding the sum of $18,000 per annum. As part of the duties imposed on Schrader he was required to travel about the city of San Diego for the purpose of selling paint and making collections. In so doing he used his own automobile, an Essex sedan, for which respondent furnished gasoline and oil. During the month of March, 1933, Schrader sold a quantity of paint to a firm in San Diego known as Shaw Brothers. Respondent was informed by Schrader that the transaction was a sale and that the purchaser would pay monthly installments on the purchase price and would be entitled to have from 30 to 60 days credit on any additional purchases. The account was therefore carried on respondent's books as an open account. This paint was placed in a store at 1521 Thirtieth street in the city of San Diego which was then being operated by Shaw Brothers. After Schrader's death, which occurred as a result of the same accident in which plaintiff's husband lost his life, Shaw Brothers claimed that the paint had not been sold to them by Schrader but had been placed in the store on consignment, and respondent extinguished the indebtedness of Shaw Brothers by accepting enough of the paint that remained in the store to cover the unpaid balance. On November 28, 1933, this store was in charge of W. D. Mizelle who had been employed to operate it about two weeks prior to said date by R. C. Wright who owned a hardware store at Thirtieth street and Adams avenue in the city of San Diego. Wright was also a customer of respondent. During the time Mizelle operated the store at 1521 Thirtieth street Schrader occasionally called at the store and brought paint to replace that which had been sold by Mizelle. On November 28, 1933, and for some time prior thereto appellant's husband was employed during a portion of his time by Roy E. Dodson, a plumbing contractor. From 8 o'clock a. m. to 8:15 a. m. of said date Jenkins assisted Dodson in loading a truck at Thirtieth street and Adams avenue and upon the completion of this task was advised by Dodson that his services would not be required until 10 a. m. At some time before Jenkins and Dodson separated, the former told the latter that "he was to go with a fellow to see about the management of a paint store." At approximately 10 a. m. of said date Schrader was in his garage at 3176 B street in San Diego, which was about five blocks distant from 1521 Thirtieth street and was there measuring some lumber which was respondent's property, and, which had been stored in the garage at respondent's request until respondent should have use for it or until it could be sold. At approximately ten minutes past 10 a. m. Schrader departed from the garage in his automobile. Shortly after 10 a. m. Schrader appeared at the store at 1521 Thirtieth street. At this time Jenkins was in the store, having arrived there some six or seven minutes in advance of Schrader. The two men repaired to the rear of the store where Jenkins stated that he wanted to arrange that part of the premises for living quarters and to erect some partitions and to install a bath. Schrader remarked that he thought this could be done. At this time Jenkins found a piece of timber that was in the room and used it for the purpose of taking measurements. Shortly thereafter and prior to 10:25 a. m. Schrader and Jenkins left the store together in the former's automobile and set out in a general northerly direction toward a bridge known as the Thirtieth street bridge. As the two men departed from the store at 1521 Thirtieth street Schrader was driving the car and Jenkins was seated at his right. At approximately 10:25 a. m. the Essex car in which the men were riding came into collision with another automobile on the Thirtieth street bridge and as a result of the collision the Essex automobile was precipitated from the bridge into the canyon beneath the structure and both men were instantly killed.

[3, 4] In contending that the above-stated evidence was sufficient to show prima facie that Jenkins was a passenger in Schrader's automobile at the time of the fatal accident, appellant recognizes the distinction which the law makes between a passenger and a guest. As heretofore noted, section 141¾ of the California Vehicle Act, as the same existed on the date of the accident, defined a guest as one "who accepts a ride in any vehicle without giving compensation therefor." In Parrett v. Carothers, 11 Cal.App.(2d) 222, 228, 53 P.(2d) 1023, it is correctly stated that a passenger is one who is rendering value received, in whatever amount, and who gives such recompense for the ride as may be regarded by way of compensation therefor, that is, a return which may make worth while the giving of the ride. In Rocha v. Hulen, 6 Cal.App.(2d) 245, 253, 44 P.(2d) 478, 482, the court said: "A passenger, of course, is one who accepts a ride and returns compensation in some form, or that compensation in some form is contemplated." In Crawford v. Foster, 110 Cal.App. 81, 84, 293 P. 841, 842, it is pointed out that the modifying language found in the statute, "without giving compensation therefor," may not properly be so restricted as to apply only to those who specifically pay cash or its equivalent for their transportation, but that the word "compensation" is sufficiently broad to include the giving by the rider to the operator of the vehicle of any return which may make it worth the lat-

ter's while to furnish the ride. In Piercy v. Zeiss, 8 Cal.App.(2d) 595, 598, 47 P.(2d) 818, 820, reference is made to the meaning of the term "compensation" as used in the California guest statute in the following language: "It seems to be well settled that under the terms of this statute a benefit accruing to the driver of a car may be such a compensation as will take a person riding with him out of the guest class and, further, that an anticipated or prospective profit is a benefit and may be as effectual for this purpose as an immediate or direct return."

[5, 6] Basing her argument on the accepted definition of compensation as the term is used in the guest law as exemplified in the above-cited authorities and numerous other California decisions, appellant contends that the evidence produced by her on her case in chief was ample to establish prima facie that her intestate was a passenger in Schrader's automobile at the time the fatal accident occurred. The evidentiary basis for this contention may be stated as follows: Respondent was admittedly interested in increasing the sale of its product. To facilitate this object it authorized Schrader to travel about the city of San Diego in his automobile for which it furnished the necessary gasoline and oil. On the very morning of the accident Jenkins stated that he was to go with a fellow to see about the management of a paint store. Less than two hours after this statement was made Jenkins appeared in a paint store in company with Schrader and there stated that he wished to arrange the rear part of the room for living quarters and to erect partitions for this purpose and at this time he made some measurements of the premises. A short time before Schrader appeared at this paint store he had spent ten minutes in his garage measuring some lumber stored therein which was respondent's property and which was for sale. When Schrader and Jenkins departed from the paint store they went away in Schrader's automobile in a northerly direction which was the general direction from the paint store of the place of business of the plumbing contractor with whom Jenkins had part time employment and where he was scheduled to be at 10 a. m. From these facts it is declared that it is reasonable to infer that Schrader expected to install Jenkins as manager of the paint store at 1521 Thirtieth street, which would result in an advantage to respondent in that the sale of its product would thereby be promoted and a further and incidental benefit would accrue to respondent in that Jenkins evidently expected to live in the rear of the storeroom and wished to erect partitions for which Schrader would sell him respondent's lumber which was stored in Schrader's garage.

It is apparent that the foundation for appellant's contention in this regard is the statement of Jenkins made to his employer, Dodson, during the morning of November 28, 1933, to the effect that he was to go with some person to see about the management of a paint store and that from this simple bit of evidence a considerable number of inferences must be fairly deducible if appellant's contention of evidentiary sufficiency to justify denial of respondent's motion for a nonsuit is to be sustained.

In the first place it must be inferred that Schrader was the "fellow" whom Jenkins had arranged to accompany on an expedition to see about the management of a paint store. Second, it must be inferred that it was Jenkins who was to become the manager of the store. Third, it must be inferred that it was the store at 1521 Thirtieth street which Jenkins had in mind when he made the statement. Fourth, it must be inferred that the assumption by Jenkins of the management of this store would be of advantage to respondent. The last-mentioned inference is obviously one that is drawn from the inference that Jenkins was investigating the possibility of becoming manager of the store. In section 1958 of the Code of Civil Procedure an inference is defined as a deduction which, without express direction of law, a jury may properly draw from proven facts. Section 1960 of the same Code declares that an inference must be founded on a fact legally proved. It is clear, therefore, that an inference must have for its foundation a legally proven fact, and that it is not deducible from another inference. Tucker v. City of San Francisco, 111 Cal. App. 720, 726, 296 P. 101. While it is true that there was evidence which tended to show that the paint which was contained in the store at 1521 Thirtieth street had originally been installed by Schrader on consignment under an agreement with Shaw Brothers, who apparently then controlled the store, and it might fairly be inferred that it was accordingly of advantage to respondent that the store should be kept open to the end that the paint might be sold, it must nevertheless be observed that there was no evidence which tended to show that there was any probability that this store would be closed. Moreover, there was no evidence which indicated that the store was then in need of a manager or that if Jenkins could have succeeded in obtaining such a position he would have sold any more of the paint than the persons who were then operating the store were selling. It is apparent, therefore, that the all-important feature of benefit which might be derived by respondent from Jenkins' success in obtaining the position of manager had no substantial evidentiary basis and was a matter which was purely conjectural and speculative.

Appellant attempts to work out a theory of advantage which would inure to respondent through the possibility of selling to Jenkins all or a part of respondent's lumber that was then stored in Schrader's garage. This theory also has its basis in the statement that he was to go with a fellow to see about the management of a paint store. From this fact and from the fact that he was later seen at the store where he made some measurements and declared that he would wish to erect partitions and install a bath so that the rear of the room could be occupied as living quarters it is argued that it is reasonable to infer therefrom that he proposed, if successful in obtaining the position of manager, to make the above-mentioned alterations which would render it necessary for him to purchase lumber to effectuate them. From the fact that a few minutes prior to the time that Schrader appeared at the store where he met Jenkins, the former was seen in his garage measuring the lumber, it is declared that the jury might properly have inferred that Schrader hoped to sell a part of the lumber to Jenkins to be used in making the proposed alterations, a matter which would have been of direct advantage to respondent, since the lumber was for sale.

Here again from the simple fact that Schrader was measuring respondent's lumber it is argued that Schrader hoped to be able to sell the lumber and that he expected to be able to sell it to Jenkins who could conceivably only be interested in purchasing any lumber if he could succeed in obtaining the position of manager of this particular store which is itself an inference deduced from his statement that he was going to see about the management of a paint store. That Schrader expected to be able to sell the lumber to any one is a pure inference. That he hoped to be able to dispose of it to a particular person is another inference which is based not on any fact, but on the former inference. The possibility of advantage to be derived by respondent through the sale of its lumber is therefore purely and entirely speculative without any substantial evidentiary support. Upon this state of the evidence the trial court's action in granting respondent's motion for a nonsuit was proper. Curry v. Williams, 109 Cal.App. 649, 654, 293 P. 623.

[7] Appellant complains that the trial court committed reversible error in rejecting certain evidence offered by her as part of her case in chief. The record shows that when the witness Dodson was on the stand, appellant's counsel directed to him certain inquiries, whose purpose was to obtain a recitation by the witness of certain statements made to him by Jenkins on the day preceding the accident. Objections were sustained to all such inquiries. Thereupon appellant made a formal offer of proof of the following facts: In the morning of November 27, 1933, Jenkins was cleaning up the yard at Dodson's place of business and while so engaged Jenkins stated to Dodson that he was still considering taking over the paint store of the National Paint & Varnish Company and that he and his wife planned to live in the rear part of the store of respondent at Thirtieth and B streets and his wife would take care of the store when he was absent, and that he wished to be sure that he could continue his part-time employment for Dodson. Respondent's objection to the offer of proof was sustained.

It is apparent that the statements of the deceased which appellant sought to have admitted in evidence related to the element of the status in Schrader's automobile of the deceased at the time the accident occurred and more directly to the matter of compensation given by the deceased to Schrader in return for the ride which was furnished to him. It is also apparent that the evidence sought to be adduced was pure hearsay. In support of her contention that the evidence was admissible and that the court erred in rejecting it, appellant urges that it falls within a clearly recognized exception to the rule which forbids the reception of hearsay evidence in that it consisted of declarations of the deceased as to his intent and plan respecting the transaction wherein he met his death.

It is declared that the evidence was relevant because the presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done, and that the declarations of a person revealing the existence of the plan or design, although pure hearsay, are admissible as statements of a mental condition.

Assuming, without deciding, that the evidence comprised in appellant's offer was admissible and that the trial court erred in rejecting it, the conclusion is impelling that the error was harmless. The rejected evidence could have shown nothing more than that Jenkins on the day prior to the accident was considering taking over the store at Thirtieth and B streets, and that, if he should do so, he and his wife planned to utilize the rear part of the store for living quarters. This showing, together with his statement made the following day to the effect that he was to go with some one to see about the management of a paint store, might conceivably be said to point to the fact that it was Schrader whom Jenkins was to accompany to the store at 1521 Thirtieth street and that this particular store, being one in which paint was offered for sale, was the store which Jenkins had in mind "taking over," or of which he thought he might become the manager. Not a scintilla of evidence was produced which tended to show that respondent owned the store or had any control over it or could have placed any person in charge of it. No evidence was produced which in any respect suggested that Schrader was in any fashion authorized or empowered by any one to place Jenkins or any other person in charge of the store or to install any one as its manager, or that Schrader ever had in mind placing Jenkins or any person in the store as its manager or operator. Further, it must be borne in mind that the evidence showed that the store was open on the date of the accident and there was no evidence that whoever controlled the store was dissatisfied with the services of the persons who then had charge of it or intended to replace them. Finally, no showing whatever was made that any benefit or advantage would have inured to respondent if Jenkins were installed as manager or placed in charge of the store.

With respect to the possibility of advantage accruing to respondent through a change in the management of the store by the installation of Jenkins in the position due to the fact that he expected to live in the rear of the store and would therefore wish to make alterations which would require him to purchase lumber therefor, and the possibility that he would then become a potential purchaser of respondent's lumber stored in Schrader's garage, it is again obvious that entirely too much is left to conjecture and speculation in the framework of appellant's case to make it possible to declare that appellant had made out a prima facie case of advantage or benefit that might result to respondent. The one additional factor that might have a bearing on the sale of the lumber which is contained in the rejected evidence consists of the statement attributed to the deceased to the effect that he and his wife planned to live in the rear of the store. The addition of this fact is not sufficient to overcome the palpable weakness of appellant's proof of any compensation given by her intestate in return for the ride furnished him by Schrader. It is still open to conjecture and surmise that when Schrader was measuring the lumber in his garage at 10 o'clock of the morning of the accident he had in mind the possibility of selling any of the lumber to Jenkins, or that Jenkins would have purchased any part of the lumber.

Appellant's final complaint is that the trial court erroneously rejected a certified copy of findings and award made by the Industrial Accident Commission of the state of California in a proceeding instituted by the surviving wife and children of George H. Schrader for the purpose of securing compensation for his death from the insurance carrier of Schrader's employer. It was contended at the time the offer was made, and it is here contended, that the evidence was relevant and material for the reason that the commission expressly found that Schrader was manager of a branch store of respondent on November 28, 1933, and that on said date he "sustained injury arising out of and occurring in the course of his employment, which injury caused the employee's death on the same day." It is apparent that the evidence was offered for the purpose of showing that at the time of the fatal accident Schrader was acting in the course of his employment and that it related solely to this issue which was one of the elements of appellant's case which she had to establish to entitle her to recover. It is equally apparent that the rejected evidence has no bearing on the question of the status of appellant's intestate whether guest or passenger at the time of the accident. For the purpose of this decision, it has been assumed that Schrader was acting in the scope of his employment at the time of the accident. The opinion herein is based solely on the ground that it was an essential requisite of appellant's case that she show that her husband was a passenger in Schrader's automobile at the time he was killed and that no substantial evidence which tended to prove this necessary element had been produced by her when she had rested her case, and that therefore the trial court's action in granting respondent's motion for a nonsuit was proper. This view of the case renders unnecessary any consideration of appellant's last-mentioned contention.

The judgment from which this appeal has been perfected is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

REESE v. SMITH.*

Civ. 10903.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1936.

Rehearing Denied Nov. 5, 1936.

Hearing Granted by Supreme Court Dec. 3, 1936.

1. Appeal and error 🔑1011(1)

Doctrine that finding of trial court on conflicting evidence will not be disturbed on appeal contemplates that finding must be based on real and substantial conflict upon material points.

2. Food 🔑25

In action for injury suffered as alleged result of eating pork sausage, plaintiff was bound to assume burden of proof and to prevail by preponderance of evidence.

3. Evidence 🔑98

If existence of essential fact upon which party relies is left in doubt or uncertainty, party upon whom burden rests to establish that fact should suffer, and not his adversary.

4. Evidence 🔑597

Judgment cannot be based on guesses or conjectures, and a finding of fact must be an inference drawn from evidence rather than on mere speculation as to probabilities without evidence.

5. Food 🔑25

Evidence *held* insufficient to support judgment for injury alleged to be result of negligence of defendant in preparation and sale of pork sausage which, when later eaten by plaintiff, caused an illness diagnosed by her physician as "botulism."

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Lovella Reese against E. F. Smith, doing business as E. F. Smith Public Markets. From a judgment for plaintiff, defendant appeals.

Reversed and remanded.

Swaffield & Swaffield, W. Torrence Stockman, and Owen Meredith, all of Los Angeles, for appellant.

Stevens Fargo and George W. Fenimore, both of Los Angeles, for respondent.

DORAN, Justice.

This is an action wherein the plaintiff recovered a judgment of $1,630, alleged to be the result of negligence on the part of defendant in the preparation and sale of pork sausage which, when later eaten by plaintiff, caused an illness diagnosed by her physician as "botulism."

The evidence reveals that plaintiff was a widow, 29 years of age; that she lived alone; and until a month previous to the incident complained of had been in the employ of the S. E. R. A. as a seamstress at the monthly wage of $24. On the day in question she ate her breakfast, consisting of a glass of milk and a piece of bread, at 7 o'clock in the morning. She testified that she ate nothing else all day until 5:30 that evening. About 5 o'clock she visited appellant's place of business and purchased a pound of link sausage, which was wrapped in paper held in place by a "sticker." Plaintiff returned to her home, about four blocks distant, broke off two of the links of sausage, fried them and prepared them in the form of a sandwich. The remainder of the sausage she replaced in the original wrapper which, she testified, she then put "in the ice box on the ice." She was taken ill as she finished eating the sandwich; her testimony was: "After I had got through eating, just before, I taken a pain in my stomach." Within a few minutes after she was taken ill neighbors offered their assistance and the police department was notified. By the time the officers had arrived it was dark, and after hearing plaintiff's account of the probable cause of her illness, one of the officers went to the ice box to examine the remainder of the sausage. This was about two hours and a half after the sausage had been purchased. He testified: "'Let's go back in the kitchen and see if we can find this meat she said she had been eating from.'" (Addressing one William Hardy, a neighbor, who accompanied the officer to the kitchen.) "And he (Hardy) opened the ice box and we looked for any package that looked like it might hold meat, and there was a package in there that we found some sausage in." Question by attorney for plaintiff: "What happened to the package? A. Well, it was link sausage, large link sausage, and I believe there was three and a half links, and the half link looked like it had been broken or else cut in half with a very dull knife and had a ragged edge. I laid it on top of the high oven there, the man was with me in the kitchen, and I used my flashlight, and on the open end of the sausage there were several maggots."

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*For subsequent opinion see 70 P.2d 933.

The witness Hardy testified that he, at the same time, saw two maggots "between the links." The officer was asked whether there was any ice in the ice box, to which he replied: "I couldn't say. We didn't open the ice side." He also testified that he saw other articles in the ice box, to which he paid no attention.

Plaintiff's physician testified that he diagnosed plaintiff's illness as "botulism," and that in his opinion it was caused from eating the above-described sausage.

The evidence further reveals that after the ambulance had taken plaintiff to the receiving hospital, the officer took the sausage to the butcher who had sold it to plaintiff, where it was examined and compared with like sausage still on sale. The officer testified that aside from the appearance of the maggots, the sausage which he brought with him gave no evidence, either from odor or appearance, of being unwholesome. The next day inspectors from the Los Angeles health department visited plaintiff's home and obtained the remainder of the sausage. Their testimony was to the effect that there were no maggots at that time and from their examination it appeared fresh and wholesome. It was then taken to the health department for chemical and microscopic examination. The evidence reveals that from this examination the sausage was found to be pure and wholesome and "no organisms of the food poisoning groups were present".

It was established by expert testimony introduced for the defendant and unrefuted that no examination was made for bacillus botulinus because such organisms only flourish where there is no oxygen present—such as in canned goods. It was also contended by experts for the defense that the effect of food poisoning, particularly botulism, does not manifest itself for several hours after contaminated food is eaten; and, that the appearance of maggots was not necessarily evidence of contamination.

The only expert evidence offered by plaintiff was the testimony of her physician, who testified: "I diagnosed the case as botulism."

The court found: "That it is true that on or about August 28, 1935, plaintiff purchased from defendant E. F. Smith at 4222 South Central Avenue, Los Angeles, California, for her own consumption, food consisting of meat, and that on or about said date said plaintiff ate said meat so purchased and immediately thereafter became violently ill and suffered severe and permanent injuries and suffered severe nervous shock, to her general damage. * * * That it is true that the aforesaid illness, injury and damage to plaintiff were directly and proximately caused by the negligence and carelessness of defendant E. F. Smith only, in manufacturing, producing, preparing, compounding, packing, offering, keeping and selling the said goods to plaintiff; said food being a filthy, decomposed and putrid animal substance and unwholesome and unfit for human consumption."

It would appear as a first impression, from a cursory examination of the record herein, that there is merely a conflict in the evidence, and that, therefore, in the absence of prejudicial error, the judgment should stand. A more careful study of the evidence, however, and a consideration of the findings in the light thereof, develop the decisive question herein: namely, whether there is any evidence at all to support the court's findings above quoted in regard to the quality and character of the food. Obviously, if the evidence is insufficient in this respect, the question as to a conflict and also the question as to whether the evidence preponderates are eliminated.

[1-4] That the finding of the trial court on conflicting evidence will not be disturbed on appeal, is elementary, but that doctrine contemplates that the finding must be based on a "real and substantial conflict upon material points." 2 Cal.Jur., § 545, p. 929. In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. Patterson v. San Francisco, etc., Railway Co., 147 Cal. 178, 81 P. 531. A judgment cannot be based on guesses or conjectures. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480. And, also, "A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities." 23 Cor. Jur., § 1750, p. 18.

[5] In analyzing the evidence adduced at the trial, it is at once apparent that the presence of the maggots is a treacherous circumstance—a circumstance fraught with the capability as well as the tendency to deceive and mislead. The memory of that with which maggots are generally associated from common experience naturally arouses a feeling of revulsion. Under the influence of emotions thus aroused, a greater significance and importance might easily be attributed to the presence of maggots than pure reason would allow. Biologically, maggots are but the larvae of insects, most commonly that of the house fly. They are not poisonous; indeed, it is conceded that maggots are used in modern surgery for the treatment of open wounds. Moreover, maggots are not found exclusively on "filthy, decomposed and putrid animal substance." Their presence, therefore, standing alone, furnished no evidence that the sausage was of the quality and character found by the trial court.

The record reveals but two facts legally established by plaintiff to support the judgment: First, that she became ill while eating the sausage; and, second, that there were maggots on the remainder of the sausage. It further appears as an opinion or suggestion of Dr. Towles, plaintiff's attending physician, that the sausage caused plaintiff's illness. Dr. Towles' testimony on that subject on direct examination was as follows:

"Q. Given a further history of the diet of this woman during the twenty-four hours preceding her illness, consisting wholly of milk and bread in the morning, about seven a. m., and a sandwich, consisting of pork sausage fried in lard, and bread, a matter of an hour or so preceding her attack, with the further explanation that the lard and the bread, the remaining portion had been eaten without ill effects by several other people, would you be able to state from what source the bacteria botulini came, which made her ill? A. Well, I would say that it came from something that she ate.

"Q. But if that were all she ate would you be able to tell what product contained the bacteria? A. I would by a process of elimination.

"Q. And what product would that be? A. It *seemed* to have been only the sausage." (Italics added.)

Conceding to such testimony any value to which it might be entitled, nevertheless it is at the most but an inference, not a fact, and the further testimony of the witness that because the food caused plaintiff's illness it therefore was poisonous, is also but an inference—an inference, moreover, open to the further objection that it is based on an inference, which is a process of reasoning rejected by the law. An inference cannot be based on an inference. Section 1960, Code Civ.Proc. Thus the record is left without evidence, direct or inferential, that the food in question was "filthy, decomposed and unwholesome," as the court found.

At the close of the trial, the court made the following comments on the evidence, in part as follows: "The court is convinced, after very carefully listening to and weighing the evidence in this case, that this plaintiff was stricken by reason of this sausage which she had purchased from the defendant and had consumed. The court makes no finding as to whether it was botulism or not from which the plaintiff suffered; and the court does not believe that the plaintiff is required to prove any specific named poisoning or ailment. It may have been that she was suffering from some poison that medical science has not yet isolated or discovered. The court is convinced that whatever she may have suffered from was the direct and proximate result of the fact that this sausage contained some substance, or was in itself in such a condition as to proximately cause her injury." While the reasoning of the trial judge is held to be ineffective for any purpose if the findings and judgment are valid in every respect, nevertheless the foregoing observations by the trial judge are urged in support of appellant's argument that the judgment is speculative. As to this phase of the appeal, such reference is not inappropriate, nor indeed without merit.

There is no legal evidence in the record in support of the finding that the food in question was "filthy, decomposed and putrid animal substance, and unwholesome and unfit for human consumption."

The judgment is reversed, and cause remanded.

I concur: YORK, J.

HOUSER, Presiding Justice.

I dissent. As in substance is alleged in plaintiff's complaint, one of the determinative questions of fact upon which her cause of action depended was whether defendant had sold to plaintiff food that was "unwholesome and unfit for human consumption." In effect, by its findings of fact the trial court declared that plaintiff's allegation in that regard was true; and in that connection, in appellant's closing brief he expressly admits not only that in selling the food to plaintiff, he gave to her an implied warranty that it was fit for human consumption, but also, that "if there was any evidence produced at the trial tending to prove that the sausages complained of were unfit for human consumption at the time they were sold, *the judgment rendered should not be disturbed.*"

In other words, as far as this appeal is concerned, the only issue before this court is plainly limited to a determination of whether on the trial of the action evidence of a substantial nature was introduced from which it properly might be inferred that the sausage in question was "unwholesome and unfit for human consumption."

The first evidence of the unwholesomeness of the sausage is that at least a part of it was infested with maggots; and as a clear indication that the maggots were not simply *on the outside* of the sausages, but that they actually *infested* them, testimony given by a police officer, as appears in the record, is as follows:

"Q. How long were the largest of those worms? A. Well, they appeared to be about a quarter of an inch, they were sort of *fastened onto the meat* and were wriggling.

"Q. That is, one end would be *sticking in the meat?* A. *Yes,* they never fell off or anything, they were just moving.

"Q. How many would you say you saw? A. At least several.

"Q. That is, more than one or two? A. *More than seven or eight.*"

It is obvious that the inference naturally follows that as to that particular sausage it was at least both unwholesome and unfit for human consumption. But in that regard, the finding made by the trial court to that effect is not compelled to rest solely on that inference. Testimony that was given by the doctor who attended plaintiff in her illness included statements, in substance, that maggots *live only on putrefied matter;* that they do not eat *"clean"* flesh, *but that only which is decayed.* In part the doctor testified as follows:

"Q. And what is it that maggots feed on, on what type of food? A. *Putrid material.*

"Q. *Do they in fact feed upon wholesome, clean flesh?* A. *They do not.*

"Q. Have you had experience or study that leads you to that answer? A. I do.

"Q. What is that? A. Well, they are taking maggots now and inserting them in tissues and letting them go down to the bone, especially in cases of osteomyelitis, inflammation of the covering of the bone, where they have a slow healing or non-healing process. Now medical science is inserting maggots in the place *to eat out the decayed flesh, the rotten material.*

"Q. Don't the maggots eat the *clean* flesh? A. *They do not.* * * *

"Q. * * if there were maggots on the sausage, would that have any connection with Mrs. Reese's disease? A. It would.

"Q. In what manner? A. If the maggots were on the sausage it would give more evidence to show that the sausage *was in a putrifactive state.*

"Q. But that is the only thing the presence of maggots would convey to you? A.

That is one of the things that maggots would convey.

"Q. Are maggots poisonous, if you eat them? A. Maggots are sometimes poisonous, *but are most assuredly poisonous in food material. It shows there is a putrifactive process going on* and a chemical change going on in the food or media in which they exist. * * *

"Q. * * * How about the maggots themselves? A. The maggots themselves may be clean *or may be toxic.*

"Q. *They may be poisonous; is that correct?* A. *Yes.*

"Q. They may or may not be? A. They may or may not be, but you can develop a maggot—maggots are even grown and put into decayed flesh, *but they are put there only to eat the decayed flesh; they only thrive on decayed particles of matter.*"

Regarding the probable effect upon a human who had eaten maggots that had fed upon putrid flesh, the doctor states as follows:

"A. A person could eat maggots and they might be consumed in the system or they may go into the intestinal tract and there develop and pass through the intestinal tract whole; *but they are most certainly toxic in the intestinal tract.* * * *

"Q. Then they are somewhat poisonous, and if I am in a weakened condition I will get it, and if my strength is strong enough I will throw it off. A. *They are certainly not wholesome.* * * *

"A. I won't state that a maggot in itself, just to lay a maggot out that had been grown, would be absolutely poisonous, *just toxic poison.*

"Q. Will you state it is not poisonous? A. Well, that depends. If a maggot is brought out of a very dirty, filthy place *you know he contains matter that is toxic.* * * *

"Q. Now, getting to decayed meat, *is there anything poisonous about putrefied meat?* A. *Yes there is.*"

The subsidiary question as to the scientific name of the poisonous germ that was present in the putrid and maggot-infested sausages was of no decisive importance. From a legal standpoint, the injection of that issue into the case was nothing less than an adroit attempt on the part of defendant to distract the attention of the court from that which appellant now concedes was the ultimate and determinative fact, to-wit, of whether the sausages "were unfit for human consumption."

To my mind, it is evident that substantial evidence was before the trial court from which it became fairly inferable that the sausage which plaintiff had eaten was neither wholesome nor fit for human consumption. And if my conclusion in that regard is correct, it inevitably follows that the judgment should be affirmed. Gindraux v. Maurice Mercantile Co., 4 Cal.(2d) 206, 47 P.(2d) 708, and authorities there cited.

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17 Cal.App.2d 127

MONTGOMERY WARD & CO. v. WELCH, Tax Collector, et al.

Civ. 1910.

District Court of Appeal, Fourth District, California.

Oct. 16, 1936.

Rehearing Denied Nov. 7, 1936.

1. Appeal and error ⚷103

Order denying motion for judgment on pleadings is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. Taxation ⚷319(1)

Ordinarily, an assessment is not invalidated because assessor did not actually inspect property if, from other sources, he had sufficient knowledge or evidence of its existence and value.

3. Taxation ⚷319(2)

Presumption exists that public official, such as tax assessor, performs his duty and did not make assessment without proper knowledge of existence and value of property.

4. Taxation ⚷500

That taxpayer did not receive notice of assessment in time to enable it to make protest before board of equalization *held* not to excuse failure to make such protest.

5. Taxation ⚷478

Statutes permitting board of equalization to cancel illegal assessment are available only where assessment is absolutely void, and in case of mere overvaluation relief must be obtained by making timely objection before board of equalization (Pol.Code, §§ 3804, 3804a).

6. Taxation ⚿500

Even if property was assessed at nearly four times its actual value, application for relief to board of equalization *held* necessary prerequisite to maintenance of action to obtain cancellation or reduction of tax (Pol. Code, §§ 3804, 3804a).

◆

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Montgomery Ward & Company against W. O. Welch, Tax Collector of the County of Los Angeles, and others, wherein defendants filed cross-complaint. From an order denying plaintiff's motion for judgment on the pleadings and from a judgment for defendants, plaintiff appeals.

Appeal from order denying motion for judgment on the pleadings dismissed, and judgment affirmed.

For prior opinion, see 59 P.(2d) 529.

Tanner, Odell & Taft and S. W. Odell, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief, the plaintiff praying that a tax levied in the sum of $4,351.26 be canceled as having been arbitrarily made, that the true amount of the tax which should have been levied on the property in question should be fixed by the court at $1,173.46 "or such other sum as may be the true and correct assessment for said year," and that upon payment into court of the amount so found the tax be adjudged to have been satisfied.

The complaint alleges that on the first Monday in March, 1931, the plaintiff had taxable property in a certain warehouse in Los Angeles of the full cash value of $41,612.15; that in accordance with the provisions of section 3629 of the Political Code the plaintiff, on June 29, 1931, furnished to the assessor a statement of its unsecured personal property for the year 1931; that the assessor did not personally view or appraise the personal property in question, but notwithstanding the filing of the said statement arbitrarily assessed the said property at a valuation of $154,300 and arbitrarily levied a tax thereon of $4,351.26; that on July 15, 1931, the assessor mailed a notice of assessment to the plaintiff at its office in Chicago; that the plaintiff did not receive said notice until after the board of supervisors sitting as a board of equalization had adjourned; that plaintiff had no opportunity to make a protest to the board of equalization and to seek a modification of the assessment; that the plaintiff offered to pay to the tax collector the sum of $1,173.46 and has ever since been ready and willing to pay this amount; and that on February 17, 1932, the plaintiff filed a petition with the board of supervisors asking said board to correct said assessment and to authorize the payment of $1,173.46 in full for said taxes, which petition was denied.

An answer and cross-complaint was filed by the defendants. Among other things, it was alleged that the plaintiff vacated this warehouse on or about April 30, 1931, and removed the taxable property in question to other locations in various cities and towns in the same county; that the full cash value of the property on the first Monday in March, 1931, was $154,300; that the assessor duly assessed said property to the plaintiff at the value of $154,300 and levied taxes thereon in the sum of $4,351.26; that no real property was or is assessed to or owned by the defendant as security for the payment of said taxes; that the true and lawful amount of the tax and the amount which was actually levied is $4,351.26; that the plaintiff made no application to the board of equalization for a reduction in the valuation placed upon the property by the assessor; and that the plaintiff did not take any steps provided by law for the purpose of securing a reduction in the assessment. In answering the cross-complaint the plaintiff alleged that it had removed the property from the warehouse before April 1, 1931, that there was no property in the warehouse at the time the assessment was actually made, that the assessor did not, either in person or by deputy, enter the warehouse on the first Monday in March, 1931, or between that date and April 1, 1931, when all of the property had been removed, and that the assessor had arbitrarily assumed that the warehouse contained approximately the same quantity of goods that had been therein on the first Monday of March, 1930.

[1] Each party filed a motion for judgment on the pleadings, the plaintiff's motion being denied and the defendants' motion granted. The plaintiff has appealed

from the order denying its motion for judgment on the pleadings and also from the judgment entered after granting the defendants' motion. The order denying the plaintiff's motion for judgment on the pleadings is not appealable and that appeal should be dismissed. Code Civ.Proc. § 963, as amended by St.1933, p. 2472; Holton v. Noble, 83 Cal. 7, 23 P. 58.

[2, 3] It is appellant's contention that the assessor did not view the property, that he had no information concerning it except the statement furnished him by the appellant, that the assessment was arbitrarily made, and that, under the circumstances, the statement of the amount and value of the goods furnished by the appellant must be taken as conclusive. In its answer to the cross-complaint the appellant admits that it removed the property before April 1, 1931, and within the time in which the assessor could legally view and assess the same. We have been pointed to no statute requiring the assessor to view property before he can assess it nor to any case holding to this effect. Ordinarily an assessment is not invalidated by the fact that the assessor did not actually inspect the property if, from other sources, he had sufficient knowledge or evidence of its existence and value. See 61 Cor.Jur. 629, and cases there cited. It is to be presumed that a public official does his duty. No facts are pleaded by the appellant to show that the assessor did not have sufficient information to make the assessment in this instance, and it is not even pleaded that the property in the warehouse was not the same or approximately the same as that found there when the assessment for the previous year was made.

[4] The complaint alleged that the full cash value of the property in question was $41,612.15, whereas it was assessed at $154,300, and the appellant relies on such cases as Birch v. County of Orange, 186 Cal. 736, 200 P. 647, in which it had been held that a grossly inequitable and palpably excessive overvaluation of property for taxation may be held constructively fraudulent. It is admitted that no application for a reduction in the assessment was made to the board of supervisors sitting as a board of equalization. If this was necessary the allegation that the appellant did not receive the notice of assessment in time to enable it to make a protest before the board of equalization is not sufficient to excuse the failure to make such an application. No personal service of such a notice is required by the statute and it is the taxpayer's duty to keep himself informed as to his assessment. The main question here presented is whether such an action as this may be maintained where the question of overvaluation of the property has not been first presented before the board of equalization.

[5] With respect to the remedy available to a taxpayer there is an obvious distinction between a mere overvaluation of property in an assessment and a double, erroneous, or illegal assessment. Brenner v. Los Angeles, 160 Cal. 72, 116 P. 397; Associated Oil Co. v. County of Orange, 4 Cal.App.(2d) 5, 40 P.(2d) 887. In the case of an erroneous or illegal assessment the board of supervisors may refund the amount paid under protest or cancel the entire assessment under the provisions of section 3804 or section 3804a of the Political Code. Those sections are available, where the property is assessed "more than once, or erroneously or illegally," in the absence of any previous application to or showing before the board of equalization [Rittersbacher v. Board of Supervisors, 220 Cal. 535, 32 P.(2d) 135], but they are available only where the assessment is absolutely void. Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 99 P. 483, 20 L.R.A.(N.S.) 211. On the other hand, in cases of mere overvaluation of property, relief is to be obtained by making timely objection before the board of supervisors sitting as a board of equalization. Associated Oil Co. v. County of Orange, supra; Southern California Hardware, etc., Co. v. Los Angeles County, 49 Cal.App. 712, 194 P. 62; Globe G. & M. Co. v. Los Angeles Co., 62 Cal.App. 297, 216 P. 631.

The appellant relies on such cases as Birch v. County of Orange, supra, where the overvaluation of certain property was held to have been so inequitable as to constitute a constructive fraud and to invalidate the assessment. However, in that case all of the material facts had been presented before the board of equalization, which had refused relief. In Wores v. Imperial Irrigation Dist., 193 Cal. 609, 227 P. 181, 187, in discussing the powers of the board of equalization and the power of the courts in reviewing the decisions of that board, the court said:

"In the case of La Grange, etc., Co. v. Carter, 142 Cal. 560, 565, 76 P. 241, this court declared the general rule applicable to the powers and duties of boards of equalization to be that—'A board of equalization of a county possesses great powers under our Constitution and statutes as to raising or lowering assessments. It seems, in the absence of fraud or malicious abuse of its powers, to be the sole judge of questions of fact and of the values of property. Such powers should be used with caution, after investigation, and with the sole purpose of doing equal and exact justice to each and every taxpayer, whether rich or poor, corporation or private citizen. To it the taxpayer can go for relief when assessed for more than his property is worth. To it the taxpayer may go when through fraud, favoritism, or ignorance of values some taxpayer is about to escape his just burden of taxation. We must presume in all cases that as a public official body it has performed his duty.'

"In the case of Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277, this court approved the foregoing rule and amplified it by the statement that—'It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at and when not made in pursuance of some fixed rule or general system the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. (San Jose Gas Co. v. January, 57 Cal. 614; Henne v. Los Angeles County, 129 Cal. 297, 61 P. 1081; see, also, Gray on Limitations of Taxing Power, § 1460, 31 C.C.A. 537.)' The court in that case, however, proceeded to say: 'But it is likewise universally held that a taxpayer may so assail an assessment in the courts where it was "fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes," and it has that effect, or where there is something equivalent to fraud in the making of the assessment, producing such effect.' In the case of Southern Pac. Co. v. San Diego County, 183 Cal. 543, 191 P. 931, this court approved both the general rule and the exception to it as enunciated in the case last above cited but held that where it was shown to a board of equalization by evidence, without substantial contradiction or conflict, that certain property was assessed at nearly twice its real value, while other property similarly situated was assessed in pursuance of a 'systematic, willful, and intentional scheme to so do, at not to exceed twenty-five per cent of its real value,' and that the board of equalization, with full knowledge of the existence of these facts, refused to take any other action than to deny the injured taxpayers' application for relief, such a situation would present a case showing 'something equivalent to fraud' which would entitle the taxpayer to relief in the courts, regardless of the denial of his application by the board of equalization, and this entirely regardless of the motives of the members of the board. In the still more recent case of Birch v. Orange County, 186 Cal. 736, 200 P. 647, this court gave application to the same doctrine both in its general rule and in the exception, holding that 'a grossly inequitable and palpably excessive overvaluation of property for taxation may be held constructively fraudulent,' and cited a long line of cases in support of this conclusion. In both of the cases last above cited, and in all of the authorities upon which the aforesaid conclusion rests, it was made to affirmatively appear that there was no basis in reason or in the facts educed before the board of equalization in each case or before the court for any differentiation between the property subjected to the alleged unjust assessment and other properties of the same class similarly situated for purposes of taxation, and that no reasonable justification could be found or offered for the inequality of the assessment."

[6] The case before us is purely that of a claimed overvaluation of the property and is not one of a double, erroneous, or illegal assessment which is entirely void. Assuming that the assessment of property at nearly four times its actual value may be so inequitable as to constitute a constructive fraud, it does not follow that such an assessment may be attacked at any time and in any place. It

is essential to the performance of governmental functions that an orderly system of assessment and collection of taxes shall be maintained, and that the amounts of the assessments be fixed with certainty in a prescribed manner and at a definite time. Our system provides a method of reviewing the values fixed by the assessor and a tribunal to pass upon any claims of overvaluation. If that tribunal fails to properly discharge its duty the courts may intervene, but a different situation is presented where a taxpayer fails to avail himself of the machinery provided and fails to make timely application to and make proof of his contentions before the board of equalization. Under the statutes and the authorities above referred to we conclude that an application for relief to the board of equalization is a necessary prerequisite to the maintenance of such an action as this, and that the complaint filed by the appellant failed to state a cause of action.

The purported appeal from the order denying the appellant's motion for judgment on the pleadings is dismissed, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

KEY NUMBER SYSTEM

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17 Cal.App.2d 80

HANSEN v. CALIFORNIA BANK et al.

Civ. 5645.

District Court of Appeal, Third District, California.

Oct. 14, 1936.

Rehearing Denied Nov. 13, 1936.

Hearing Denied by Supreme Court Dec. 10, 1936.

1. Bankruptcy 🔑303(3)

As respects bank's liability to trustee of bankrupt corporation for amount paid to bank by corporation for purchase of its own stock without authorization from corporation commissioner, evidence *held* to sustain finding that stock was purchased and paid for by corporation, and not by individual stockholders thereof (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

2. Banks and banking 🔑118

As respects bank's liability to trustee of bankrupt corporation for amount paid to bank by corporation for purchase of its own stock without authorization from corporation commissioner, evidence *held* to sustain finding that bank's vice president sold stock to corporation as agent of bank, and not as agent of stockholder who had pledged stock with bank (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St. 1929, p. 1270).

3. Corporations 🔑141

As respects bank's liability to trustee of bankrupt corporation for amount paid to bank by corporation for purchase of its own stock without authorization from corporation commissioner, bank which held indicia of ownership of stock had authority to pass title thereto so as to render bank liable therefor, regardless of bank's actual title to stock (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

4. Corporations 🔑141

Stockholder who clothed bank with indicia of ownership of shares of stock by delivering them to bank, signed in blank, could not complain of subsequent sale and transfer of stock by bank to innocent purchaser.

5. Corporations 🔑141

Representations of bank that it was owner of stock which bank, without authorization from corporation commissioner, sold to corporation which had issued such stock, *held* to estop bank from denying sale to corporation, in action by trustee of corporation which became bankrupt to recover amount paid for such stock (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St. 1929, p. 1270).

6. Bankruptcy 🔑303(3)

As respects bank's liability to trustee of bankrupt corporation for amount paid to bank by corporation for purchase of its own stock, evidence *held* to support findings that corporation paid for such stock out of its capital stock without authority of corporation commissioner, thereby diminishing assets and that such payment was not made from surplus funds available for cash dividends (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

7. Bankruptcy 🔑303(1)

In action by trustee of bankrupt corporation to recover from bank amount which corporation had paid to bank for purchase of corporation's own stock without authorization from corporation commissioner, trustee was not required to prove that corporation was actually insolvent at time of purchase in order to establish violation of statute so as to render sale of stock invalid (Civ.Code, § 309, as amended by St.1929, p. 1266).

8. Corporations 🔑376

Corporation may not, ordinarily, be authorized to purchase its own shares of stock, since result constitutes an illegal withdrawal and payment to stockholders of part of capital stock, contrary to statutes, and transaction is therefore ultra vires (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

9. Bankruptcy 🔑250(1)
Corporations 🔑376

Corporation *held* unauthorized to purchase, without authority from corporation commissioner, its own stock from bank to which stock was pledged by stockholder, regardless of whether corporation was then bankrupt, and money which was paid to bank became a trust fund subject to recovery by bankruptcy trustee (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

10. Appeal and error 🔑882(11)

Bank which was required by judgment to pay to trustee of bankrupt corporation amount paid to bank by corporation for purchase of its own stock without authorization from corporation commissioner could not, on appeal, complain of lack of evidence to show that corporation was insolvent at time of purchase, where trustee was prevented from showing corporation's insolvency because of bank's objections to evidence.

11. Bankruptcy 🔑282

Trustee of bankrupt corporation *held* entitled to maintain action in behalf of creditors existing before and after illegal transaction was consummated to recover trust fund belonging to corporation, which was created by illegal purchase of its own stock without consent of corporation commissioner, since such transaction was ultra vires and void (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

12. Bankruptcy 🔑298

Bankruptcy Act provision that suit shall not be brought by or against trustee of bankrupt estate subsequent to two years after estate has been closed supersedes the limitation of time within which such class of equitable suits may be brought and prescribed by state statutes with relation thereto, and has effect of extending or changing time therefor to two years after estate has been closed (Bankr.Act § 11d, 11 U.S.C.A. § 29(d).

13. Bankruptcy 🔑298

Suit commenced August 15, 1933, by trustee of a bankrupt corporation, who was appointed June 26, 1933, to recover from bank amount paid to it by corporation for purchase of its own stock on July 25, 1930, without authorization from corporation commissioner, *held* not barred by limitation, in view of Bankruptcy Act provision superseding limitation of time within which equitable suits may be brought as prescribed by state statutes (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270; Code Civ.Proc. § 338, subd. 4; Bankr. Act § 11d, 11 U.S.C.A. § 29(d).

14. Principal and agent 🔑197

Judgment against bank and its agent for amount which corporation had paid to bank for purchase of corporation's own stock in violation of statute *held* not inconsistent because of findings that sale was void, and that corporation's trustee was entitled to rescind transaction, where bank was liable because it acquired fund under circumstances creating trust for corporation's creditors, and bank's agent became personally liable because he procured sale by fraudulent representation (Civ.Code, § 309, as amended by St.1929, p. 1266; § 354, as amended by St.1929, p. 1270).

15. Principal and agent 🔑156

While agent is ordinarily relieved of liability for tortious representations when sale is openly made in name and for benefit of disclosed principal, or when principal ratifies wrongful conduct of agent, agent may also be held liable when tortious acts are such that principal could not legally authorize them.

16. Principal and agent 🔑145(4)

In suit by trustee of bankrupt corporation against bank and its agent to recover amount paid to bank by corporation for purchase of its own stock in violation of statute, alleged right to enforce election of remedies against either bank or agent was waived by failure of defendants to demand election by demurrer, motion, or otherwise.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Clarence Hansen, trustee of the estate of American Jobbers, Inc., in bankruptcy, against the California Bank and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Swanwick, Donnelly & Proudfit, William B. Himrod, and Donald O. Welton, all of Los Angeles, for appellants.

William P. Redmond and Louis B. Minter, both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them for $13,935.91 and interest in favor of the plaintiff, as trustee of the American Jobbers, Inc., a bankrupt corporation, being the amount paid to the bank by the American Jobbers corporation in 1930 for the purchase of its own corporation stock in violation of the provisions of section 354 of the Civil Code, as it then existed, now sections 341 and 342 of the same Code, and contrary to the provisions of section 309 of the Civil Code, as it then existed, now sections 346, 363 and 364 of the same Code.

The American Jobbers, Inc., was incorporated in 1924, for the purpose of conducting a produce business, in Los Angeles, with an authorized capital stock of $10,000, consisting of 100 shares of the par value of $100 each. The only stockholders were Bryant, Clark, Daley, and Berman. Bryant owned 37 shares of stock. Daley, Clark, and Berman were directors of the corporation. In 1930, when the stock in question was purchased, the corporation had an outstanding indebtedness; it possessed cash on deposit in the California Bank of Los Angeles in the sum of about $4,000, but it then had no surplus available for cash dividends. Bryant became indebted to the California Bank and assigned and delivered to it his 37 shares of stock represented by certificate number 6, which he indorsed in blank. This assignment of stock was made pursuant to a trust agreement to secure the debt, but that agreement was unknown to the other shareholders and directors of the American Jobbers corporation. Bryant was in default and unable to pay the bank. Mr. Maulhardt, the agent and representative of the California Bank, informed Clark, Daley, and Berman, the directors of the American Jobbers, Inc., a corporation, that the bank owned Bryant's 37 shares of stock and offered to sell them for $16,000. This was agreed upon. The American Jobbers, Inc., purchased the stock at that price, drawing its check upon the California Bank for $4,000, which it then had on deposit in that bank and executed its promissory note for the balance of the purchase price, to wit, $12,000, dated July 25, 1930, payable to the California Bank on demand at the rate of 7 per cent. interest per annum. This note was signed by "American Jobbers, Inc., by P. W. Daley, President, and Paul Berman, Secretary." The note was indorsed and payment was guaranteed by Daley, Berman, and Clark individually. Prior to August 3, 1931, the American Jobbers, Inc., paid to the bank for credit on its $12,000 note the sum of $5,000 and accrued interest. On the last-mentioned date the corporation executed and delivered its note to the bank for the unpaid balance of the original note, to wit, $7,000, and the original note was then surrendered. Prior to July 15, 1932, this debt was reduced to $4,000. A new note for the last-mentioned sum was executed and delivered to the bank in the same form as the original note, including its indorsements. The $7,000 note was then surrendered. Subsequently $700 was paid to the bank and applied on the last $4,000 note. At no time did the American Jobbers, Inc., procure authorization from the corporation commissioner of California to either purchase the 37 shares of stock or make payments thereon. The American Jobbers, Inc., became bankrupt and made a voluntary assignment for the benefit of creditors. Upon proceedings duly presented to the United States District Court for the Southern District of California, the respondent, Clarence Hansen, was appointed and qualified as trustee in bankruptcy of the estate of the insolvent corporation June 26, 1933. On authorization therefor, this suit was commenced against the California Bank and J. G. Maulhardt August 15, 1933, praying for rescission of the sale of the 37 shares of stock to the corporation and for judgment for $13,850, as trust funds held by the bank for the benefit of the estate of the bankrupt corporation. The cause was tried by the court. Findings favorable to the plaintiff, in accordance with the preceding statement of facts, were adopted and judgment was rendered against both defendants as prayed for. From that judgment, the defendants have appealed.

The appellants contend that the judgment is not supported by the evidence, for the reasons that it does not appear that

(1) American Jobbers, Inc., purchased its own stock; (2) the stock was purchased from California Bank; (3) the purchase price of the stock was paid from the capital stock of the corporation; (4) respondent does not represent the creditors of the corporation; (5) the action is barred by the provisions of section 338, subd. 4, of the Code of Civil Procedure; and (6) the judgment against the bank rescinding the purchase of stock is in conflict with the finding that its agent was guilty of fraud, which, in effect, amounts to an affirmance of the contract.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence. The court found that the American Jobbers, Inc., purchased for itself, contrary to law, 37 shares of its own stock from the California Bank of Los Angeles in consideration of the sum of $16,000. There is a conflict of evidence, but it sufficiently appears that Mr. Maulhardt, acting as the agent for the bank, sold to the American Jobbers, Inc., the 37 shares of stock formerly belonging to Bryant. Maulhardt was the vice president, manager of the marketing department, and agent of the bank. Mr. Daley, president of the produce corporation, testified that Mr. Maulhardt told him the bank was forced to take Bryant's 37 shares of stock, and would sell it for $16,000; that they did not want to see the stock get into the hands of a stranger, and therefore suggested that the corporation purchase it. Daley told Maulhardt that the produce corporation did not have sufficient money with which to buy the stock, but the vice president of the bank suggested that it had $4,000 on deposit in his bank, which it could pay in cash, and that the bank would arrange to loan the produce corporation the remaining $12,000 to be represented by its promissory note. The purchase of the stock upon those terms was agreed upon. The corporation drew its check in favor of the bank for the $4,000 which was on deposit there, and also executed and delivered its promissory note for the sum of $12,000, payable to the bank on demand, at 7 per cent. interest, payable annually. The note was dated July 25, 1930. The individual stockholders of the produce corporation did not buy the stock. None of the money which was used to pay for the stock belonged to the individual stockholders. It was corporation money, as was also the promissory note. The certificate of stock, signed in blank by Bryant, was then delivered to the corporation. The certificate was cancelled, and separate shares were issued by agreement in the names of the three remaining members of the corporation as follows: 13 shares to Daley and 12 shares each to Clark and Berman. These shares were not delivered to the parties, but were placed in the safe of the corporation and held for delivery when the purchase price and indebtedness to the bank was fully paid. The three directors of the corporation testified to substantially these facts. Mr. Daley said in that regard: "Mr. Maulhardt came in the office and said that * * * those shares of stock of Bryant's was going to be sold and (he) didn't want to see a stranger buy it; he thought it would be good for us to buy it, the American Jobbers. And he said he could arrange for us to buy the stock. I told him at the time that I didn't want to take that money out of the business, the business would not stand it; and of course he knew how much money we had over there. * * * Mr. Maulhardt said that we could pay him $4,000 cash, and the balance could be paid monthly, plus the interest. * * * When we got this (certificate of stock) we split * * * the shares, the 13, 12, 12, and put them in the safe and figured whenever it was paid for by the American Jobbers, why, we would have the entire possession of them."

Mr. Clark testified regarding the sale of the shares: Mr. Maulhardt told him "he had them to dispose of and wanted to dispose of them to us, and it took a layout of $16,000 to handle it, but we didn't have that money to handle it with. He put the proposition up to us how it could be handled. * * * It was agreed we would pay $4,000 down and give him a note for the rest of it. * * * Well, they gave us a check for $12,000 for the loan, and we in turn gave them $16,000.

"Q. When you say 'we, in turn, gave $16,000,' who do you mean by 'we'? A. The corporation, * * * American Jobbers. * * * It (the $12,000 note) was to the bank, made payable to the bank, as I recall it. * * *

"Q. Who purchased it (the stock)? A. The American Jobbers. * * *

"Q. I will ask you whether or not after your conversation with Mr. Maulhardt did you or did you not set up in the books of the company a charge against the individuals, namely, yourself, Mr. Daley and Mr. Berman with $12,000, or $16,000? A. No sir. * * * (Regarding the party to whom the stock was sold.)

"Q. What do you mean by saying 'us'? A. Well, from our standpoint we was talking of the company * * * American Jobbers, the three of us. * * *

"Q. What portion of that $16,000 did you owe the corporation? A. I say I did not consider that I owed it to them.

"Q. You do not consider that you owe it? A. No."

Mr. Daley also testified to substantially the same facts. He asserted that he never had possession of the stock, or any part of it. In effect, he testified that it was purchased by the corporation, and not by the individual stockholders. It was paid for with funds belonging to the corporation and not by funds of the individual members thereof. He said in that regard:

"Q. Mr. Daley, I will ask you whether or not you were indebted to the corporation * * * on account of notes and accounts receivable as a stockholder or officer of this corporation in the sum of $16,000 or any part thereof? A. No sir. * * *

"Q. Did you ever give anything to the American Jobbers for that stock? A. No, sir."

Regarding the question as to whether the corporation or its individual stockholders purchased the stock, Mr. Redmond, one of plaintiff's attorneys, testified that he had a conversation with Maulhardt, who said in reply to an inquiry from Daley: "Well, why not the bank loan to Berman and Clark and myself this money, and we will buy the shares individually?" To this inquiry Redmond says Maulhardt replied: "No, boys, you can't do that, because, you know, you boys haven't got the financial standing, haven't got the money to pay for the shares of stock; but the bank will sell these 37 shares of stock to the corporation and loan the $12,000.00 with which it can buy those shares of stock, including $4,000.00 cash for a total of $16,000.00."

The foregoing testimony sufficiently sustains the finding that the stock was purchased and paid for by the corporation and not by the individual stockholders thereof.

It is true that the three directors of the corporation individually indorsed the corporation notes to the bank, guaranteeing their payment. But this is not inconsistent with the theory that it was the corporation's note upon which the bank required additional security in the form of their individual guaranty to pay the notes.

[2] The appellants contend that the finding to the effect that the stock was purchased from the California Bank is not supported by the evidence. On the contrary, they assert that Bryant, the original owner of the stock, sold it to the individual directors of the produce corporation through his agent, Mr. Maulhardt. Upon this issue as to whether Maulhardt sold the stock as the agent of Bryant or as agent of the bank, the evidence is also conflicting. We are of the opinion there is ample evidence to support the finding that Maulhardt sold the stock as the agent of the bank and not as agent of Bryant. At least there is sufficient evidence to show that Maulhardt was the agent of the bank in that transaction. This would render the bank liable. In support of this theory the record discloses the fact that Maulhardt was vice president and manager of the marketing and produce department of the bank. He represented to the directors of the corporation that Bryant had transferred the stock to the bank to secure an indebtedness which he owed the bank, that he was in default, and that the stock belonged to the bank which was anxious to sell it. Mr. Redmond, one of the attorneys for plaintiff testified in that regard that he had a conversation with Maulhardt, who said: "I consider myself and the bank very friendly to the American Jobbers; we know the boys very well, so we called in Daley or Clark, * * * or both, and I told them that the California Bank had 37 shares of stock that was assigned in blank to the California Bank as security for a debt evidenced by a promissory note that Bryant owed to the California Bank. That Bryant fell down on the payment of his note; that the bank took over the shares of stock and has got to realize on the shares of stock." The bank was in actual possession of the stock which was assigned by the former owner in blank. In payment for the stock the corporation gave its check to the bank for the sum of $4,000 which it had on deposit in that bank, and further executed its promissory note to the bank for the balance of the purchase price, to wit, $12,000. Partial payments upon this note were subsequently made. Two other renewal notes were subsequently executed by the corporation to the bank. The bank, and not Bryant, was the payee named in each of these notes. They were

retained by the bank. They were neither made payable to, nor were they held by, Bryant. To refute the assertion that Mr. Maulhardt sold the stock as the agent of the former owner, Mr. Bryant testified:

"Q. Have you or have you not authorized and directed Mr. Maulhardt, the California Bank, to sell those shares of stock for you for $16,000? A. I did not. * * *

"Q. Have you had a conversation with Mr. Maulhardt in the month of July, 1930, with regard to those shares of stock? A. No, sir. * * * I never knew those shares were sold until several months afterward."

[3] Whatever the fact may be with regard to the bank's actual title to the stock, it certainly held the indicia of ownership of the stock, and it therefore had authority to pass title thereto, so as to render the bank liable therefor. With respect to the passing of title to similar shares of stock which were signed by the owner in blank and delivered to a corporation, it was said in Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 513, 73 A.L.R. 1398: "It is common knowledge that, as between the parties to the transaction the property in shares of stock customarily passes in the ordinary and regular course of trade by delivery of the certificate indorsed in blank by the person to whom the certificate purports on its face to have been issued."

[4] Having clothed the bank with the indicia of ownership of the shares of stock, by transferring and delivering them to the bank, signed in blank, Bryant may not complain of the subsequent sale and transfer to an innocent purchaser thereof. The Powers Case, supra, holds in that regard: "In proper cases, and this case is one, the equities should be examined in accordance with the familiar principles that, 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer' (Civ. Code, § 3543), and that where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority. (Code Civ.Proc. § 1962, subd. 3). In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud."

In the present case there is no evidence that the corporation or any of its officers or directors had knowledge that the bank was not the true owner of the stock or that the bank was not authorized to sell it.

[5] It is true that a declaration of trust was received in evidence over the objection of the plaintiff, which document was executed by A. J. Bryant and wife, as trustors, to California Trust Company, a corporation, as trustee, January 14, 1930, to secure the payment of $10,000 due from the trustors to the California Bank, the named beneficiary of the trust instrument. The debt was evidenced by two $5,000 promissory notes, dated in September and December, 1929, due on demand at 7 per cent. interest per annum. This trust instrument authorized the sale and conveyance of two parcels of land in Los Angeles, together with the 37 shares of stock belonging to the Bryants, and a certain mortgage bond of $1,000. The trust instrument provided that for default on the part of the trustors in the payment of any portion of the principal or interest of the indebtedness as provided by the terms of the two promissory notes, when due, the trustee was authorized to sell any of the personal property mentioned therein "without notice to or demand upon the Trustors, such notice and/or demand being expressly waived." It does appear that Bryant and his wife were in default of payment of these notes, and that the trustee had authority to sell the stock under the provisions of the trust instrument prior to the time when the stock was sold to the produce corporation by the California Bank. The evidence warrants the inference that Maulhardt, as agent of the bank, represented to the purchaser of the stock that it belonged to the bank and that it was desirous of selling it. That transaction may be reasonably reconciled with the provisions of the trust instrument. Whether the stock was actually sold and transferred to the bank is immaterial so far as this case is concerned. Moreover, our attention is called to no evidence indicating that the corporation or its officers had any knowledge of the existence of that trust instrument. In truth, the evidence is just the contrary. They were ignorant of that fact. The provisions of the trust instrument, therefore, do not relieve the bank of liability in this suit. Its representations

that it was the owner of the stock at the time it was sold to the corporation estops it from now denying that fact.

[6] The evidence adequately supports the findings of the court to the effect that the American Jobbers, Inc., purchased from and paid to the California Bank the sum of $13,935.91 for 37 shares of its own stock out of its capital stock, without authority of the corporation commissioner of the state of California, thereby diminishing and depleting its assets to that extent, and that this payment was not made from surplus funds available for cash dividends.

The purchase of this stock under such circumstances was unauthorized, in contravention of the explicit provisions of law and therefore void. Section 309 of the Civil Code as it existed at the time of this illegal transaction (Stats.1929, p. 1266) provided in part: "Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided; provided, that dividends may be paid upon shares entitled to cumulative preferential dividends from paid-in surplus, as well as from profits arising from the business, but the holders of such shares shall be notified when dividends are paid from paid-in surplus. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its terms of existence. * * *"

Section 354 of the Civil Code, as it then existed (Stats.1929, p. 1270), limited the power of a corporation with respect to repurchasing its stock, thereby prohibiting the right to do so under the circumstances of this case. It provided in part:

"Every corporation, as such, has power: * * *

"7. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments; provided, that a corporation shall not, in issuing shares or taking subscriptions therefor, agree to repurchase such shares, or give to the subscriber a right to surrender or resell the same to the corporation;

"8. To purchase and cancel upon its books and restore to the status of authorized but unissued shares of any of its outstanding shares as follows:

"(a) To collect or compromise in good faith a debt, claim or controversy with any shareholder;

"(b) From surplus available for cash dividends when authorized by vote or written consent of the holders of two-thirds of each class of shares outstanding exclusive of the shares to be purchased;

"(c) From one who as an employee has purchased such shares from the corporation under an agreement giving the corporation the right to repurchase. * * *"

The evidence that the corporation did not procure the authorization of the corporation commissioner to purchase its stock is undisputed. Mr. Daley, the president of the corporation, testified in that regard: "Q. Mr. Daley, I ask you whether or not the corporation, the American Jobbers, applied for and obtained a permit from the Corporation Commissioner of the State of California at any time to purchase the shares of stock, the 37 shares of stock from the California Bank or from Bryant? * * * A. No, sir."

The evidence shows that at the time of the agreement to purchase the stock on the part of the corporation it was indebted and then had creditors. It shows that the corporation then possessed $4,000 on deposit with the California Bank. It may be inferred that amount constituted its entire surplus fund, for no evidence was offered to indicate that it possessed more. When Mr. Maulhardt proposed to sell the stock to the corporation for $16,000, Mr. Daley said: "I told him at the time that I didn't want to take that much money out of the business, the business would not stand it; * * * It took a layout of $16,000 to handle it, but we didn't have that money to handle it with." Moreover, in order to consummate the purchase of the stock, it was necessary for the bank to loan the produce corporation the sum of $12,000, which was evidently paid from subsequent earnings during the period of two years and eight months. In the absence of testimony to the contrary, this is a sufficient prima facie showing that the corporation did not then have on hand sufficient capital stock or cash assets with which to purchase the stock over and above the sum required to pay its existing debts.

[7] It was not necessary to prove the corporation was actually insolvent to establish a violation of the provisions of section 309 of the Civil Code, as it then existed, so as to render the sale of stock invalid. In construing a similar statute which existed in the state of Ohio, it is said in the case of Rheinstrom v. Seasongood, 19 Ohio N.P.(N.S.) 393, 27 Ohio Dec. 430, as reported in 55 A.L.R. 103, note: "The facts that the corporation might not have been actually insolvent at the time of the payment of a dividend, and that no then existing creditors were harmed, have been held not to prevent recovery of the dividend by the trustee in bankruptcy, where it was at the time heavily indebted, and there were no surplus profits or earnings out of which the dividend could be legally declared, and the party to whom the payment was made knew of its financial condition."

[8] It has been uniformly held in California that a corporation may not ordinarily be authorized to purchase its own shares of stock since the result constitutes an illegal withdrawal and payment to stockholders of a part of the capital stock, contrary to the statutory provisions of law, and that the transaction is therefore ultra vires. Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 P. 582, 44 L.R.A. (N.S.) 156, Ann.Cas.1914B, 1013; Stevens v. Boyes Hot Springs Co., 113 Cal.App. 479, 298 P. 508; Mancini v. Patrizi, 87 Cal.App. 435, 262 P. 375; Wagg v. Toler, 80 Cal.App. 501, 251 P. 973; 7 Cal.Jur. 78, § 571; 4 Thompson on Corporations (2d Ed.) 625, § 4076; 6 Fletcher's Cyc. of Corp. p. 752, § 2847. In the Schulte Case, supra, an order sustaining a demurrer on the part of the defendant corporation on the ground that the complaint failed to state facts sufficient to constitute a cause of action was reversed. It was alleged the corporation sold 20 shares of its stock accompanied by an agreement that "should the purchaser of said stock * * * wish to sell the same, we will repurchase it at par value. * * *" It was further alleged that: "At the time the contract was made and ever since, the defendant owned and owns surplus profits exceeding, by over $50,000, the sum of the corporate debts. * * * The defendant could comply with its contract without injury to any creditor or stockholder." In spite of the fact that the stock could be repurchased by the corporation without harm to the creditors or stockholders, in effect the above-quoted agreement contemporaneous with the original sale of the stock, was held to be ultra vires and invalid. Construing the provisions of section 309 supra, as it then existed, the court said:

"The phrase 'capital stock,' as used in this section * * * has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital—i. e., assets—with which the corporation carries on its corporate business. [Citing numerous cases.] Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. Kohl v. Lilienthal, 81 Cal. [378] 385, 20 P. 401, 22 P. 689, 6 L.R.A. 520; Burne v. Lee, 156 Cal. [221] 222, 104 P. 438.

"In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. Cook on Corp. (6th Ed.) § 311. But, in view of the Code provisions to which we have referred, it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw and pay to a stockholder a part of the 'capital stock.' Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 P. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (Ralston v. Bank of California, 112 Cal. 208, 213, 44 P. 476), but the general rule is, as above stated, that the purchase is unauthorized. Thus, this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder the right upon 60 days' notice, to withdraw from the corporation and to receive, upon surrender of his stock, the amount paid therefor. Vercoutere v. Golden State L. Co., 116 Cal. 410, 48 P. 375."

[9] Under the preceding authority, the corporation in the present case was unauthorized to repurchase its own stock, regardless of whether it was then bankrupt, and the money which was paid to the bank therefor, with knowledge on its part of the inability of the corporation to purchase the stock, became a trust fund, subject to re-

covery by the trustee of the corporation in a proper suit.

[10] Moreover, the respondent was prevented at the trial from showing that the corporation was insolvent, and that the stock could not be repurchased by it without loss to the creditors. Objections to evidence offered for that purpose by the respondent were sustained. The appellants may therefore not complain on appeal of a lack of evidence in that regard. Nor are the bank statements of the corporation conclusive, one of which statements was previously filed with the bank "for the purpose of procuring and establishing credit from time to time with you for our negotiable paper." They merely created a conflict of evidence, and the trial court had a right to disregard them under the circumstances.

[11] The appellants contend that, since the trustee in bankruptcy was in no better position than the creditors to reclaim the money expended by the corporation to repurchase its own stock, he is estopped from maintaining this suit for the reason that the record fails to show there were creditors of the corporation in existence at the time of the purchase, and that subsequent creditors are not in a position to complain of the transaction. Sargent v. Palace Cafe Co., 175 Cal. 737, 167 P. 146; Scales v. Holje, 41 Cal.App. 733, 183 P. 308. In other words, it is asserted the trustee in bankruptcy could represent in this suit to recover the funds thus illegally expended only the existing creditors at the time of the purchase of stock, and that the evidence fails to show there were then any such creditors.

The court found that: "At all times alleged in plaintiff's amended complaint, there were creditors to whom the American Jobbers, Inc., a corporation, were indebted." Mr. Redmond testified that on September 16, 1933, a meeting of the creditors of the corporation was held, at which meeting there were present at least ten creditors of the American Jobbers, Inc. The cause appears to have been tried on the theory that it was immaterial whether there were creditors of the corporation prior to the purchase of the stock. At least our attention is not called to evidence regarding that issue, except that upon the objection of the appellants plaintiff was precluded from showing the financial status of the corporation which necessarily included the proof of its existing indebtedness to creditors. Mr. Daley, the president, was asked: "Q. If the corporation, the American Jobbers, preceding its becoming bankrupt, when it was declared bankrupt, if it had this $16,000 would it have been financially in a position to meet its obligations?" To this question the appellants objected on the ground that it was incompetent, irrelevant, and immaterial. This objection was sustained. The appellants may, therefore, not complain that the plaintiff failed to show that the corporation could not then meet its obligations on account of debts which it owed to creditors.

Moreover, under the authorities in this state, it is immaterial whether creditors of the corporation existed at the time of the purchase of stock. It has been repeatedly held that a trustee in bankruptcy may maintain an action in behalf of any and all creditors to recover a trust fund belonging to the corporation which is created by an illegal purchase of its own stock without the consent of the corporation commissioner and contrary to law, for the reason that the transaction is ultra vires and void. Kahle v. Stephens, 214 Cal. 89, 93, 4 P.(2d) 145, 147; Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156; Martin v. Zellerbach, 38 Cal. 300, 311, 99 Am.Dec. 365; 55 A.L.R., p. 116, 4 Creditors. In the Kahle Case, supra, it is said in that regard: "The argument that the trustee cannot bring this action on behalf of creditors whose claims were not in existence at the time of the fraud is also without merit. * * * The trustee is a party authorized to sue on their behalf."

And regarding the same question, the Martin Case, supra, says: "As to all creditors of the company, prior or subsequent, it [the transaction] was simply void; and no reason has been suggested why a creditor who has in no way promoted the void act should be estopped from contesting it."

The Scales Case, supra, relied upon by the appellants, may be distinguished from the present action. That was a suit by the trustee in bankruptcy of a corporation to recover money paid by the president of a one-man corporation to satisfy his personal debt to Holje. The question of the violation of sections 309 and 354 of the Civil Code, as they then existed, does not appear to have been involved in that suit. That cause involved only the misappropriation of corporation funds by an officer thereof.

The defendant in that suit, Holje, was not a creditor of the corporation. In the present suit the corporation purchased its own stock in violation of the statutory provisions above referred to, which rendered the transaction ultra vires and void. If it be deemed that the principle regarding the unlawful distribution of corporation assets for the benefit of stockholders contrary to the provisions of the statute was involved in the Scales Case, then we must assume that decision was overruled by the later case of Kahle v. Stephens, supra, which appears to directly determine the point adversely to the appellants. There may be a conflict of authorities in other jurisdictions regarding that question (55 A.L.R., p. 116, 4 Creditors), but the Supreme Court of California has decided that the trustee in bankruptcy may maintain the action to recover money paid by a corporation to repurchase its own stock in violation of the statutory provisions in behalf of creditors thereof existing both before and after the illegal transaction is consummated.

Likewise the Sargent Case, supra, upon which the appellants rely, is distinguishable from the present action. That was not a suit by a trustee of a bankrupt corporation. Nor did it involve the purchase of stock by the corporation contrary to law. The syllabus of that case correctly states the issues involved therein, as follows: "A promissory note issued by a corporation to one of its directors as part payment of the purchase price on a sale by him to one of the other directors of all the stock of the corporation except the two 'qualifying' shares is neither void nor voidable, where the directors are the only stockholders and there are no adverse interests of creditors involved."

As between the identical parties who were involved in that transaction, since there were no creditors to complain, the corporation should be estopped from denying the validity of its own act. The last-mentioned case is not in conflict with what we have previously said regarding the right of a trustee in bankruptcy to maintain this suit in behalf of creditors existing either before or after the consummation of the sale.

[12, 13] This suit is not barred by the statute of limitations (section 338, subd. 4, Code Civ.Proc.), for the reason that three years had not elapsed from the date of the sale of stock before the appointment and qualification of the trustee in bankruptcy occurred, and the suit was commenced immediately thereafter. Section 11, subdivision (d) of the National Bankruptcy Act (11 U.S.C.A. § 29, subd. (d) provides that: "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." It has been repeatedly determined by state and federal courts that the preceding provision of the Bankruptcy Act supersedes the limitation of time within which this class of equitable suits may be brought as prescribed by state statutes with relation thereto, and has the effect of extending or changing the time therefor to "two years after the estate has been closed." Isaacs v. Neece (C.C.A.) 75 F.(2d) 566, 568; Devoy v. Superior Fire Ins. Co., 239 App.Div. 28, 265 N.Y.S. 432; 5 Remington on Bankruptcy (3d Ed.) p. 402, § 2347; Black on Bankruptcy (4th Ed.) p. 1064, §§ 865, 866; 1 Collier on Bankruptcy, p. 424. The rule that the Federal Bankruptcy Act has the effect of extending the time within which a trustee may commence a suit under the circumstances of this case to two years after the closing of the bankrupt estate is announced in 5 Remington on Bankruptcy, supra, as follows: "Suit may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within the two years after the closing of the estate, notwithstanding the state statute of limitations may bar the action before the two years have expired. In short, the act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted."

The preceding text applies to the facts of the present case. In this suit it appears the unlawful purchase of the bank stock occurred July 25, 1930. Within three years thereafter, to wit, on June 26, 1933, the trustee in bankruptcy was appointed, and qualified. This suit was commenced August 15, 1933. It was therefore not barred by the statute of limitations, even though it be conceded that, except for the controlling provisions of section 11d of the Federal Bankruptcy Act, this case would have been barred by the provisions of section 338, subd. 4, of the Code of Civil Procedure of this state. In view of the authorities above cited, it is unnecessary for us to determine whether the running of the statute under the state law would have been tolled for failure to have discovered the fraud upon which the suit is based, or whether that lack of knowledge was properly pleaded and proved at the trial.

The Isaacs Case, supra, was a suit in equity by a trustee in bankruptcy, similar to the present case, to cancel instruments as fraudulently and illegally made by the bankrupt, and to recover for the benefit of creditors money paid in redemption of stock. In that case the Circuit Court of Appeals reviewed and distinguished many cases cited on the theory that they support a contrary doctrine. After citing numerous cases in support of its conclusions, the court said:

"All of these hold flatly that section 29 [section 11d of the Bankruptcy Act] provides a limitation period which supersedes all state statutes, and gives the trustee the time stated in it to sue. Two of these cases definitely decline to follow the Davis Case [(C.C.A.) 273 F. 397]. All hold that the effect of this section is the same as that of the corresponding section of the prior act, which was uniformly held to supersede all state statutes. * * *

"We think the trustee's position that section 29 fixes the time he may sue all causes of action not already barred when the bankruptcy proceedings were filed, furnishes a more reasonable, a more workable theory of limitation than the one advanced in the Davis and Drain [(C.C.A.) 69 F. (2d) 290] Cases, supra, that it applies to some actions, but not to others."

Some of these adverse cases may be distinguished by the manner in which the suits arose, or by the fact that the question of the limitation of time for the commencement of an action pursuant to the Federal Bankruptcy Act was not involved or properly presented. The case of Davis v. Willey (C.C.A.) 273 F. 397, upon which the appellants in this case chiefly rely, appears to be in point. But that case is specifically disapproved by the Supreme Court of New York in the case of Devoy v. Superior Fire Ins. Co., 239 App.Div. 28, 265 N.Y.S. 432, 435, in the following language: "The foregoing weight of authority precludes adopting the contrary holding in Davis v. Willey (C.C.A.) 273 F. 397, the reasoning of which defendant disavows."

We therefore conclude the present action is not barred by the statute of limitations.

[14] Finally, the appellants assert that the judgment which was rendered against the bank on the theory that the contract of sale of stock was rescinded is in irreconcilable conflict with the judgment against Maulhardt, its agent, on the ground that the sale was procured by his fraud.

We are of the opinion there is no merit in this contention. The gist of this action is not based on the rescission of a contract which is deemed to be merely voidable. It is a suit to recover a trust fund held by the California Bank for the benefit of the creditors of American Jobbers, Inc., a bankrupt corporation. The theory of the pleadings and of the trial unquestionably was that the California Bank, through its agent, Maulhardt, fraudulently and wrongfully induced the produce corporation by tortious representations to purchase 37 shares of its own stock in violation of sections 309 and 354 of the Civil Code, as the sections then existed; that the purported sale was therefore ultra vires and void ab initio; that the bank received the benefits of the illegal transaction and now retains the sum of $13,935.91 thus acquired, which it holds in trust for the creditors of the corporation. The judgment does not purport to rescind the sale. It merely declares that the plaintiff is entitled to judgment in the sum of $13,935.91 and interest against both defendants, and that the California Bank is entitled to a return of the 37 shares of stock. The court did find that the purported sale of stock was contrary to law and void. It also found that plaintiff was entitled "to rescind the transaction" upon return of the stock to the bank. Since the sale was void, it is not necessary to rescind the transaction. But that finding is immaterial and harmless. The transaction was in direct violation of the statute, and therefore void in its entirety. It was, in fact, no sale at all. It was necessary only to allege and prove facts sufficient to show that the California Bank acquired the fund derived from the illegal sale of the stock under such circumstances that a trust fund was created to which the creditors of the bankrupt corporation is entitled. The codefendant, Maulhardt, became personally liable independently of the bank, for the reason that he procured the illegal sale of the stock by means of fraudulent and tortious representations. The judgment is therefore not inconsistent. Both the principal and the agent are liable under the circumstances of this case.

Independently of the doctrine of agency, the California Bank is liable to account to the creditors of the produce corporation in the present case because it holds a trust fund belonging to the estate of the bankrupt estate which was acquired by a purported sale of stock, which sale was in direct violation of law and therefore void. The bank holds the funds as trustee for the real owners thereof, subject to the return of the stock. The return of the stock was tendered, and the judgment decrees the return of this stock to the bank.

It is conceded the bank was not an undisclosed principal in the transaction. It could not authorize its agent to sell stock of the produce corporation to the corporation itself because that was in violation of the statute. On the doctrine of ostensible agency the bank would be liable only under the circumstances stated in section 2334 of the Civil Code. But ostensible agency is not here involved. The bank did acquire the fund by means of tortious acts to which it was a party, to wit, persuading the corporation to purchase its own stock in violation of the statute. It will be presumed to have knowledge of the illegal transaction, for the bank held the 37 shares of stock and transferred them to the corporation in consideration of the payment of $16,000, the greater portion of which purchase price was loaned to the corporation by the bank, with which to consummate the illegal purchase. The bank itself took and held the corporation's promissory note for $12,000, representing that loan with which the illegal purchase of stock was largely made. The bank must therefore be deemed to have had knowledge of the illegal transaction which renders it liable in this suit. The bank is not liable by merely ratifying the tortious acts of its agent where the purported sale is actually made in the name and for the benefit of the principal, for under such circumstances the third party actually gets what he bargains for, and the agent is thereby released from liability. 1 Mechem on Agency (2d Ed.) p. 387, § 542. But, even under such circumstances, "the principal, however, cannot retain the proceeds of the agent's misrepresentation if the other party is willing to return what he has received." 1 Restatement of Law of Agency, p. 575, § 258c.

[15] But, while the agent is ordinarily relieved of liability for tortious representations when the sale is openly made in the name and for the benefit of a disclosed principal, or when the principal ratifies the wrongful conduct of the agent, the agent is not relieved, but, on the contrary, may also be held liable, when the tortious acts are of such a nature that the principal could not legally authorize them, as was the fact in the present action.

In 1 Mechem on Agency (2d Ed.) p. 388, § 546, it is said in that regard:

> "But where the act was one which the principal could not lawfully do or authorize, the case is different. Here while, by ratifying the tort committed by his agent the principal becomes liable therefor, this is an additional liability and not a substituted one. The agent still remains liable to third persons and satisfaction may be demanded either of the principal or of the agent or of both. It is no defense to one who is sued for committing a trespass to reply that he acted as the agent of another."

[16] Under the circumstances of this case, Maulhardt was also personally liable for his tortious acts, independently and separately from the liability of the bank. Assuming that the responsibility of the principal and of the agent under the circumstances of this case is a separate and distinct liability, as above related, then the plaintiff could not be required to elect its remedy against either one or the other. Moreover, assuming, without so deciding, that an election of remedies against either the principal or the agent might have been enforced, that right was waived in the present action by failure on the part of the defendants to demand the election by demurrer, motion or otherwise. Klinger v. Modesto Fruit Co., Inc., 107 Cal. App. 97, 103, 290 P. 127; Craig v. Buckley, 218 Cal. 78, 82, 21 P.(2d) 430. The appellants may therefore not complain of a failure on the part of plaintiff to elect with respect to its remedy as between the principal and the agent.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

17 Cal.App.2d 141

PEOPLE v. BRAIN.

Cr. 1919.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1936.

1. Criminal law ⚷1178

Where point was not touched on in brief, no reference was made to transcript in regard to matter and point was not supported by argument or citation of authority, point *held* abandoned.

2. Witnesses ⚷337(5)

Defendant, offering himself as witness, waives privilege against having charge of previous conviction read to jury or alluded to on trial, and may be impeached on cross-examination in same manner as any other witness by showing previous conviction of a felony (Pen.Code, § 1025).

3. Witnesses ⚷337(5)

Cross-examination of defendant offering himself as witness may properly extend to ascertaining character of offense involved in previous felony conviction (Pen.Code, § 1025).

4. Criminal law ⚷722½

Where fact of defendant's previous conviction was properly before jury, that district attorney alluded thereto in argument *held* not misconduct.

5. Criminal law ⚷1169(12), 1171(1)

Misconduct, if any, on part of district attorney in introducing portion of defendant's statement concerning prior conviction, and error, if any, of trial court in admitting such statement, *held* not prejudicial where thereafter defendant took stand as witness, and testimony concerning entire disputed portion of statement then became admissible and was admitted (Pen.Code, § 1025).

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Eugene A. Brain was convicted of grand theft, after a prior conviction of felony, and with possessing a black-jack, and he appeals.

Affirmed.

Joseph M. Trusty and H. J. Kleefisch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was charged in two separate informations. The first information charged grand theft and a prior conviction of a felony. The second charged possession of a black-jack. Defendant entered a plea of not guilty in each instance, but he admitted that he had suffered the prior conviction. The informations were consolidated for trial; and, upon a trial by jury, verdicts of guilty were returned upon both informations. Defendant's motion for a new trial was denied, and he was sentenced to state's prison upon the charges, the sentences to run concurrently. He appeals from the judgment of conviction and the order denying his motion for a new trial.

During the trial, the district attorney introduced evidence of a conversation had with the defendant shortly after his arrest. In that conversation, defendant had stated, among other things, that he had been previously convicted of a felony, to wit, robbery. The introduction of this evidence was assigned as misconduct. The court struck out "the question and answer with reference to the prior conviction" and instructed the jury to disregard that portion of the testimony. Thereafter, defendant took the witness stand in his own defense, and, upon cross-examination, he answered that he had previously been convicted of a felony, to wit, robbery in Ventura county in 1925. In the argument to the jury, the district attorney referred to the right of the jury to consider the previous conviction of a felony in weighing the testimony of the defendant.

[1] Appellant states three points in his brief: (1) "Misconduct of the district attorney in alluding to admitted prior conviction of felony"; (2) "Error of the court in admitting in evidence extra-judicial admissions of prior conviction of felony"; and (3) "Misconduct of district attorney in misrepresenting defendant's extra-judicial statement as constituting a confession." The third point is not touched in any manner in the brief. There is no reference to the transcript showing that the district attorney made any such representation, and there is neither argument nor citation of authority on the subject. We may, therefore, treat the third point as abandoned on this appeal.

[2-4] We find no reversible error in connection with the first and second points. While section 1025 of the Penal Code provides that under the circumstances before us, "the charge of the previous conviction must not be read to the jury, nor alluded to on the trial," a defendant, who offers himself as a witness waives the privilege accorded by that section (People v. Granillo, 140 Cal.App. 707, 714, 36 P.(2d) 206), and such defendant may be impeached on cross-examination, in the same manner as any other witness, by showing a previous conviction of a felony. People v. Romer, 218 Cal. 449, 452, 23 P.(2d) 749; People v. Rose, 9 Cal. App.(2d) 171, 174, 49 P.(2d) 334. Furthermore, such cross-examination may properly extend to ascertaining the character of the offense involved in the previous felony conviction. People v. Romer, supra, 218 Cal. 449, at page 451, 23 P.(2d) 749; People v. McCombs, 133 Cal.App. 698, 700, 24 P.(2d) 883. The fact of the previous conviction was therefore properly before the jury, and we find no misconduct on the part of the district attorney in alluding thereto in his argument.

[5] We need not discuss the question of whether it was misconduct on the part of the district attorney to introduce that portion of appellant's statement concerning his prior conviction or whether the trial court was in error in "admitting" that portion of said statement. It will be noted that the trial court promptly struck out the disputed portion of the statement and instructed the jury to disregard it. But assuming, without deciding, that there was misconduct and error as claimed by appellant, it appears that appellant thereafter took the stand as a witness, and that testimony concerning the entire disputed portion of the statement then became admissible and was admitted. The situation presented is somewhat similar to that discussed in People v. Booth, 72 Cal. App. 160, 166, 236 P. 987, 989, where the court said: "The district attorney had, under these circumstances, no right to refer to the prior conviction, as the defendant had not at that time chosen to take the stand in his own behalf. Pen.Code, § 1025. Here, however, he later became a witness on his own behalf, and it then became proper to ask him if he had ever been convicted of a felony for the purpose of impeachment. 8 Cal.Jur., p. 647. The question was asked, and the defendant admitted that he had suffered such a conviction. Erroneous admission of evidence of a fact subsequently proved by defendant's testimony is harmless." In the present case, the misconduct and error, if any, cannot be considered prejudicial under the circumstances.

The judgment of conviction and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

17 Cal.App.2d 202

HELLER INV. CO. v. SOUTHERN TITLE & TRUST CO. et al.

Civ. 1978.

District Court of Appeal, Fourth District, California.

Oct. 22, 1936.

Hearing Denied by Supreme Court Dec. 21, 1936.

1. Constitutional law 🔑154(2)

Constitutional provision reserving to state right to alter or amend state laws governing corporations *held* to give state right to change contract of stockholder with corporation as against contention that authorization of such changes would violate State and Federal Constitutions (Const.Cal. art. 1, §§ 13, 16, art. 12, § 1; Const.U.S. art. 1, § 10; Amend. 14).

2. Corporations 🔑38

Legislature has power to authorize changes in corporate stock structure without provision for voluntary exchange of stock, or that new stock be offered for sale to existing stockholders before sale to public (Const. art. 12, § 1).

3. Corporations 🔑38

Corporation *held* authorized to change corporate structure, decrease amount of common stock, and issue preferred stock having potential control of voting power of corporation, thereby changing voting rights of common stock theretofore issued (Civ.Code, §§ 348, 362, 362a, 362b, as amended by St.1933, pp. 1386, 1393–1395; Const. art. 12, § 1).

4. Corporations 🔑38

Corporation changing capital stock structure *held* entitled to enforce compulsory exchange of stock certificates without consent of all stockholders (Civ.Code, § 326b, as amended by St.1933, p. 1374; § 348a, as amended by St.1933, p. 1387; Const. art. 12, § 1).

5. Corporations ⚷38

On corporation's change of capital stock structure by issuance of new preferred stock, corporation *held* not required to offer preferred stock to stockholders before selling to others in absence of provision in articles of incorporation requiring directors to offer to stockholders any shares of stock before selling them to nonstockholders (Civ.Code, § 297; Const. art. 12, § 1).

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the Heller Investment Company against the Southern Title & Trust Company, formerly the Southern Title Guaranty Company, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Stearns, Luce, Forward & Swing, of San Diego, for appellant.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondents.

MARKS, Justice.

The individual defendants are officers of the corporate defendant. Plaintiff does not complain of the judgment in their favor. We will therefore treat the case as though the corporate defendant were the sole respondent. Plaintiff and defendant are corporations organized under the laws of the state of California. Plaintiff owned 479 shares of the common capital stock of the defendant which stock had a par value of $100 a share. The business of defendant was such that it came under the banking department and also the division of insurance of the department of investments of California.

In 1933 the assets of defendant became impaired, and in order to enable it to continue in business it was necessary to secure new and additional capital. At that time it had an authorized capital of $500,000, divided into 5,000 shares of common stock of the par value of $100 each. There was issued and outstanding 4,100 shares of this stock.

Proceedings were had to amend its articles of incorporation fixing its authorized capital stock at $550,000 divided into 3,500 shares of common stock of the par value of $100 each, and 8,000 shares of preferred stock of the par value of $25 each. The preferred stock is entitled to receive annual 6 per cent. cumulative dividends and may be retired after one year from the date of its issue upon payment to its owners of its par value and all accrued and unpaid dividends. Each share of stock of each class is given one vote, so it is apparent that the potential control of the corporation as far as the voting power of the stock is concerned passed from the common to the preferred stockholders.

At the meeting of the stockholders held for the purpose of acting upon the proposed changes in the stock structure of the corporation 4,071 shares out of the total of 4,100 issued shares were represented. 3,374 shares were voted in favor of the change and 697 shares against it. The statement is made in the brief of defendant, and it is not disputed, that plaintiff is the only shareholder now opposing the change.

As the number of shares of the common stock were reduced, the corporation required the exchange of such stock on the basis of seven-tenths of one share of the new stock for each share of the old stock. Plaintiff refused to make this exchange, demanded the issuance to it of 479 shares of the new common stock in exchange for its surrender of its like number of shares of the old stock and upon the refusal of defendant to issue the new stock in that amount plaintiff instituted this action to compel its issuance. The trial court gave judgment for defendant, and this appeal followed.

The propositions relied upon by plaintiff for a reversal of the judgment may be thus briefly summarized: That defendant cannot take away from plaintiff three-tenths of its capital stock without its consent and without compensation; that the right of a stockholder in a corporation to vote his stock is a property right that cannot be abridged without his consent and without compensation; that the proceedings changing the stock structure of defendant were void, as none of the resolutions adopted by either the directors or stockholders in the process of the change required the defendant to first offer for sale the preferred stock to the existing common stockholders before offering it for sale to others; that under subdivision 1 of section 348a of the Civil Code (as amended by St.1933, p. 1387) the defendant cannot force the exchange of stock and that an exchange must be voluntarily made, if made at all.

In arguing the first two assignments of error plaintiff cites sections 13 and 16 of article 1 of the State Constitution, and the Fourteenth Amendment to the Federal Constitution. From plaintiff's argument it would appear that section 10 of article 1 of the Federal Constitution would be a more appropriate citation. Plaintiff bases its arguments on the contentions that the proceedings in question deprived it of valuable property rights without compensation and violated a contract between it and the corporation, and, upon the provisions of subdivision 1 of section 348a of the Civil Code under which the argument is made, that the exchange of a given number of shares of the old stock for a lesser number of shares of the new stock can only be made when voluntary and when it is consented to by all the stockholders. It further argues that the new preferred stock cannot be authorized without the consent of all the stockholders.

In 1933 the Legislature recast the corporation laws of the state of California (Stats. 1933, chap. 533, p. 1358). Sections 294, 297, 326b, 348, 348a, 362, 362a, and 362b of the Civil Code seem to be controlling here and fully uphold the judgment of the trial court, if they do not violate the provisions of the State or Federal Constitutions. It is not suggested that the proceedings taken by defendant to change its stock structure violated any of these Code sections, if the exchange of stock need not be voluntary, and, if the directors and stockholders, in the resolutions passed, need not require that the new preferred stock be offered for sale to the existing stockholders before offering it for sale to others. It should be observed that while none of the resolutions required that the preferred stock be first offered to the stockholders, the permit to sell this stock issued by the insurance commissioner contained such a requirement and the stock was actually offered to the common stockholders, none of whom purchased any of it. Pursuant to the permit 5,120 shares of the preferred stock were thereupon sold to others at its par value of $25 per share and the full purchase price of $128,000 was paid into the treasury of the corporation.

[1] In each of the two Constitutions of California (Article 4, § 31, Const.1849; article 12, § 1, Const.1879) there was reserved to the state the right to alter or amend the state laws governing corporations. This reserved power has been frequently discussed and has, without exception, been upheld and construed as giving the state the right to change the contract of a stockholder with a corporation. A late decision of the Supreme Court on that question (Rainey v. Michel, 57 P.(2d) 932, 942, 105 A.L.R. 148) would seem to be controlling here and obviate the citation of other California authorities. In 1931 (Stats.1931, p. 338) the Legislature passed an act changing the prior liability of a stockholder in a state bank in relation to payment of the debts of the corporation. The defendant Michel made the same argument that is being made by the plaintiff in the instant case and urged that the Bank Act of 1931 violated the Federal and State Constitutions by changing the obligations of the contracts of stockholders who acquired their stock prior to the effective date of the present bank act. In disposing of this contention in the Rainey Case, the Supreme Court said:

"The next point urged is based upon one of the admitted facts in this case, namely, that all of the stock held by the defendant upon which liability has been imposed was acquired by him prior to the effective date of the statute—August 14, 1931. It is contended that to impose liability on a stockholder, based upon ownership of stock owned prior to the passage of the statute imposing the liability, is to impair the obligation of the stockholder's contract in violation of article 1, § 10, of the United States Constitution, and article 1, § 16, of the State Constitution. The contract referred to must be deemed to be the contract between the stockholder and the corporation. The question then is, Can the Legislature, in the absence of constitutional prohibition, lawfully impose a liability on the ownership of stock which, when acquired, was not subject to such liability? Section 1 of article 12 of the State Constitution, both before and after its amendment in 1930, expressly provided: 'All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed.' This section contains a complete answer to the question now being considered, and this is so, even if it be assumed that the laws in force at the time the stock was purchased are read into and become a part of the stockholder's contract with the corporation, for the very obvious reason that the provision above quoted must be read into the charter of every corporation. The contract between the stockholder and the corporation is subject to the exercise of this reserved power. A case in point is McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am.St.Rep. 149, an action against the stockholders of a bank under the general stockholders' liability act then existing.

The stockholders defended on the ground, among others, that the bank was organized at a time when the statute under which it was formed provided for no such liability as to them. It was held that there was no merit in the defense. Speaking of the power of the Legislature to change the contract between the stockholder and the corporation, the court stated (111 Cal. 57, at page 66, 43 P. 418, 420, 52 Am.St.Rep. 149):

" 'It is objected, however, that, if the provisions of the Code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect.

" 'The answer to this objection is that the constitution of 1849 provided: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." Const. art. 4, § 31.

" 'Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States.'

"The principles above enunciated are in accord with the decisions of the United States Supreme Court and with the overwhelming weight of authority in other jurisdictions. Sherman v. Smith, 1 Black (66 U.S.) 587, 17 L.Ed. 163; Barth v. Pock, 51 Mont. 418, 155 P. 282; Melaven v. Schmidt, 34 N.M. 443, 283 P. 900; Williams v. Nall, 108 Ky. 21, 55 S.W. 706; Somerville v. St. Louis Min. & Mill. Co., 46 Mont. 268, 127 P. 464, L.R.A.1915B, 811; Maxwell v. Thompson, 232 N.Y. 619, 134 N.E. 596; Bank of Blytheville v. State, 148 Ark. 504, 230 S.W. 550.

"It is true that some of the cases cited by the defendant hold that a new liability cannot lawfully be imposed on a stockholder by a legislative enactment passed after he has purchased his stock, but an examination of most of those cases discloses that they were decided in states where, when the stock was purchased, there was no constitutional provision reserving in the Legislature the power to alter or amend or repeal the existing laws as to corporations. See, for example, Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N.W. 798, L.R.A.1917A, 1223; Schramm v. Done, 135 Or. 16, 293 P. 931; Hammons v. Watkins, 33 Ariz. 76, 262 P. 616. Such cases are not in point."

The Constitution of New York contains a provision similar to that found in the Constitution of California reserving to the state the power to change its laws governing corporations. The case of Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N.Y.S. 357, 358, is of importance here. In that case a corporation having only common stock proposed to issue five million dollars worth of preferred stock. The plaintiff, a dissenting common stockholder, maintained that the preferred stock could not be issued without the unanimous consent of all the stockholders, and that doing so violated constitutional provisions protecting the sanctity of contracts. In deciding this question, the New York court said:

"It was established in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629, that a charter from the state to a private corporation created a contract, and that the Constitution of the United States, which forbids any state passing any law impairing the obligation of contracts, prevented a change by legislative enactment of the charter so issued. It was feared that the operative effect of such holding would be to build up corporate power, which might become so strong as to be a menace to the exercise of governmental powers. To forestall such result, nearly all of the states of the Union have provided, either by statute or constitutional provision, a limitation upon corporate power by reserving the right to alter or repeal the charter granted to any corporation. Such is the provision of the Constitution of this state (Const. art. 8, § 1), and it had also been the subject of constitutional provision and statutory enactment for a long time prior to the existence of the present Constitution. Does this legislation, therefore, fall within the reserved power of the Legislature to alter or repeal? If it does, the proposed issue of stock is authorized by law. If it does not, there is no authority therefor, save upon the consent of all the shareholders. * * *

"The distinction which exists between issuing an obligation of the corporation for the purpose of borrowing money and issuing preferred stock for the same purpose is that in the latter the charge upon incomes is made perpetual, while in the former it may be discharged by payment. This difference, however, does not militate against the fact that resort may be had to an issue of preferred stock for the purpose of raising money, and that it is practically effectual for such a purpose. The power invoked, treated as a mere method of raising money, is not different from that which authorizes borrowing money in any other form. As we have already seen, the imposition of an additional obligation, the extension of corporate purpose whereby the value of the stock is impaired, and creating inequality in shares of stock, have all been supported as a valid exercise of legislative power, which does not infringe upon vested rights or rights of contract. It cannot be gainsaid but that the issue and sale of preferred stock is a method by which money can be raised, and, when authorized by law, is a perfectly legitimate method of providing a corporation with funds, and, it may be added, is frequently resorted to. The corporation receives the benefit of the money, the proceeds of the preferred stock. In this increment the holders of the common stock share equally, and each holder of the common stock stands upon an equal plane in respect thereto. It may not be the best method of raising money; but, when authorized by law, it certainly is a method which the corporators may use, and no stockholder would have ground for complaint. Whether it be usually resorted to for such purpose or not is quite beside the question. That is one of power; and, if that exist, whether the method be good or bad is not of consequence. * * * We reach the conclusion, therefore, that this act is a valid exercise of legislative power, and that it applies to corporations existing at the time of its passage."

To the same effect are Salt Lake Automobile Co. v. Keith-O'Brien Co., 45 Utah, 218, 143 P. 1015; General Investment Co. v. American Hide & Leather Co., 98 N.J. Eq. 326, 129 A. 244, 44 A.L.R. 60; Wasson v. Planters' Bank & Trust Co., 188 Ark. 343, 65 S.W.(2d) 528, 90 A.L.R. 141.

In the case of Page v. Whittenton Mfg. Co., 211 Mass. 424, 97 N.E. 1006, it appears that the assets of the defendant corporation had become so impaired that it was facing the necessity of either obtaining additional capital or of liquidating. It was decided to reduce the number of shares of common stock and increase the number of shares of preferred stock to obtain the needed capital to enable the corporation to continue in business. The Supreme Court of Massachusetts held the proposed plan legal as it was approved by a majority of the stock as provided in the statute of the state and that it did not interfere with the rights of the objecting minority stockholders. It was also held that the change in voting power of the common stock did not infringe upon the rights of the old stockholders. See, also, In re Sharood Shoe Corporation (D.C.) 192 F. 945.

The case of Attorney General ex rel. v. Looker, 111 Mich. 498, 69 N.W. 929, 931, 56 L.R.A. 947, involved the right of the state under a reserved power in the Constitution similar to that of California to pass a law changing the voting power of the minority stock in an existing corporation from the power specified in its articles of association. In deciding that question the Supreme Court of Michigan said: "It is claimed by the counsel that the method of electing the directors of the Michigan Mutual Life Insurance Company was made in pursuance of the statute, and constitutes a contract between the stockholders of the company, which the legislature cannot set aside; and it is asserted that the minority stockholders law changes the contract between the stockholders, and is therefore within the constitutional provision which forbids impairing the obligation of contracts. It would seem to be a complete reply to this view to say that the stockholders knew when they entered this corporation that the constitution reserved to the legislature the right to amend, alter, or repeal the law under which the corporation was organized. The stockholders are as much bound by this constitutional provision as though it was contained in the articles of incorporation. Parker v. Railroad Co., 109 Mass. 506. In this case it was said: 'Many cases have arisen in this court involving the construction and application of the power to amend or alter charters. The reservation of power is broad and comprehensive. Whatever may be its limitations, it at least reserves to the legislature the right to make any reasonable amendments, regulating the mode in which the franchise granted shall be used and enjoyed, which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted.' South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Shields v. Ohio, 95 U.S. [319] 324 [24 L.Ed. 357]. In the case of Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U.S. [258] 270, 13 S.Ct. 90 [36 L.Ed. 963], it was held, in an opinion written by Justice Harlan: 'A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but, where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of said privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation.'"

[2] From the foregoing authorities it seems clear that under the power of control over corporations reserved to the state in the Constitution, the Legislature has power to authorize the exact changes that were made in the stock structure of the defendant. We must, then, examine the statutes to determine whether the changes made are authorized by law.

[3] The question of the legality of the change of the voting rights of the common and the preferred stock is settled by the provisions of the Civil Code. Sections 348, 362, 362a, and 362b of that Code (as amended by St.1933, pp. 1386, 1393–1395) authorize and provide the method for amendment of the articles of incorporation of a corporation. The amended articles may reduce the stated capital, change the preferences of or restrictions on any class of outstanding stock and change its voting power. Section 348a of the Civil Code (as amended by St.1933, p. 1387) provides that: "Adjustment of outstanding par value shares to correspond with the stated capital of a corporation as reduced may be effected: * * * (4) In any other way not repugnant to law."

Section 294 of the Civil Code (as amended by St.1933, p. 1362) provides in part as follows: "Stock corporations may issue one or more classes and/or series of shares, any of which classes or series may be with par value or without par value, and with full, limited or no voting rights, and with such other preferences, rights, privileges and restrictions as are stated or authorized in their articles."

It is clear from the foregoing sections that a corporation may change its corporate stock structure, may increase or decrease its capital stock and may deny to a class of stock any voting privileges. As we have concluded that these sections are valid enactments under the reserved power of the Constitution (Rainey v. Michel, supra) it follows that the defendant corporation was fully authorized to change its corporate structure, decrease the amount of its common stock and issue preferred stock having the potential control of the voting power of the corporation.

[4] As we have seen, section 348a of the Civil Code (as amended by St.1933, p. 1387) provides that there may be an adjustment of the outstanding par value shares of capital stock to conform to a new reduced capital structure "in any other way not repugnant to law." Thus, if the law provides for the compulsory exchange of the old stock for the new, plaintiff's argument that the exchange can only be made when it is voluntary and consented to by all stockholders, must fail.

Section 326b of the Civil Code (as amended by St.1933, p. 1374) provides in part as follows: "When the articles are amended in any way affecting the statements contained in the certificates for outstanding shares, or it becomes desirable for any reason, in the discretion of the board of directors, to cancel any outstanding certificate for shares and issue a new certificate therefor conforming to the rights of the holder, the board of directors may order any holders of outstanding certificates for shares to surrender and exchange them for new certificates within a reasonable time to be fixed by the board of directors."

Under the plain language of this section the corporation can enforce a compulsory exchange of the certificates and the argument that the exchange of the old common stock of plaintiff for the new stock must be voluntary, must fail.

[5] On the question of the necessity of offering the preferred stock to the stockholders before selling it to others, we find that section 297 of the Civil Code provides as follows: "Unless otherwise provided in the articles, the board of directors may issue shares, option rights, or securities having conversion or option rights, without first offering the same to shareholders of any class or classes."

No provision in the articles of incorporation of defendant has been called to our attention which requires its directors to offer to the stockholders any shares of stock before selling any of them to nonstockholders.

It follows that it was not necessary to incorporate in the resolutions passed by either the directors or stockholders changing the stock structure, any provision requiring that the preferred stock be offered to the stockholders before selling it to others.

It therefore appears that the Legislature has authorized and legalized the exact changes made by the defendant corporation in altering its stock structure. As the lawmakers of the state had the authority so to do under the reserve power in the Constitution, plaintiff has no valid grounds of complaint.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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17 Cal.App.2d 122

PEOPLE v. WILLIAMS.

Cr. 1918.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1936.

1. Witnesses ⇨246(1)

Unobjectionable questions asked witnesses by trial court in robbery prosecution for purposes of record *held* not error.

2. Criminal law ⇨698(2)

Trial court's sustaining objections to questions asked by defense when prosecution had not interposed objection *held* proper (Code Civ.Proc. § 2066).

3. Criminal law ⇨511(4)

In robbery prosecution, testimony that certain articles resembled articles seen at holdup *held* sufficient identification of articles to constitute corroboration of accomplice's testimony.

4. Criminal law ⇨761(2)

In robbery prosecution, instruction that testimony concerning circumstances surrounding return of stolen chain to owner by attorney who subsequently represented defendant could be considered as corroboration of accomplice's testimony *held* not error as against contention that instruction assumed that attorney represented defendant when chain was delivered to owner.

5. Criminal law ⇨822(1)

All instructions must be considered together.

6. Criminal law ⇨761(9)

In robbery prosecution, instructions referring to participant in robbery as "the accomplice" *held* not error, where uncontradicted evidence showed participant to be an accomplice, and question whether he was accomplice of defendant was left to jury.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Louis Williams was convicted of first degree robbery, and he appeals.

Affirmed.

Charles Reagh, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant and two others, George Woodbur and Lester Leuty, were charged in an information filed by the district attorney with having committed robbery. All of the defendants pleaded not guilty. The trial commenced on June 25, 1936. Before that date the defendants George Woodbur and Lester Leuty withdrew their pleas of not guilty and entered a plea of guilty. The defendant Louis Williams only went to trial. The jury returned a verdict of guilty as charged in the information and determined the degree to be first degree. The defendant made a motion for a new trial and a motion in arrest of judgment. Both motions were denied. He was sentenced to state prison, and thereupon he appealed from the order denying his motion for a new trial, from the order denying his motion in arrest of judgment, and from the final judgment.

He claims he did not have a fair trial and specifies the particulars.

On March 17, 1936, Dr. Lew E. Wallace, a dentist, was held up by two young men while he was walking near his home on Monterey boulevard in San Francisco. The act occurred at about 9:30 p. m. The holdup occurred in the middle of the block where the two men stepped out from behind some shrubbery. One man held a gun and told him to get into the shrubbery, which he did, and there he was searched and robbed by the two men. One of them admonished the doctor to keep quiet or he would bat the doctor in the jaw. While the holdup was taking place, a third man in an automobile which was parked nearby also kept the doctor covered with a gun. From the doctor was taken a gold watch, a gold chain, a gold knife, an elk's tooth, a wallet containing currency, a card case containing lodge receipts, a Knight Templar's badge, a pen flashlight, a fountain pen, a gold pencil, and about $25 or $30. After taking these things from the doctor, the men told him to get along, whereupon he proceeded to his home. At the trial the doctor testified that a gun shown to him resembled the gun that had been used by one of the men who held him up, and that another gun shown to him resembled the gun used by the man in the automobile. He also identified a watch shown to him as his watch; also a chain, a Knight Templar badge, a penknife, a gold pencil, and a pen flashlight. The chain was given to him immediately prior to holding the preliminary hearing. It was given to him by Mr. Reagh. The doctor also testified that a picture of a Chevrolet car shown to him represented a car that was similar to the one at the scene of the hold-up. He further testified that he could not identify the person who remained in the automobile and held a gun on him, but he did identify the two men who stood on the ground and held him up as being Leuty and Woodbur. Dr. Wallace's nephew identified the pen flashlight as resembling one he had given to his uncle. Robert Thompson, a former employer of the defendant, identified the gun which Dr. Wallace had testified resembled the one held by the man in the automobile as being a gun which he had sold to the defendant about the middle of February, 1936. Corporal Meyer testified he was in a pawn shop when George Woodbur, one of the codefendants, tried to pawn a Knight Templar badge and a gold penknife. He identified both of those articles when shown to him in the courtroom. On the same day that George Woodbur attempted to pawn said articles the corporal arrested this defendant and took from his possession a small pen flashlight. At that time the defendant stated he had bought the flashlight at the Levin store at Oak and Van Ness avenue for twenty cents. After arresting the defendant, he was taken to the police station and was accused of using the Chevrolet car in the robbery, but the defendant denied using it. He stated it was possible somebody could have driven the car and, when asked the name of such person, he gave the name of a dead man. Mr. Gray, the sales manager of Levin's store, testified his store never carried such an article as the pen flashlight. Inspector Hanson testified that on going to Leuty's home he found both guns and the watch. Lester Leuty, one of the codefendants, took the stand and related how he and Woodbur identified the guns in evidence and testified how the robbery was committed. He also testified how the loot was divided and that the defendant received the pen flashlight and the watch chain. He further testified the gold pencil and Knight Templar badge were given to Woodbur. Dr. Wallace testified that Mr. Reagh returned the chain to him at the preliminary examination. As we understand the record, the preliminary examination of all three defendants was set for the same hour. Mr. Reagh appeared at that time as the attorney for Woodbur and Leuty and waived a preliminary examination in their behalf. Later he appeared as attorney for Williams ex gratia and conducted the examination. Shortly before the examination commenced he handed to Dr. Wallace the chain. In this connection it should be added that Leuty testified Williams had told him the doctor specially wanted his chain back, so Williams had given it to a girl friend of his to take to Mr. Reagh to be given to Dr. Wallace. Mr. Reagh testified the chain was brought to his office by a man who left it there. No questions were asked, and he did not know the man's name.

[1] The defendant complains because the trial court propounded many questions to the several witnesses. The record shows it did so for the purposes of the record. It is not claimed that any single question was objectionable. A careful inspection of the record disclosed no error as to any question propounded by the court.

[2] It is also claimed the trial court sustained objections to questions asked by the defense when the prosecution had not interposed an objection. Such fact, standing alone, was not error, but it was quite the proper practice. Code Civ.Proc. § 2066; 27 Cal.Jur. 62; People v. Bartley, 12 Cal. App. 773, 777, 108 P. 868; People v. Dad, 51 Cal.App. 182, 185, 196 P. 506; People v. Tomasovich, 56 Cal.App. 520, 528, 206 P. 119. Otherwise the defendant does not claim any single one of the objections was erroneously sustained.

Finally it is asserted that the trial court "asked more questions than either counsel." In the first place, the statement is a decided misrepresentation of the record. In the second place, under all of the circumstances surrounding the trial, we fail to see how the trial court could have done its duty if it had not asked every question which it propounded.

[3] As stated above, Lester Leuty testified for the prosecution. Manifestly he was an accomplice. For corroboration the prosecution relied to a great extent on the stolen articles produced by it, identified by the witnesses, and offered in evidence. In so far as we have noticed, no single witness testified positively in giving testimony of and regarding the identification of any single article. The testimony was to the effect that a certain article was like or that it resembled the one seen at the holdup. The defendant now contends that the identification was not so complete as to constitute corroboration. Under all of the circumstances, we think the identification of each article was sufficient and that the trial court did not err in submitting the case on that theory.

[4, 5] The trial court gave the jury an instruction that it could consider the testimony regarding "the chain" as corroboration. The defendant claims it was prejudicial error because it assumed as a fact that Mr. Reagh was the attorney for this defendant at the moment he delivered the chain to Dr. Wallace. The instruction was not so worded. The uncontradicted evidence was that Mr. Reagh, a few moments after the said delivery, commenced to act as the defendant's attorney and is still so acting. The instruction contained no word at variance with such facts. Moreover, all of the instructions are to be considered together. In many different places the trial court instructed the jury that all questions of fact were for the determination of the jury and not for the determination of the court and that the court was not expressing any opinion thereon.

[6] In other instructions the trial court referred to Leuty as "the accomplice." The defendant asserts that was assuming a fact. It was, but properly so. The uncontradicted evidence showed Leuty to be an accomplice. No word in the instruction was to the effect that he was the accomplice of this defendant. That question was left for the determination of the jury.

We find no error in the record. The judgment and orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

7 Cal.2d 599

LOCKE v. MITCHELL et al.

L. A. 15823.

Supreme Court of California.
Oct. 29, 1936.

1. Libel and slander 🔑6(2)

Letter sent by officers of League of California Municipalities to officials of "member Cities of League," reporting discharge of plaintiff as secretary-manager of league for misappropriation of league's funds, would be libelous per se if letter was false and unprivileged (Civ.Code, § 45).

2. Libel and slander 🔑93

Privilege must be pleaded as an affirmative defense to action for libel, except where existence of privilege is disclosed on face of complaint (Civ.Code, §§ 45, 48; § 47, subd. 3).

3. Libel and slander 🔑51(1)

In action for libel against officers of League of California Municipalities for sending letter to officials of "member Cities of League," reporting discharge of plaintiff as secretary-manager of league for misappropriation of league's funds, letter, if without malice, was a "privileged communication" to an interested person, within meaning of statute, and hence malice became gist of action and had to exist as a fact before cause of action would lie (Civ.Code, § 47, subd. 3).

[Ed. Note.—For other definitions of "Privileged Communication (In Libel and Slander)," see Words & Phrases.]

4. Libel and slander 🔑83

While, in case of false and unprivileged publication, libelous per se, malice is implied, and lack of it is matter of defense which need not be pleaded, where complaint discloses case of qualified privilege, no malice is presumed, and, in order to state cause of action, pleading must contain affirmative allegations of malice in fact (Civ.Code, § 47, subds. 3, 4, 5, and § 48).

5. Pleading 🔑8(3)

Complaint alleging that defendant officers of League of California Municipalities sent letter to officials of "member Cities of League," reporting discharge of plaintiff as secretary-manager of league for misappropriation of league's funds, and that such charges in letter were false, malicious and scandalous, *held* insufficient to state cause of action for libel, in absence of allegations that malice existed at time communication was published; allegation that charges were malicious being mere conclusion (Civ.Code, §§ 45, 47, 48).

6. Pleading 🔑8(3)

Words "malice" and "maliciously," in complaint in libel action, standing alone, are insufficient to charge malice in fact (Civ. Code, § 48).

The word "malicious," as used in complaint in libel action, evidently applies to matter published and not the act of publishing, and denotes merely the absence of lawful excuse, and to say that defamatory words are "malicious" in that sense means that they are unprivileged, not employed under circumstances which excuse them.

[Ed. Note.—For other definitions of "Malicious," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by William J. Locke against James H. Mitchell and another. From a judgment of dismissal after having sustained a general demurrer without leave to amend, plaintiff appeals.

Affirmed.

For prior opinion, see 54 P.(2d) 505.

Kirkbride, Wilson & Brooks, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellant.

Clive W. Johnson and Paul J. Otto, of Los Angeles, for respondent James H. Mitchell.

W. L. Pollard and S. L. Kurland, both of Los Angeles, for respondent Gordon Whitnall.

EDMONDS, Justice pro tem.

A general demurrer to plaintiff's complaint having been sustained without leave to amend, plaintiff appeals from the judgment of dismissal subsequently entered.

The action is one for libel, and is based upon a letter alleged to have been written and published by the defendants. The complaint alleges that plaintiff is an attorney who for more than twenty years before the publication of the letter complained of specialized in municipal corporation law and served either as assistant secretary or secretary of the League of California Municipalities, an association composed of more than 100 incorporated cities and towns in this state, and that during the larger part of said time plaintiff acted as special legal advisor to many of the cities. The complaint further alleges that without any valid reason therefor plaintiff was discharged from his office as secretary by the directors of the league, and that thereafter defendants "maliciously composed of and concerning plaintiff, false and defamatory matter in the form of a letter" and published the letter by causing it to be mailed to mayors and city officials of many cities belonging to the league.

This letter, quoted in full in the complaint, appears to have been written on stationery of the League of California Municipalities, where also appears under the title of president, the name of defendant Mitchell. It is addressed to "Honorable Mayors and City Officials of the Member Cities of the League of California Municipalities," under date of March 24, 1932, and is signed: "James H. Mitchell, President League of California Municipalities." In it Mitchell states that the board of directors of the league on March 12th was compelled, "in view of the facts presented," to ask for plaintiff's resignation.

As reasons for demanding the resignation, the letter states that during plaintiff's absence from the city a Mr. Levy came into possession of a check for $190 payable to the league; that plaintiff by wire authorized Levy to indorse the check in the name of the league; that Levy did indorse it and used the proceeds; and that the league has never received that part of the money to which it was entitled. The letter discusses other checks which, it states, although payable to the league, were indorsed and cashed, the major portion of the proceeds being used for other than league purposes. It also states that "the testimony given to the Board showed without contradiction that of the various sums appropriated as aforesaid, there is at least now a net sum of $202.40 unpaid," and that knowledge of the transactions came "from sources other than the office of the Secretary-Manager." The letter also mentions a publishing company with which the plaintiff was connected during all of the time mentioned, and implies that the transactions of this company with the league were questionable, if not dishonest.

[1] Reading the letter as a whole there is no doubt that it charges plaintiff with dishonest conduct and that its publication had a "tendency to injure him in his occupation"; hence under section 45 of the Civil Code, which defines "libel" as a "false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy * * * or which has a tendency to injure him in his occupation," the letter would be libelous per se if both false and unprivileged. Bates v. Campbell, 213 Cal. 438, 2 P.(2d) 383; Layne v. Kirby, 208 Cal. 694, 284 P. 441; Maher v. Devlin, 203 Cal. 270, 263 P. 812.

[2, 3] Privilege must be pleaded as an affirmative defense to an action for libel (Gilman v. McClatchy, 111 Cal. 606, 44 P. 241), except where the existence of the privilege is disclosed on the face of the complaint. Maher v. Devlin, supra. Here the face of the complaint discloses a clear case of qualified privilege under section 47, subdivision 3, of the Civil Code, which provides that a privileged publication is one made "in a communication, without malice, to a person interested therein * * * by one who is also interested, or * * * by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or * * * who is requested by the person interested to give the information." In other words, the letter here, *if without malice,* was a privileged communication to an interested person within the meaning of the quoted code section. In such a case malice becomes the gist of the action and it must exist as a fact before the cause of action will lie.

[4] Furthermore, while in the case of a false and unprivileged publication, libelous per se, malice is implied, and lack of

it is a matter of defense, which need not be pleaded (Gilman v. McClatchy, supra; Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1), this is not true of a qualified privilege, for section 48 of the Civil Code expressly declares that "malice is not inferred from the communication or publication" in the cases provided for in subdivisions 3, 4, and 5 of section 47. Hence, where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact. Taylor v. Lewis, 132 Cal.App. 381, 22 P.(2d) 569, 571; Gunsul v. Ray, 6 Cal.App.(2d) 528, 45 P.(2d) 248; Morcom v. San Francisco Shopping News, 4 Cal.App.(2d) 284, 40 P.(2d) 940.

[5] The complaint in this case sets forth no facts showing that malice existed at the time the communication was published. The allegations that defendants "maliciously composed of and concerning plaintiff, false and defamatory matter in the form of a letter" and "that said charges, made and published in said letter * * * were and are false, malicious and scandalous * * *", state the mere conclusion of the pleader. Taylor v. Lewis, supra. In the case last cited it is said: "Does the complaint herein allege such malice? In our opinion it does not. The allegation that the article was 'maliciously published' would seem to be but a mere conclusion of the pleader, unless the article itself lends support to such conclusion."

[6] In the present case the letter itself does not support the conclusion that it was maliciously published. On the contrary, its tenor indicates that it was published with regret after a partial investigation which led the writer to believe that the charges made were true. The pleading does not allege that the defendants knew the charges were false or had any reason to believe they were false. The pleading, of course, does use the words "malicious" and "maliciously"; but these words, standing alone, are not sufficient to charge malice in fact. The rule as stated in Henry v. Moberly, 6 Ind.App. 490, 33 N.E. 981, 983, 984, is as follows: "The word 'malicious,' as used in the complaint evidently applies to the matter published, and not to the act of publishing. * * * The word 'malicious' 'denotes merely the absence of lawful excuse; in fact, to say that defamatory words are malicious in that sense means that they are unprivileged, not employed under circumstances which excuse them.' Ogden, Sland. & L. (2d Eng.Ed.) 270; Townsh. Sland. & L. (4th Ed.) p. 66. The use of the word in that sense is overcome by the statement of the facts and circumstances, which show there was an excuse, in this: that the occasion for the uttering and the publishing of the words in controversy was privileged. * * * When the complaint discloses that the occasion was privileged, the allegation that the language was false and malicious is not sufficient, but in such case the complaint must further show that the defendant acted maliciously in publishing it. In this case, in view of the averments contained in the complaint * * * the appellee should have further alleged either, in express terms, that appellant acted maliciously, or she should have averred facts which would have been the equivalent of such allegations." So in the present case we conclude that the complaint fails to allege malice in fact on the part of the defendants.

Our attention is called to certain language in Stevens v. Snow, 191 Cal. 58, 64, 65, 214 P. 968, 970, which appears to be at variance with the well-established rule concerning the pleading of privilege. The court there said: "The rule that privilege, to be available as a defense, must be pleaded, is subject to the single exception that when it appears upon the face of the complaint it may be availed of by demurrer. [Citing cases.] But this exception is limited to cases of absolute privilege under subdivisions 1 and 2 of section 47, Civil Code." The last sentence is unsupported in the opinion by any citation of authority and was unnecessary to the decision, as the court was considering a communication which was both libelous per se and unprivileged.

As the complaint in the present case fails to state a cause of action, the demurrer was properly sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.

BOYER v. TRAVELERS INS. CO.

S. F. 15716.

Supreme Court of California.

Oct. 30, 1936.

Rehearing Denied Nov. 25, 1936.

1. Insurance ⚷175

Group life policy, providing that employee failing to file written application for insurance on or before completion of one month of service would be insured from fourteenth day of calendar month following date of application provided employee was actually at work on such day, *held* to permit insurance to become effective as to any employee only if health permitted him to be actually at work on specified date following making of application.

2. Insurance ⚷665(2)

Evidence *held* insufficient to support judgment granting recovery on group life policy under which automobile salesman had applied for insurance on ground that, while in hospital on date of his death, automobile salesman was "actually at work" as required by policy in order for insurance to become effective, since for employee to have been "actually at work" it would have been necessary for him to have been doing some of the things for which he was employed.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Edna K. Boyer against the Travelers Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

For prior opinion of the District Court of Appeal, see 57 P.(2d) 1328.

O'Connor, Fitzgerald & Moran, Leo R. Friedman, and Joseph T. O'Connor, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondent.

PER CURIAM.

A hearing in this court was granted, after decision by the District Court of Appeal, in order that we might give further consideration to the question of whether the employee hereinafter mentioned was "actually at work," within the meaning of that phrase as used in a policy of group insurance, on July 14, 1933, or the day on which he died.

After further and careful consideration, we are satisfied with the opinion rendered by the District Court of Appeal, speaking through Mr. Justice Spence, and we hereby adopt that opinion as the opinion of this court as follows:

"This action was brought to recover the sum of $4,000 alleged to have become due to plaintiff from defendant under a policy of group life insurance. Upon a trial by jury, plaintiff had judgment and defendant appeals.

"The main question raised upon this appeal is whether the insurance under the group policy had become effective upon the life of Mr. Boyer at the time of his death on July 14, 1933. His employer, Edmund Lowe Motors Company, had previously obtained the group policy from defendant. Mr. Boyer made written application for insurance thereunder on July 5, 1933. He had made no previous application. At that time, he had been an employee for more than one month and less than four months. Said policy provided: 'Each such Employee who fails to file written application for this insurance on or before the completion of one month of service, will be insured from the fourteenth day of the calendar month next following the date on which he files such application provided he does so on or before the completion of four months of service *and is actually at work on said day, or if not actually at work, from the date on which he returns to work.*' (Italics ours.) It may be stated that employees applying for insurance after the completion of four months' service were required to obtain the approval of the insurance company 'upon the basis of a medical examination.'

"After making his written application for insurance on July 5, 1933, Mr. Boyer continued his work as a salesman for the next few days. When he awoke on the morning of July 10, 1933, he was afflicted with a shortness of breath. A doctor was called and Mr. Boyer was rushed to a hospital where he was put under an oxygen tent. This tent was taken off at intervals but was used most of the time until his death. While Mr. Boyer was able to sit up in bed and to carry on a conversation at least some of the time, he was continuously confined to his bed in the hospital under the doctor's care until he died on July 14, 1933, at 9:30 p. m.

"Appellant contends that the evidence was insufficient to sustain the implied finding of the jury to the effect that Mr. Boyer was 'actually at work' on July 14, 1933. In our opinion this contention must be sustained. Before referring to the evidence relied upon by respondent to sustain this finding, it may be stated that respondent concedes that it was not sufficient under the policy to show merely that Mr. Boyer was in the employ of the company on July 14, 1933, but that it was also necessary to show that he was 'actually at work' on that date. It may be further stated that appellant concedes that if the evidence was sufficient to show that Mr. Boyer was 'actually at work' on July 14, 1933, then the insurance was effective at the time of his death on the evening of that day.

"The evidence showed that Mr. Boyer was employed in the capacity of a salesman on a commission basis. The sales manager testified, 'The duties were the selling of Lincoln automobiles.' He was an elderly man and was employed mainly because of his ability to make contacts with wealthy people who had the means to purchase high-priced automobiles. He was not required to do certain things which were required of the other salesmen, but he was nevertheless on call by the sales manager 'at all times in the 24 hours,' and it was his duty to carry out the instructions of the sales manager. He was not employed as an executive nor did he have any supervisory powers or duties over others. He worked both independently of other salesmen and also in cooperation with other salesmen on prospective deals.

"In an attempt to show that Mr. Boyer was 'actually at work' on July 14, 1933, respondent introduced evidence to show that Mr. Lowe and the sales manager visited Mr. Boyer on that day and discussed certain prospective deals with him. They were there about 25 or 30 minutes. A review of this evidence shows that the discussion involved certain deals upon which Mr. Boyer had been working before he was taken to the hospital and that the said discussion related solely to the question of whether other salesmen should be permitted to carry on the work or whether said deals should be permitted to rest until Mr. Boyer was able to return to work. Upon this evidence, respondent seeks to sustain the finding under attack.

[1, 2] "We believe, however, that said evidence was wholly insufficient to show that Mr. Boyer was 'actually at work.' Respondent lays great stress upon the fact that the effectiveness of the insurance as to Mr. Boyer was not dependent upon Mr. Boyer's state of health. While it is true that no physical examination was required and the employee was not required to make any representation regarding his health, it was the clear purpose of the policy provision to permit the insurance to become effective as to any employee only in the event that his health was such as to permit him to be 'actually at work' on the specified date following the making of his application. Or, putting it another way, it was the clear purpose of the policy provision to prevent the insurance from becoming effective as to any employee, such as a salesman, who was so seriously ill as to be continuously confined to his bed in a hospital and unable to be 'actually at work' on the date specified. The evidence upon which respondent relies to show that Mr. Boyer was 'actually at work' is merely evidence of a conversation necessitated by the fact that he was not 'actually at work' and could not be 'actually at work' on the day in question.

"The parties discuss the meaning of the words 'actually at work' and the propriety of the trial court's instructions on this subject. No authority directly in point has been called to our attention and we know of none. Respondent cites and relies upon Equitable Life Assurance Society v. Worthman (C.C.A.) 67 F.(2d) 721. Both the policy provisions and the facts regarding the illness were very different in that case. It was not there required that the employee be at work on any particular day. The deceased there was not confined to his bed at all times and his work was of an advisory and supervisory character. Appellant cites Leach v. Metropolitan Life Ins. Co., 124 Kan. 584, 261 P. 603, 604, in which the words 'actively at work' were used in the policy, but it was there conceded by the parties that the deceased was not 'actively at work' at the time specified. We do not deem it necessary, however, to define the words 'actually at work' or to discuss the trial court's instructions. Said words are in common usage, and their meaning, as applied to an automobile salesman, would seem quite clear and unambiguous. But granting that the rule of liberal construction could be applied, we would be required to stretch that rule beyond all reason in order to hold that the evidence here was sufficient to show that Mr. Boyer was 'actually at work' on July 14, 1933, when it showed that he performed none of his customary duties as a salesman on that day but merely discussed his inability to perform his duties and the advisability of permitting others to carry on until such time as he might be able to perform such duties."

For the purpose of further clarifying our conclusions, we may observe that, in order for the employee to have been "actually at work," it would have been necessary for him to have been doing some of the things for which he was employed, i. e., making contacts, instead of being confined to his bed under an oxygen tent, entirely unable to make those contacts for which he was employed. The evidence here discloses that Boyer was not able to do what Mr. Lowe wanted and requested his employer to wait until he got out.

The judgment is reversed.

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7 Cal.2d 574

NUCKOLLS v. BANK OF CALIFORNIA, NATIONAL ASS'N, et al.

SYMONDS et al. v. NUCKOLLS et al.

S. F. 15709.

Supreme Court of California.

Oct. 26, 1936.

1. Appeal and error 🔑477

Appellate courts should not, except in unusual emergency, exercise their alleged power of supersedeas to stay judgment until petitioner has first presented matter to trial court, since Legislature has provided method by which trial court, in proper case, may grant a stay (Code Civ.Proc. § 946).

2. Appeal and error 🔑485(1)

Appeal by beneficiary and giving of bond by him does not stay a judgment against a trustee.

3. Appeal and error 🔑477

Supreme Court possesses power upon proper showing and in proper case to restrain sale of trust assets, pending appeal, by issuance of a supersedeas.

4. Appeal and error 🔑479(1)

Trustee of bankrupt against whom judgment was rendered foreclosing his interest in certain trusts *held* not entitled to supersedeas to stay judgment on ground that trial court held that defense of usury was not available in action on note resulting in judgment because of repeal of usury law by amendment to constitution, and that such conclusion was based on decision in case which was pending before supreme court, where case was decided by supreme court on ground other than usury point.

5. Appeal and error 🔑479(1)

Supersedeas *held* not to lie to stay judgment foreclosing interest in trusts, where record disclosed that there were at least two grounds for trial court's judgment, either of which would be sufficient to sustain it, and Supreme Court could not presume error; presumption being in favor of lower court's decision (Code Civ.Proc. § 946).

6. Appeal and error 🔑458(1)

Supersedeas is issued usually to protect appellate court's jurisdiction, and, if stay can be granted only at risk of destroying rights which would belong to respondent if judgment is affirmed, supersedeas is not necessary or proper to complete exercise of appellate jurisdiction.

In Bank.

Action by Anna B. Nuckolls against the Bank of California National Association, as trustee, and others. From a judgment, M. C. Symonds as trustee, etc., and others, appeal, and M. C. Symonds petitions for writ of supersedeas.

Writ denied, and order to show cause discharged.

Charles A. Christin and Torregano & Stark, all of San Francisco, for petitioner.

Maurice R. Carey, Lloyd Hummel, and John A. Gorfinkel, all of San Francisco, for respondent Anna B. Nuckolls.

Pillsbury, Madison & Sutro and W. E. Pringle, all of San Francisco, for respondent Bank of California, National Ass'n.

PER CURIAM.

Petition for a writ of supersedeas. So far as is material here, the petition alleges that the above-entitled action is now pending in this court; that the judgment appealed from ordered the foreclosure of defendant Horatio McMillan's interest in a certain trust of real and personal property of which defendant Bank of California is trustee; that the appellants are subsequent lien creditors of Horatio McMillan and holders of subsequent assignments of his interest in the trust; that prior to the entry of judgment McMillan was adjudicated a bankrupt and petitioner was appointed trustee of his estate; that as such trustee petitioner intervened in the above action and defended the same on the ground the transaction forming the basis of the action was tainted with usury; that the trial court found that the transaction when entered into was usurious, but held that the defense was not available for the reason that the Usury Law (St.1919, p. lxxxiii) had been repealed in 1934 by the addition of a new section to the State Constitution, section 22 of article 20; that this conclusion was based upon the decision of the District Court of Appeal in Andrews v. Reidy, 54 P.(2d) 30; that subsequent to the entry of judgment in the present case this court granted a hearing in the Reidy Case, and that cause is now pending in this court; that the trial court has ordered the sale of the interest of McMillan in the trust to satisfy the judgment of plaintiff and that a commissioner has been appointed and a date fixed for the sale; that McMillan's estate is devoid of assets and petitioner is unable to furnish a bond to stay proceedings; that the main part of the trust estate consists of assets of a nonfluctuating nature. On information and belief it is alleged that plaintiff Anna B. Nuckolls is insolvent and, in the event of a reversal, will be unable to account for the proceeds received at the sale.

Defendant Bank of California has filed an answer in which it is alleged that it is a disinterested party in these proceedings and stands ready to act in accordance with the orders of this court, or of any other court that has jurisdiction of the trust. This defendant, as an exhibit to its answer, lists the assets of the trust. It is therein disclosed that the trust assets consist of stocks and bonds and over $32,000 in cash.

The plaintiff Nuckolls made her return by way of general demurrer and answer. So far as pertinent here, the answer admits that the estate of McMillan is insolvent and that the trustee is financially unable to put up a bond. It is further alleged that the trial court based its decision not only on the finding that the usury law had been repealed, but also on the finding, quoted in the answer, that Nuckolls was a bona fide purchaser of the note upon which the action was based, without notice of its usurious character, and that therefore, even if the Usury Law was not repealed, the defense could not be urged against her. This plaintiff vigorously denies that she is insolvent and will be unable to return the money in the event of a reversal. She alleges that she possesses unencumbered assets, which she lists, totaling over $120,000. She also denies that the trust assets are of a nonfluctuating nature. She alleges that the stocks and bonds not only are fluctuating, but that their value will be materially affected by the result of several cases, now pending in the United States Supreme Court. It is also alleged that the $32,000 in cash in the trust fund is in a special deposit, and not drawing interest.

The appellant Symonds, in addition to his petition, has also filed an affidavit containing a few of the findings and conclusions of the trial court.

[1] It is to be noted that the pleadings and other papers upon which this cause was submitted do not contain a complete copy of the trial court's findings and conclusions, nor do they contain a copy of the judgment. The exact nature of the judgment is not disclosed. If the judgment is one that could be stayed by the filing of a bond by appellant Symonds in the lower court, this appellant has not proceeded to exhaust his remedies in that court. Section 946 of the Code of Civil Procedure provides in part: "And the court below may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right." Not only does the petition fail to allege that such an application was made to the trial court, but on the oral argument it was admitted that no such application had been made. Inasmuch as the Legislature has provided a method by which the trial court, in a proper case, may grant the

stay, the appellate courts, assuming that they have the power, should not, except in some unusual emergency, exercise their power until the petitioner has first presented the matter to the trial court.

[2-4] On the other hand, if the judgment is one falling within the category of those discussed in Halsted v. First National Bank, 173 Cal. 605, 160 P. 1075; Cullinan v. Mercantile Trust Co., 193 Cal. 562, 226 P. 4; Kentfield v. Kentfield, 4 Cal.(2d) 585, 51 P.(2d) 94, it may be that the trustee could not file a bond to stay a judgment against a nonappealing trustee. It is settled by those cases that an appeal by a beneficiary and the giving of a bond by him does not stay a judgment against a trustee. Those cases also establish the rule that this court possesses the power, upon a proper showing and in a proper case, to restrain a sale of trust assets pending appeal, by the issuance of a supersedeas. The present case, however, does not present a situation where that power should be exercised. In the first place, the case of Andrews v. Reidy, which was pending in this court when the order to show cause was issued, has since been decided, and such decision is now final (60 P.(2d) 832). That case was decided on grounds other than the usury point that may be involved on the present appeal. The present case, therefore, does not fall within the rule discussed in Tucker v. Howe, 217 Cal. 23, 17 P.(2d) 103.

[5, 6] In the second place, probable error has not been made to appear. From the rather incomplete and unsatisfactory showing, it appears that there were at least two grounds for the trial court's judgment, either of which would be sufficient to sustain it. We cannot presume error. This court must consider the rights of respondents as well as those of appellants. Affirmances must be contemplated as well as reversals; in fact, until the contrary is shown, the presumption is in favor of the lower court's decision. A supersedeas is issued usually to protect the appellate court's jurisdiction. If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.(N.S.) 436; 2 Cal.Jur. 465, § 217. The present case is not one where the status quo may be maintained without injury to respondent Nuckolls. Not only is the money in the trust not drawing interest, but the balance of the trust estate consists of stocks and bonds that are subject to constant fluctuation. Why respondent, in whose favor the presumption exists as to the correctness of the trial court's decision, should be required to stand these losses has not been made to appear. No satisfactory reason has been advanced why, in this case, the normal processes of the law should not take their ordinary course.

For the foregoing reasons the application for the writ is denied and the order to show cause discharged.

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7 Cal.2d 612

PEOPLE v. TRIPPELL.

Cr. 3997.

Supreme Court of California.

Oct. 30, 1936.

1. Criminal law 🔑1153(2)

Finding of trial court that 5½ year old girl was qualified to be sworn as witness in prosecution for indecent assault committed against her *held* conclusive, where record did not affirmatively show that trial court had abused its discretion (Pen.Code, § 288).

2. Infants 🔑20

Evidence sustained conviction for indecent assault against 5½ year old girl (Pen. Code, § 288).

3. Criminal law 🔑260(11), 1159(4)

Judgment based upon jury's verdict or trial court's decision against defendant in prosecution for indecent assault against child is conclusive unless child's testimony is manifestly false or inherently improbable (Pen. Code, § 288).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Al Trippell was convicted of an indecent assault against a child, and he appeals.

Affirmed.

For prior opinion, see 54 P.(2d) 763.

S. S. Hahn, Joel Terrell, and L. E. Hardy, all of Los Angeles, Al Trippell, in pro. per., Charles B. Taylor, of Los Angeles, O. F. Meldon, of Sacramento, and William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

PER CURIAM.

A hearing was granted in this court, after decision by the District Court of Appeal, Second Appellate District, Division 1 [54 P.(2d) 763], in order to consider more fully the contentions of defendant that the prosecuting witness in this case was incompetent to testify, and that her testimony was so strongly impeached as to deserve no credence. Upon a full study of the briefs and examination of the record, we are unable to reach this conclusion. We accordingly adopt the opinion of Mr. Presiding Justice Houser, of the said District Court of Appeal, as the opinion of this court. It reads as follows:

"From a judgment of conviction on each of two counts of the offense denounced by the provisions of section 288 of the Penal Code, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

[1] "The victim of defendant's alleged felonious assault was a girl of the age of about 5½ years. On the trial of the action, because of the extreme infancy of the child, she was questioned at length by the trial judge touching her qualifications to be sworn as a witness. It would be a waste of time to herein set forth the details of that examination. Although the question as to whether the child was really qualified as a witness may readily be one regarding which reasonable men might differ one from the other, nevertheless, since the record does not affirmatively establish the fact that the trial judge abused his discretion in the matter, his conclusion thereon must be accepted as final and conclusive, from which it follows that the specification by appellant of prejudicial error in that regard cannot be sustained.

[2, 3] "And the same principle prevails with reference to the sufficiency of the evidence to support the judgment. Judging from the 'cold record,' the testimony given by the child was most unsatisfactory. Time and again, that in important particulars in her testimony she was manifestly mistaken, was clearly established; and on each of several different occasions, if she did not admit that her testimony in some particular was false, such a conclusion was inevitable. Both she and her mother admitted that in some respects the mother had instructed the child concerning at least what she should say on her voir dire examination. In addition thereto, the reputation of the mother in some respects was seriously impeached. By independent witnesses, in substance, it was testified that the mother had a mercenary motive in the prosecution of the defendant, in that before he had been accused of the commission of the offense the mother had broadly stated, in effect, that, if she could get 'something on' defendant, she could extort money from him. Besides that, it was testified that on several different occasions she had made somewhat questionable advances to defendant, in which she had been uniformly repulsed by him. But, notwithstanding such unsavory conditions, it was within the province of the trial judge, who, of course, had the witnesses before him, with the attendant opportunity to judge of their truthfulness regarding the essential facts, to finally determine where the truth lay; and in that connection, in substance, it was his conclusion that, in spite of the adverse and unfavorable conditions that surrounded the testimony that was given by the child, her testimony was to be preferred to, and should prevail over, that presented by defendant, whose reputation, especially in line with the offense of which he had been accused, apparently was untarnished and unimpeachable. In cases of this sort, wherein the sufficiency of the evidence is relied upon as a reason for the reversal of the judgment, the law is well established that, unless the testimony given by the child is manifestly false or inherently improbable, a judgment that is based upon a verdict returned by a jury or a decision rendered by the trial judge against the defendant is conclusive on appeal. In that regard it is impossible for this court to say that the foregoing drastic condition, necessary to the reversal of the judgment, obtains.

"None of the other errors specified by appellant are worthy of serious consideration."

The judgment, and the order by which defendant's motion for a new trial was denied, are affirmed.

7 Cal.2d 549

KREBS et al. v. LOS ANGELES RY. CORPORATION.

L. A. 15858.

Supreme Court of California.

Oct. 23, 1936.

Rehearing Denied Nov. 19, 1936.

1. **New trial** 🔑162(1)

Where trial court ordered that motion for new trial would be granted because of excessive damages awarded in action brought by husband and wife unless parties remitted lump sum, failure to specify amount to be remitted from each assessment did not render order invalid if granted on valid ground, and, if condition was not complied with, order, if otherwise valid, became operative.

2. **New trial** 🔑8

Order granting new trial as to both husband and wife because of excessive damages awarded to wife in action brought by both *held* erroneous.

3. **Appeal and error** 🔑837(8)

Supreme Court could look to record of proceedings which led to entry of order granting new trial because of excessive damages, conditionally upon remission of specified sum, to determine that new trial was granted as to both husband and wife because of excessive damages awarded to wife, where remission of amount specified would have left amount awarded to husband plus amount which court had previously stated was proper allowance to wife.

4. **Judges** 🔑51(2)

Where disqualification of judge depends not on interest but on alleged bias and prejudice, party with knowledge of facts which tend to show prejudice cannot, without objection, permit motion for new trial to proceed through hearing and, in event of adverse decision, submit that judge was prejudiced (Code Civ.Proc. § 170, as amended).

5. **Judges** 🔑56

Pending determination of qualification by another judge, judge sought to be disqualified because of bias or prejudice is without right to take further action in cause, and order made by him on motion for new trial will be vacated on appeal from order (Code Civ.Proc. § 170, as amended).

6. **Judges** 🔑51(3)

Where affidavit or statement insufficiently charges judge with bias or prejudice, or is filed too late, judge may strike it from files and is not required to submit it to another judge (Code Civ.Proc. § 170, as amended).

7. **Judges** 🔑51(2)

Affidavit of prejudice, for acts which took place during trial, filed by plaintiffs after judge had stated that, unless plaintiffs would consent to reduction of verdict for one of them, new trial would be granted as to both, and after judge had taken motion for new trial under submission, was filed too late (Code Civ.Proc. § 170, as amended).

8. **Judges** 🔑51(2)

Plaintiffs who filed affidavit of prejudice after defendant's motion for new trial came on for hearing waived right to object to judge's passing, on motion, even if affidavit was filed on time, where plaintiffs withdrew affidavit when judge stated that, if affidavit would be withdrawn, he would grant motion for new trial unless plaintiffs consented to reduction of verdict (Code Civ.Proc. § 170, as amended).

9. **Appeal and error** 🔑979(5)

Supreme Court *held* not authorized to interfere with order granting new trial as to one of two plaintiffs where trial court, in exercise of its discretion in passing on defendant's motion for new trial, might have concluded that verdict should be upheld or that it was so high as to indicate passion and prejudice.

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Grace Krebs and another against the Los Angeles Railway Corporation. Judgment was entered for plaintiffs, and, from an order granting defendant's motion for a new trial, plaintiffs appeal.

Reversed in part and affirmed in part.

Prior opinion, 54 P.(2d) 1142.

A. Brigham Rose and Paul Angelillo, both of Los Angeles (Chauncey Tramutolo, of San Francisco, of counsel), for appellants.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles (Ira C. Powers, of Los Angeles, of counsel), for respondent.

SEAWELL, Justice.

Plaintiffs appeal from an order granting defendant's motion for a new trial. Plaintiffs, husband and wife, received personal injuries when the automobile which plaintiff C. A. Krebs was driving, and in which plaintiff Grace Krebs was a passenger, was struck by a street car of defendant railway company.

They brought a single action to recover damages for personal injuries sustained by each of them. The court entered judgment upon the jury's verdict assessing damages to Grace Krebs in the sum of $10,000 and damages to C. A. Krebs in the sum of $2,000. Thereafter the court granted defendant's motion for a new trial. The following oral order was made by the trial judge from the bench: "Matter heretofore submitted, it is now ordered that defendant's motion for a new trial will be granted on the ground of excessive damages, unless within ten days the plaintiffs remit $7,500 in writing, and upon the filing of said remission the motion will be denied." Plaintiffs failed to file the remission, with the result that a new trial was granted. Plaintiffs appeal from said order.

[1] Plaintiffs contend that the court erroneously granted a new trial as to both plaintiffs, although it was of the view that the damages were excessive as to plaintiff Grace Krebs only. They further contend that, if it must be held that the order conditionally granted a new trial on the ground that the damages awarded both plaintiffs were excessive, nevertheless it should have specified an amount to be remitted from each assessment as a condition to denying the new trial, instead of specifying a lump sum to be remitted from the total of both assessments. Plaintiffs may have been willing to accept a remission as to the assessment for damages to one of them, while as to the other they would elect to prosecute an appeal from the order granting a new trial. The improper form of the condition would not render invalid an order granting a new trial on a valid ground. If the condition was not complied with, the order granting a new trial, if otherwise valid, became operative. Bledsoe v. Decrow, 132 Cal. 312, 64 P. 397.

[2] However, we are of the view that a new trial was granted erroneously as to both plaintiffs on the ground that the damages awarded Grace Krebs only were excessive. For this reason the order must be reversed as to plaintiff C. A. Krebs without regard to plaintiff's further contention that it should be set aside as to both of them because of bias and prejudice of Hon. Guy F. Bush, judge, which disqualified him to pass on said motion for a new trial.

[3] The order, as quoted in the opening paragraph of this opinion, grants a new trial as to both plaintiffs "on the ground of excessive damages." Defendant contends that we may not look to the record of proceedings which led to the entry of the order to determine that the court granted a new trial as to both plaintiffs on the ground that the damages awarded Grace Krebs only were excessive. Tweedale v. Barnett, 172 Cal. 271, 156 P. 483; Condon v. Ansaldi, 203 Cal. 180, 263 P. 198; People v. Driggs, 111 Cal.App. 42, 295 P. 51; Whitney v. N. W. Pac. R. R. Co., 39 Cal.App. 139, 178 P. 326; Boness v. Helphinstine, 132 Cal.App. 677, 23 P.(2d) 420.

This is not a proper case for application of the authorities relied on by defendant. Said decisions are founded on reason, but to hold that they govern the instant case plainly would be unreasonable. In People v. Driggs, supra, a defendant was convicted by a jury of eleven persons. During the trial the court had indicated that a new trial should be granted because he was of the view that the defendant could not consent to his trial by a jury of less than twelve, but he made an order granting a new trial on the sole ground of insufficiency of the evidence. It was held that remarks of the judge before final action on the motion for new trial could not be considered; that a judge at the conclusion of an argument upon motion for a new trial may state his views, and then, upon fuller and maturer deliberation, come to the conclusion that a different order should be made.

In the instant case the remarks of the court made at the very time he rendered his order orally from the bench, when considered in the light of what he had said on the preceding day, indicate that he granted the new trial as to both plaintiffs on the ground of excessive damages to Grace Krebs alone. He had stated on the preceding day that, unless plaintiffs would consent to reduction of Mrs. Krebs' judgment to $2,500, a new trial would be granted, and that he would not grant a new trial as to one of the plaintiffs; that he would not let an appeal be taken as to one of the plaintiffs. His remarks made at the very time of pronouncement of said order, and as part of its rendition, indicate that he was still of the same view. The remission of $7,500, as ordered by the court, from the total of both verdicts, which was $12,000, leaves $4,500, which is equivalent to the sum of $2,000, awarded by the jury to C. A. Krebs, plus $2,500, the amount the court previously had stated was the proper allowance for injuries to Mrs. Krebs.

Plaintiffs further contend that the order granting a new trial should be reversed as to both of them on the ground of bias and prejudice of Judge Bush, which disqualified him from passing on the motion for new trial. Notwithstanding the alleged bias and prejudice against plaintiffs' case which said judge evinced by his remarks and conduct during the trial, the jury returned a verdict for both plaintiffs. They desire to retain the judgment entered for them on said verdict, and urge the disqualification of said judge only for the purpose of invalidating the action taken by him on the defendant's motion for new trial.

It is unnecessary here to set forth the acts and statements upon which plaintiffs rely to show prejudice. We are impelled to the conclusion that plaintiffs lost the right to object to the qualification of said judge, not only by failing to file a statement of his disqualification at "the earliest practicable opportunity," as required by section 170, Code of Civil Procedure (as amended by St.1927, p. 1403, St.1929, p. 958, and St.1933, p. 1828), but also by voluntarily withdrawing the affidavit of bias and prejudice filed by them after the hearing on defendant's motion for new trial.

[4] It was held prior to the 1927 amendments to section 170, Code of Civil Procedure, that disqualification of a judge based on interest could not be waived. Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Cadenasso v. Bank of Italy, 214 Cal. 562, 563, 6 P.(2d) 944; City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084; 14 Cal.Jur. 817; notes, 5 A.L.R. 1588; 57 A.L.R. 292. It is unnecessary to determine here whether the 1927 amendments changed the rule in this respect. Where the disqualification depends not on interest, but on alleged bias and prejudice, that is, the state of mind of the judge, since the amendments, as well as prior thereto, a party with knowledge of the facts which tend to show prejudice cannot, without objection, permit a motion for new trial to proceed through hearing, and in the event of an adverse decision, submit that the judge was prejudiced. People v. Berman, 117 Cal.App. 334, 4 P.(2d) 226; In re Johnson's Estate, 101 Cal.App. 110, 281 P. 435; In re Estate of Friedman, 171 Cal. 431, 439, 153 P. 918. Section 170 formerly provided that bias and prejudice were grounds of disqualification when made to appear by affidavit. Since 1927 it is provided that the judge shall not sit "when it is made to appear [that is by statement filed with the clerk] probable that, by reason of bias or prejudice" of the judge, a fair trial cannot be had. Since 1927 the section further provides that the statement of objection to the judge "shall be presented at the earliest practicable opportunity."

If disqualification of the judge resting on bias and prejudice could not be waived, it would follow that the acts of bias and prejudice on which plaintiffs rely, if sufficient to set aside the order for new trial, would also invalidate the judgment which plaintiffs seek to retain. The acts which plaintiffs cite to demonstrate the disqualification took place during the trial and prior to said judgment.

[5] The proceeding to disqualify a judge, as provided in section 170, Code of Civil Procedure, is initiated by filing of a verified statement, to which the judge must file an answer if he is unwilling to consent that the case be heard by another judge. Pending the determination of his qualification by another judge, said judge is without right to take further action in the case. Keating v. Keating, 169 Cal. 754, 147 P. 974; Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976; Bassford v. Earl, 162 Cal. 115, 121 P. 395. An order made by him on a motion for new trial will be vacated and set aside on appeal from said order.

[6, 7] In the instant case the motion for new trial came on for hearing on October 15, 1934. After the court had stated that, unless plaintiffs would consent to reduction of the verdict for Mrs. Krebs to $2,500, a new trial would be granted as to both plaintiffs, and had taken the motion under submission, plaintiffs filed an affidavit pursuant to section 170, Code of Civil Procedure. On the following day the judge stated that he would make an order to that effect if plaintiffs would withdraw the proceedings under section 170, Code of Civil Procedure. "Thereupon," the bill

of exceptions states, "counsel for plaintiffs consented to withdraw the proceedings and to strike the affidavit of prejudice, which motion was granted."

It has been held that, if the affidavit or statement insufficiently charges bias or prejudice, or is filed too late, the judge may strike it from the files, and is not required to submit it to another judge. People v. Nolan, 126 Cal.App. 623, 628, 14 P.(2d) 880; People v. Berman, 117 Cal.App. 334, 4 P.(2d) 226; People v. Emmett, 123 Cal.App. 678, 12 P.(2d) 92. The acts which appellants cite in their briefs as indicating the bias and prejudice of the judge against them and their attorney took place during the trial of the case. If appellants desired to challenge the right of said judge to pass on the motion for new trial, they should have filed their statement of prejudice before the motion for new trial came on for hearing, instead of waiting until after said judge had indicated that he would decide against them.

[8] If it be conceded that the affidavit was filed in time, nevertheless appellants are barred from raising the question of disqualification on this appeal by reason of the fact that they voluntarily withdrew it. The affidavit was filed after the hearing on the motion for new trial on October 15. The remarks of the judge in court on October 16 indicate that while the affidavit of prejudice was pending he deemed himself without right to act on the motion for new trial. He informed counsel of the order he would make if the affidavit was withdrawn. With full knowledge of the action contemplated, which action was adverse to plaintiffs in that it required them to remit $7,500 from verdicts totaling $12,000 as a condition to denial of defendant's motion for new trial, plaintiffs consented to withdraw said affidavit, and thereby waived their right to object to said judge passing on the motion.

[9] It cannot be held that the court erred in granting a new trial as to Mrs. Krebs on the ground that the damages awarded her were excessive. Without reciting the evidence bearing on the issue of damages, it is sufficient to say that the trial court, in the exercise of its discretion in passing on the motion for new trial, might either have concluded that the verdict for Mrs. Krebs should be upheld, or that it was so high as to indicate passion and prejudice of the jury. In this situation we cannot interfere with the action of the trial court in granting a new trial as to Mrs. Krebs.

We have heretofore held that the order must be reversed in so far as it grants a new trial to defendant upon the judgment in favor of Mr. Krebs. The order granting a new trial as to the judgment for Mrs. Krebs is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; LANGDON, J.

PEOPLE v. CRAIG.*

L. A. 15725.

Supreme Court of California.

Oct. 30, 1936.

1. Judges 🔑**11**

Under maxim that inclusion of one is exclusion of the other, manner designated by Constitution for removal from office of officeholders, including judges of the District Court of Appeals, *held* the only manner in which such judges could be ousted for misdemeanor in office (Const. art. 23, § 1; art. 6, § 10; art. 4, § 18).

2. Quo warranto 🔑**14**

Associate justice of District Court of Appeals could not be removed from office in quo warranto proceeding on ground that justice's conviction in Federal District Court for conspiring to obstruct and impede administration of justice had made his office vacant, where justice had not been removed from office in manner prescribed by Constitution (U.S.Cr.Code § 37, 18 U.S.C.A. § 88; Pol.Code, § 996, subd. 8; Code Civ.Proc. § 803; Const. art. 23, § 1; art. 6, § 10; art. 4, § 18).

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Quo warranto proceeding by the People of the State of California against Gavin W. Craig. From a judgment for the plaintiff, the defendant appeals.

Reversed.

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*For subsequent opinion see 72 P.2d 135.

Daniel M. Hunsaker, of Los Angeles, Don M. Kitzmiller, of Santa Monica, Albert A. Kidder, Jr., of Hollywood, and Mark L. Herron, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell and Eugene M. Elson, Deputy Attys. Gen., for the People.

WASTE, Chief Justice.

During his term of office as Associate Justice of the District Court of Appeal of the Second Appellate District, defendant was indicted in the District Court of the United States for the Southern District of California and charged with the crime of felony, to wit, a violation of section 88 of title 18 of the United States Code (18 U.S.C.A. § 88) in that he, with certain other defendants therein named, did conspire to obstruct and impede the due administration of justice. The jury returned a verdict of guilty, and judgment was entered assessing a fine of $1,000 and ordering that the defendant be confined in jail for the period of one year. Pending appeal to the Supreme Court of the United States, the defendant continued in possession of and occupied the chambers of the District Court of Appeal, used the furnishings of the same, the library facilities, records, files, and papers, and threatened to continue to do so. Thereupon this action in quo warranto was commenced by the Attorney General in the name of the people, based on section 996, subd. 8, of the Political Code, praying for a judgment declaring and decreeing that the defendant's office had become vacant, and he, unlawfully and without right, held and exercised a public civil office as Associate Justice of the District Court of Appeal of the Second Appellate District, Division 2, and praying that he be ousted and excluded therefrom.

Defendant answered the complaint, denying and putting in issue the allegations of the complaint. He alleged that he has never been impeached nor removed by legislative action from office as such Associate Justice, nor otherwise in the manner provided by law, nor at all. Judgment was entered for the people. The answer, and the same contentions here raised on appeal, present the question to be decided.

The action was brought by the respondent people in reliance on section 803 of the Code of Civil Procedure, which authorizes the bringing of such an action against one "who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military." The support for the action rests upon the contention that the conviction of the appellant under federal law is within the contemplation of section 996, subd. 8, of the Political Code, providing that "an office becomes *vacant*" when the holder suffers "conviction of a felony, or of any offense involving a violation of his official duties." The people argue that the office held by appellant became "vacant," and appellant was removed therefrom. We are of opinion that the judgment must be reversed.

There appear to be two complete answers to the argument advanced by the respondent: First, we are of the view that there is merit in the contention of appellant that his conviction under the federal law does not fall within the application of section 996, subd. 8, of the Political Code; and, second, the appellant not having been *removed* from the office to which he was elected, in the manner prescribed by the provisions of the state Constitution, he is still entitled to hold office.

[1, 2] Because we are convinced that the second point of appellant's attack on the judgment is legally unanswerable, we deem it necessary to consider that point alone. Appellant has not resigned nor been removed from his constitutional office in any one of the three ways prescribed in the Constitution of the state. Those ways are: (1) By recall by the people (Const. art. 23, § 1); (2) by concurrent resolution of both houses of the Legislature adopted by a two-thirds vote of each house (Const. art. 6, § 10); (3), by impeachment by the Legislature (Const. art. 4, § 18). After naming the office holders who "shall be liable to impeachment," including judges of the District Court of Appeal, the last-cited section provides: *"All other civil officers* [italics added] shall be tried for misdemeanor in office in such manner as the Legislature may provide." By application of the rule of construction laid down by the maxim, inclusio unius est exclusio alterius [inclusion of one is exclusion of the other], we arrive at the conclusion that by including certain judicial officers in the list of those who may be removed by joint resolution of both houses of the Legislature, or impeached, or recalled in the manner prescribed in the Constitution, the people intended to and have designated the only means by which

such officers may be ousted for misdemeanor in office.

While the exact question we are now discussing has not before received the consideration of this court, we have had occasion in the past to examine similar situations. We quote from State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432. In that case the State Bar sought to subject a judge of the superior court, a constitutional officer, to disciplinary proceedings, the ultimate effect of which would have been to remove him from his position. To allow such action to proceed, this court said (207 Cal. 323, at page 337, 278 P. 432, 438), "would be to permit the accomplishment by indirection of his disqualification to hold, and hence necessarily his removal from his office, for which the Constitution in sections 17 and 18 of article 4 thereof has provided a direct, if not an exclusive mode of procedure. An apt and well-reasoned line of authority upon this precise question is that supplied by the case of Falloon v. Clark, 61 Kan. 121, 58 P. 990, wherein the Supreme Court of Kansas determined that 'wherever the constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or suspend him from office for any other reason or in any other mode than the constitution itself has furnished.' The said court rests its authority for this conclusion upon Lowe v. Commonwealth, 3 Metc.(Ky.) 237, and Throop, Pub.Off., § 341, which latter authority states the foregoing doctrine to be well settled, and cites in support thereof the cases of State v. Wiltz, 11 La.Ann. 439; State v. McNeely, 24 La.Ann. 19; Brown v. Grover, 6 Bush (Ky.) 1; Page v. Hardin, 8 B.Mon.(Ky.) 648; and Mechem, Pub.Off., § 457."

In the more recent case of Byers v. Smith, 4 Cal.(2d) 209, at page 213, 47 P.(2d) 705, 706, this court said: "The fact, however, remains as is said in Commonwealth of Pennsylvania v. Reid, 265 Pa. 328, 108 A. 829, 831: '(T)he people are entitled to the services of the officer during the entire term for which they elected him (Lloyd v. Smith, 176 Pa. 213, 35 A. 199), unless he be removed in the way provided by the Constitution, if the officer is a constitutional officer (Bowman's Case, 225 Pa. 364, 74 A. 203), or by the Legislature or under its authority in the manner provided by Constitution or statute, if the officer is not a constitutional officer (Commonwealth v. Weir, 165 Pa. 284, 288, 30 A. 835).'"

Because these authorities rest on such well-established principles they are determinative of the question presented on this appeal. Further consideration of the matter is unnecessary.

The judgment ousting appellant from office is reversed.

We concur: SHENK, J.; SEAWELL, J.; THOMPSON, J.; LANGDON, J.; CURTIS, J.

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7 Cal.2d 604

WARE v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

L. A. 14681.

Supreme Court of California.

Oct. 29, 1936.

1. Vendor and purchaser 🔑123

In action for rescission of executory land contract, purchaser *held* not to have sustained burden to prove failure of consideration resulting from encroachment of ocean caused by severe storms.

2. Appeal and error 🔑714(5)

Purchaser who sued for rescission of executory land contract because of failure of consideration could not, by unsupported statements in briefs on appeal, supply a lack of evidence to sustain burden to show failure of consideration.

3. Vendor and purchaser 🔑109

Fact that ocean encroached upon purchaser's lot during severe storms, causing lot, which was when purchased a usual sandy beach lot, to be covered with sand débris, and destroyed shore drive which was not contiguous to purchaser's lot, *held* not to entitle purchaser to rescind executory land contract.

4. Vendor and purchaser 🔑203

Under executory land contract requiring purchaser, who was entitled to possession, to insure all the buildings to their full insurable value, purchaser *held* required to bear loss occasioned by encroachment of ocean caused by severe storms.

5. Evidence 🔑6

It is common knowledge ocean swells and tidal waves occur at unpredictable periods of time.

◆

In Bank.

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

Action by James G. Ware against the Security-First National Bank of Los Angeles, and another. From an adverse judgment, the named defendant appeals.

Reversed.

For prior opinion, see Ware v. Frank Meline Co., 53 P.(2d) 1033.

Walter H. Hewicker, of Los Angeles, for appellant.

Coleman E. Stewart, of Santa Barbara, for respondent.

SEAWELL, Justice.

The trial court rendered judgment that plaintiff recover from defendant the Frank Meline Company, Inc., and defendant Security-First National Bank of Los Angeles the sum of $955.75, with interest, paid by him upon an installment conditional sales contract for the purchase of a lot in Ventura county for the sum of $790, on the ground that plaintiff was entitled to rescind for failure of consideration. Said failure of consideration was alleged to have resulted from encroachments of the Pacific Ocean in 1931, and was caused by exceptionally severe windstorms or such other phenomena of the sea as have occurred with some frequency along the southwesterly ocean shore of the state during the past few years. Defendant Security-First National Bank of Los Angeles is the successor in interest of the Pacific Southwest Trust & Savings Bank, which as vendor entered into said contract with plaintiff. The District Court of Appeal, Third Appellate District, reversed the judgment against defendant the Frank Meline Company, Inc., which had acted as sales agent in negotiating the contract, but affirmed the judgment against defendant bank. Ware v. Frank Meline Company, Inc. (Cal.App.) 53 P.(2d) 1033. Thereafter we granted the bank's petition for hearing.

The lot which plaintiff contracted to buy, No. 866, consists entirely of sand, and it is part of a larger body of a sandy area which is bounded on the west by the Pacific Ocean. It is designated as Pierpont Bay tract on the official map on file in the county recorder's office. Said lot 866 adjoins lot 867 easterly, and fronts on Ormond court. Lot 867 corners on Shore drive and Ormond court. It will be seen that plaintiff's lot, 866, is not contiguous to Shore drive. Westerly from Shore drive is a single row of lots which fronts easterly on Shore drive and faces the ocean shore on the west. To the west of this row of lots the line of mean high tide of the Pacific Ocean is delineated on said map. Plaintiff's lot is thus separated from the mean high tide line as marked on said map by lot 867, by Shore drive, and by lots 88 and 89 (west of Shore drive), a distance of approximately 137½ feet, and, in addition, by the distance between the westerly boundary of lots 88 and 89 and the line of mean high tide as marked on said map. This distance between the westerly line of lots 88 and 89 and the mean high tide line is not definitely ascertainable, as that distance is not drawn according to scale.

On January 25, 1926, plaintiff contracted to buy lot 866. He viewed the lot a few days thereafter, and again after the streets had been paved in 1927. In September, 1931, he made the final payment upon the contract. He did not see the lot after the storm of 1931 until more than a month after making the final payment. After payment in full but before receiving a deed, he observed the conditions upon which he relies as grounds of rescission. When a deed was tendered to him he refused to accept it. The court below decreed rescission, based on the following finding: "That the improvements provided for in the sales contract of January 25, 1926, between plaintiff and the defendant * * * were installed during the year 1927, and that during the months of January and February, 1931, the Pacific Ocean encroached upon and destroyed Shore Drive, the ornamental street lighting, the facilities for water, gas, and electricity appurtenant on said real property, and also encroached upon said real property, causing it to be covered with sand and debris; that this destruction was not known to plaintiff until the 15th day of October, 1931. * * *"

The only provision with regard to installation of improvements by the seller is not contained in the conditional sales contract, in the deposit receipt executed prior to said contract. Said provision is as follows: "Improvements in the above tract include Water, Gas, Electricity, Ornamental Street Lights, Paving Seward Avenue, Pierpont Boulevard, and all lanes and walks in Courts." No provision is made for the paving of Shore drive, but plaintiff contends that because Shore drive is delineated as a street upon the subdivision map prepared by the Frank Meline Company, Inc., as sales agent, and used by it in the sale of the lots, the seller bank was under a duty to pave said Shore drive in like manner with the other streets in the tract. The seller, it seems, did in fact improve Shore drive in a manner not described, together with other streets in the tract, in 1927. The severe and unusual storms of January and February, 1931, washed out Shore drive and left it covered with sand. The storm did not wash out Ormond court or other streets in the tract. As noted above, plaintiff's lot was not located on Shore drive, but on Ormond court. The washing out of said drive did not leave plaintiff's lot without convenient means of ingress and egress by Ormond court.

[1, 2] The court's finding that the storm destroyed the ornamental street lighting and facilities for water, gas, and electricity appurtenant to plaintiff's lot is not supported by the evidence. The ornamental lighting on Shore drive was washed out, but there is no showing that the lights on Ormond court or any other street in the tract were destroyed or seriously damaged. There was testimony on behalf of defendants that the improvements on Ormond court remained. It was not shown by plaintiff that lots on Ormond court were to be supplied with water, gas, and electricity from Shore drive. The burden was on plaintiff to establish the alleged failure of consideration. The record is silent as to the location of facilities for supplying water, gas, and electricity to lots on Ormond court. In plaintiff's briefs on appeal it is suggested that the services in question were to be supplied from Shore drive. But defendant bank in its brief states unequivocally that the mains for supplying gas, electricity and water to plaintiff's lot on Ormond court were on Pierpont boulevard, which was on the easterly side of the tract, farthest from the ocean. Plaintiff cannot supply a failure of evidence on this point, upon which he had the burden of proof, by unsupported statements in his briefs on appeal.

[3] The court further found that the ocean encroached upon plaintiff's lot, "causing it to be covered with sand and débris." It is admitted that the waters of the ocean during the period of extremely severe storms in January and February, 1931, washed over plaintiff's lot and receded. The fact that after the storm it was "covered with sand and débris" scarcely affords ground for rescission. Plaintiff testified that when he purchased the lot it was the usual sandy beach lot "with perhaps a little sage or some green stuff growing on it."

There was testimony that bulkheads placed along the shore opposite the tract had been washed out in the storms of 1931. Plaintiff contracted to buy the lot in 1926. There is no claim that during the years before 1931 the waters of the ocean at any time washed over or endangered Shore drive or plaintiff's lot. Nor is there any showing that the waters of the ocean have washed over plaintiff's lot at any time since 1931. The testimony of Anthony J. Oliver, a witness for defendants, indicates that since 1931 new bulkheads and a groin have been built. There is no showing that these barriers are likely to prove insufficient to protect plaintiff's lot from future storms.

Plaintiff viewed lot 866 a few days after he contracted to buy it in 1926 and observed its proximity to the ocean. Thereafter he continued to make payments on the purchase price for more than five years. No contention is made that defendant bank, its predecessor in interest, or the selling agent, the Frank Meline Company, Inc., made any false representations whatever with reference to the lot. We conclude that plaintiff failed to prove a substantial failure of consideration entitling him to rescind. Plaintiff's lot was not contiguous to Shore drive, and the vendor had not agreed to improve said drive. The washing out of Shore drive does not afford plaintiff grounds for rescission.

[4] Furthermore, in the circumstances shown, the lot was at the risk of plaintiff in so far as damage from the ocean was concerned. In Smith v. Kelly, 218 Cal. 543, 24 P.(2d) 471, this court had occasion to consider the question as to who bears the loss under an executory contract for the sale of real property in the event of damage or destruction without fault of either party. The loss in that case was due to fire. We held that where the vendee is

in possession and the contract provides that the vendee shall cause the property to be insured against fire, the vendee is not entitled to rescind for failure of consideration upon the destruction of the building by fire. The fact that the vendee was entitled to possession, and in that case was in possession, coupled with the insurance provision of the contract, indicated an intent of the parties that the vendor retained title for security only, and that the loss should be on the vendee. In the instant case the contract gave the vendee the right of possession. It also required the vendee to insure any buildings placed on the property to their full insurable value. The land was not in fact improved by the vendee, and hence continued to be unoccupied, and there were no buildings to be insured. And the force which it is claimed has done damage is not fire, but the sea. Nevertheless, the provisions in the contract with regard to possession and insurance indicate, as they did in Smith v. Kelly, supra, an intent that the vendor should retain title for security only, and that subsequent to execution of the contract the property should be at the risk of the vendee as to any losses occurring without fault of either party. See, also, Ross v. McDougal, 12 Cal. App.(2d) 172, 55 P.(2d) 574.

The transcript is very short and the situation may be thus summarized from facts substantially stated by plaintiff: He entered into the contract of purchase in January, 1925, and viewed the premises some five or ten days thereafter. He visited the property several times both before and after the improvements were put in. The only improvements mentioned at all are a pier, bathhouse, and various streets. None of said improvements are described. He did not recollect the dates of his visits, as he said he was not "terribly interested." He did not visit said locality after the storm until eight months thereafter. He had made his final payment more than a month before said visit. On this visit he observed that the southern end of Shore drive was completely "washed out," and a heavy barricade was erected across the drive. Some of the lighting fixtures were apparently misplaced. Some references are made by plaintiff that Shore drive was "washed out." It may be inferred that said drive had been put into a passable condition for vehicles. In its state of nature it was deep sand. Whether said drive was paved with some kind of paving material, or whether it was graveled or planked, does not appear from an examination of the record. Evidently there is no claim that the earth was "washed out," but the material which formed the surface of the way was broken or disturbed in sections by ocean swells during said storms. No serious damage seems to have been done to the earth forming said driveway, nor does it appear that whatever damage was done to the improvement thereon cannot be easily repaired.

[5] Said contract does not specifically bind the defendant in the matter and no demand or request has been made that defendant do anything by way of repairs. Plaintiff's lot, which stands at a higher elevation, was not damaged by this one exceptional marine disturbance. Santa Barbara, the home of plaintiff, is a seaside city, and the location of lot 866 is on the same coast line southerly from Santa Barbara. No doubt plaintiff during his long residence of ten or twelve years has taken notice of the exceptional disturbances which are likely to occur and force water back upon beach lands which have a gradual slope oceanward, as in the instant case. This naturally may be expected. Such disturbances had occurred in the vicinity of his home city and washed out a long section of the state highway. Other similar occurrences must have been within his knowledge, as they are matters of common knowledge. He had, for a period of five years, made visits to and made payments on said property, until he entirely paid the purchase price. Some kind of a breakwater had been erected at some time along a section of the bay. No objection was made to its height or the plan of construction by plaintiff during the above period. After said storm had occurred another bulkhead was constructed and a number of groins were extended into the bay. Defendant or its predecessor at no time obligated itself to combat the fury of the sea. Plaintiff saw the situation and must have known all that any average person could have known as to the caprice of ocean swells and tidal waves, which may occur at unpredictable periods of time. That they do occur is a matter of common knowledge.

We are unable to find any good reason for allowing the plaintiff to rescind his contract at the time when the value of real estate was at its lowest mark, 1931, after having enjoyed the right of possession for approximately five years. We are unable to see that said lot suffered any damage measured by the contract of sale and purchase.

Judgment reversed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

17 Cal.App.2d 277

RABEN v. HAMILTON DIAMOND CO., Inc., et al.

Civ. 11118.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1936.

1. Appeal and error 🔑110

Action for damages for assault and battery is action in which trial by jury is a matter of right within statute authorizing an appeal from an order authorizing grant of new trial in action wherein trial by jury is matter of right (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. Appeal and error 🔑110

Order granting new trial in action for damages for assault and battery in which trial by jury was matter of right *held* appealable, notwithstanding trial was by court and not with a jury (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Reva Raben against the Hamilton Diamond Company, Inc., a corporation, and another. From an order granting the named defendant, a new trial, the plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

Ben Rosenthal and Charles Murstein, both of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black and Lazare F. Bernhard, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Respondent moves to dismiss the appeal, which is from an order granting respondent a new trial, on the ground that the appeal is not authorized in this case because the action was tried by the court without a jury. We find no basis in the law for this position.

Prior to an amendment made in 1933, that portion of section 963 of the Code of Civil Procedure applicable to our problem read: "An appeal may be taken from a superior court in the following cases: * * * 2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict in an action or proceeding tried by a jury where such trial by jury is a matter of right." Plainly, by these provisions, an appeal from an order granting a new trial was authorized only in one class of cases, that is, in those actions or proceedings where a trial by jury was a matter of right, and only then when the right had been exercised and a jury trial had.

[1, 2] In 1933 the Legislature (St.1933, p. 2472) amended this section by eliminating the words "tried by a jury," so that an appeal is now authorized, "2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict in an action or proceeding where a trial by jury is a matter of right." The classification of cases remains the same; that is, those actions or proceedings where a trial by jury is a matter of right. There is no question but that the present action, one for damages for assault and battery, comes within the class. The limitation formerly present, that the trial should be with a jury, has been eliminated. We agree with the conclusion expressed by the appellate department of the superior court in Treiman v. Kennon (1934) 139 Cal.App.(Supp.) 796, 800, 30 P.(2d) 636, that unquestionably an appeal will lie from an order granting a new trial in this class of cases, although the trial was by the court and not with a jury.

The motion to dismiss the appeal is denied.

We concur: HOUSER, P. J.; DORAN, J.

17 Cal.App.2d 135

HILBERT et al. v. OLNEY et al.

Civ. 10950.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1936.

Rehearing Denied Nov. 10, 1936.

1. Appeal and error 🔑870(2)

Appeal from judgment solely would also be considered as appeal from order denying motion for judgment notwithstanding verdict where parties treated appeal as so taken.

2. Automobiles 🔑245(17)

Whether automobile mechanic was contributorily negligent in parking his roadster partly on main traveled portion of highway in rear of truck which he was repairing *held* for jury (Gen.Laws 1931, Act 5128, § 136).

3. Negligence 🔑136(9)

Contributory negligence is question of law only when court is compelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to negligence of plaintiff contributing to his injury.

4. Appeal and error 🔑1001(1)

Reviewing court is not justified in disturbing judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support judgment, nor can court review finding based upon reasonable inference though in its judgment opposite inference is more probable.

5. Automobiles 🔑244(37)

Evidence that truck driver passed automobile at speed of 40 miles per hour, swung back to right side of road, and crashed into roadster parked three to four hundred feet distant behind truck under which mechanic was working, *held* to support finding that truck driver's negligence was sole proximate cause of collision.

6. Automobiles 🔑243(1)

In action for death of automobile mechanic who was killed when truck crashed into roadster parked behind truck on which mechanic was working, testimony that truck could have been moved completely off highway *held* properly rejected as immaterial (Gen.Laws 1931, Act 5128, § 136).

7. Appeal and error 🔑1064(1)

In action arising out of collision between defendant's truck and parked vehicles, instruction that truck towing trailer or semitrailer could not travel more than 25 miles per hour under the California Vehicle Act *held* not prejudicial error, notwithstanding that defendant's truck was tractor with semitrailer rather than truck with semi-trailer (Gen.Laws 1931, Act 5128, § 118).

8. Appeal and error 🔑1064(1)

Judgment will not be reversed by reason of erroneous instruction unless upon consideration of entire case, including evidence, it appears that such error has resulted in miscarriage of justice.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Herman Hilbert and another, minors, by their guardian ad litem, Martha Hilbert, and another, against Luther Olney and others. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

[1] By a verdict of a jury, the plaintiffs, widow and minor children of Otto Hilbert, had judgment in the sum of $20,000 against defendants Luther Olney and a copartnership, Broomcrist & Wiedeman. The defendants claimed that the verdict was not supported by the evidence and moved for judgment notwithstanding, which motion the court ordered denied. The appeal is from the judgment solely, according to the notice of appeal, but since both parties in their briefs treat the appeal as taken also from the order denying motion for judgment notwithstanding, we shall so consider it. Appellants contend that the court erred in the rulings upon evidence, upon motions made, and in giving and refusing to give certain instructions.

Olney was a truck driver employed by the partnership and, about 3 a. m. of June 6, 1935, on the Valley boulevard about a mile west of Puente, drove his Mack truck into a Chrysler roadster belonging to deceased. At the time of the collision, deceased, an automobile mechanic, was engaged in repairing an International truck, to which he had been called by the driver, one Harry Moore. As a result of this collision both Moore and Hilbert were killed, their bodies being found in the highway immediately after the accident, and the International truck was knocked astraddle of a ditch on the north side of the boulevard. The Chrysler roadster burned on the highway. Moore had been driving in a westerly direction, and experiencing some trouble with his car had gone back to Puente to Haddick's garage and summoned Hilbert to his assistance. Witnesses testified that just prior to the accident, Moore's truck was partly on the pavement and partly on the dirt near to or forming the southerly slope of the ditch and that Hilbert's roadster was just to the rear of the truck with the beams of its headlights thrown on the back end of the vehicle. There was testimony also that tail-lights on both truck and roadster were burning, that clearance lights were burning on the truck, and that there was a flare blazing between them. It was stipulated at the opening of the trial that prior to the accident the Chrysler was not disabled and that the only defect in or about the International truck was a puncture or blowout of one of the rear right tires. Testimony of one of the witnesses, however, was that as he passed the two vehicles just before the accident, "I noticed one man lying underneath the truck as though he was working on the right rear wheel. He was between the drive-axle; he was lying on his stomach and was lying approximately crossways of the road."

Section 136 of the California Vehicle Act provides in clause (a) as follows: "(a) No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway, outside of a business or residence district when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle whether attended or unattended upon any public highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon." Deering's Gen.Laws 1931, p. 2517, Act 5128.

[2, 3] Appellants contend that Hilbert was guilty of contributory negligence as a matter of law in parking his roadster partly on the main traveled road in the rear of the International truck, in violation of this statute, claiming that it was not impracticable for him to have placed the Chrysler altogether off the main traveled portion of the highway. Whether or not this was so would seem to have been a question of fact to be decided by the jury. We note that at the scene of the accident the trial judge addressed the jurors as follows: "Ladies and gentlemen of the jury, I anticipate that one of the issues in this case will be whether or not the car got off the road as far as practicable. Now, you observe the conditions along here, the conditions of the road, the dirt, and along the side of the road, and everything in connection with the scene of the accident." Also that one of his instructions to the jury was the above quoted clause (a) of section 136, California Vehicle Act. But, assuming that it was altogether practicable for the Chrysler to have been placed completely off the main traveled portion of the highway, it does not follow, necessarily, that deceased was chargeable with contributory negligence. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125, 128. See, also, Smith v. Southern Pacific Co., 201 Cal. 57, 64, 255 P. 500; Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369; Mast v. Claxton, 107 Cal.App. 59, 64, 290 P. 48. In Skaggs v. Wiley, 108 Cal.App. 429, at page 433, 292 P. 132, 133, an automobile collision case in which the Supreme Court denied a hearing, the rule where a traffic regulation is violated is stated as follows: "A failure to observe the statutory requirement as to speed will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury [citing cases], and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence, this question is one for the jury. (Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 P. 84)."

In determining, in the instant case, whether any act or omission of the deceased proximately contributed to or caused his death, the jury was bound to consider the evidence before it. From this evidence it appeared in the words of one witness that "the truck that was coming from behind hit the Chrysler roadster and knocked it into the other truck." The damage to the roadster indicated the same thing and defendant Olney referred to the International truck as "the one that the Chrysler came in contact with." From these and other circumstances, the jury may have concluded that if deceased had parked his roadster two or three hundred yards west of the International truck instead of immediately east of it, or if he had gone to the scene of his last labors on foot, this crash and the resulting deaths would have occurred just the same. In fact, this jury may have believed that instead of being a proximate cause of the accident, the placing of the Chrysler where it was should have been a means for preventing it. One witness, a watchman at a mill approximately a half mile away, on making his rounds at 3 o'clock noticed from the roof of a four-story building the lights upon the highway, particularly "three red lights, and lights shining from a car onto the back end of a truck." Another witness, Southwell, testified that he saw the lights on the two cars from a distance of 1,500 feet as he drove toward them in a westerly direction, "* * * it was a truck standing there; and there was another car was standing behind with the lights—with I should say a spotlight on it, was shining on the back of the truck." He later in his testimony said: "They had a spotlight on the back end of the Chrysler that was sitting there. * * * It was shining back up the road toward Puente." This the witness recalled as a red light and Haddick testified that the Chrysler was equipped with an extra large tail light, that "there used to be a little, small tail-light on there, and we put on a large one with a larger red glass in it, because we used the car for running up and down the road on trouble jobs."

[4] Referring again to Skaggs v. Wiley, supra, we note that "a reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it (People v. Tom Woo, 181 Cal. 315, 184 P. 389), nor can it review a finding based upon a reasonable inference, though in its judgment the opposite inference is the more probable (2 Cal.Jur. 'Appeal and Error,' § 549, p. 935; Ryder v. Bamberger, 172 Cal. 791, 158 P. 753). * * * In view of the excessive speed of the defendant and the other circumstances shown, the court might reasonably have concluded that the sole proximate cause of the collision was defendant's negligence, and, had plaintiff been traveling at the speed allowed by law, the collision would nevertheless have occurred and that he would not have escaped injury. Under all the circumstances, the question was one for the trial court [citing cases], and we cannot say that its finding is unsupported."

[5] Southwell testified that when he was a short distance east of the point where Moore's truck was being repaired, and while running at 30 miles per hour, he swung to the left into the center lane of this three-lane pavement, preparatory to passing; that Olney, going at approximately 40 miles per hour, passed him on the left, that is, in the extreme southerly lane, and cut in ahead of him by a margin of a few inches when only about 100 yards from the International truck and the Chrysler. "Well, when he passed me he swung in right short and almost caught my front fender on my left side, he swung right back to the north side of the road again, and about three to four hundred feet of when I was fixed to pass the truck, the one that was standing. * * * He swung right back in and plowed into that little Chrysler that was sitting behind the big truck."

[6-8] And so as in Skaggs v. Wiley, supra, the jury "might reasonably have concluded that the sole proximate cause of the collision was defendant's negligence."

Appellants feel that they should have been allowed to show that the International truck was not so disabled as to prevent its being moved completely off the highway, but as will be noted from our views above expressed, such testimony would be immaterial, and we believe was properly rejected. It is also contended that the court erred in giving the following instruction: "I instruct you that the California Vehicle Act [Gen.Laws 1931, Act 5128, § 118] in force and effect at the time of the accident herein referred to provided among other things as follows: 'It shall be unlawful for the driver of a motor truck towing a trailer or semi-trailer to drive the same at a speed in excess of 25 miles per hour upon any public highway.'" The objection is that the Mack truck was a tractor and a semi-trailer, not a motor truck towing a semi-trailer. The jury heard Olney answer counsel's question, "Was it a tractor or a trailer or truck and trailer?" by the words, "It was a tractor and then a semi-trailer," so if the instruction should not have been given as being inapplicable to the facts, it is quite possible that the jury ignored it. At any rate, if error arose in the giving of this instruction, we cannot believe on the record of this case that it was prejudicial error warranting reversal. As the Supreme Court has said, speaking through Mr. Justice Conrey, in the recent case of Shuey v. Asbury, 5 Cal. (2d) 712, 713, 55 P.(2d) 1160, 1161: "It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice."

We find no merit in the objections of appellants as to other instructions given and refused.

The judgment and order are affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

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17 Cal.App.2d 265

HACKER PIPE & SUPPLY CO. v. CHAPMAN VALVE MFG. CO. et al.

Civ. 10907.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1936.

Rehearing Denied Nov. 25, 1936.

1. Damages 🔑6

Damages consisting of loss of anticipated profits need not be established with certainty, but it is sufficient that it be shown as reasonable probability that profits would have been earned except for breach of contract.

2. Damages 🔑6

That actual amount of damages from breach of contract is not susceptible of exact proof is not ground for permitting one whose act has resulted in loss to another to escape liability.

3. Principal and agent 🔑41

Generally, breach of exclusive sales agency contract through invasion of territory of agent will entitle agent to profits he would have made on sales in amount of those made by principal in invaded territory.

4. Principal and agent 🔑41

In ascertaining amount of damages for breach of exclusive sales agency contract, it is proper to assume that one who has established sales agency would have been able to conduct his business in usual manner except for interference of principal, and it is therefore proper to consider in estimating profits alleged to have been lost, volume of business done in past and percentage of profit made thereon.

5. Damages 🔑6

Rule that damages which are uncertain or contingent cannot be recovered does not apply to an uncertainty as to amount of benefit or gain to be derived from performance, but to an uncertainty or contingency as to whether any such gain or benefit would be derived at all.

6. Principal and agent 🔑41

Agent with exclusive sales agency contract was entitled to recover from principal compensation for detriment proximately caused by breach of contract by invasion of agent's exclusive territory, though exact amount of damage could not be determined (Civ.Code, § 3300).

7. Damages 🔑6

Absolute certainty in fixing damages is not required, but only as much certainty as possible under proof which is available.

8. Principal and agent 🔑41

In action against principal and agent for breach of contract giving plaintiff exclusive sales agency within certain territory with provision that in certain instances principal's representative had privilege of dealing directly with prospective customers with plaintiff's compensation for such sales to be established by agreement between principal's representative and plaintiff, principal and representative could not claim that arbitrary prices fixed by them on goods which they sold secretly in violation of contract with plaintiff were highest that could have been obtained, since they could not profit by their own wrong (Civ. Code, § 3300).

9. Appeal and error 🔑1008(1)

In action against principal and representative for breach of exclusive sales agency contract providing, in certain instances, that principal's representative had privilege of dealing directly with prospective customers with plaintiff's compensation for such sales to be established by agreement between principal's representative and plaintiff, finding that it was intention of parties that agent should receive compensation on all direct sales by principal, which was properly drawn from terms and circumstances of execution of contract, *held* binding on appellate court.

10. Principal and agent ⚿41

Under exclusive sales agency contract containing provision that in certain instances principal's representative had privilege of dealing directly with prospective customers with plaintiff's compensation for such sales to be established by agreement between principal's representative and plaintiff, compensation not being stipulated in contract, it would be presumed that parties intended that it should be reasonable amount where plaintiff had been denied opportunity to agree upon amount.

11. Principal and agent ⚿41

Under exclusive sales agency contract containing provision that in certain instances principal's representative had privilege of dealing directly with prospective customers with plaintiff's compensation for such sales to be established by agreement between principal's representative and plaintiff, proper basis of plaintiff's damage for secret sales by principal and representative at arbitrary prices was agent's customary percentage of profit.

12. Principal and agent ⚿41

Agent with exclusive sales agency contract which permitted principal's representative to make a few sales within agent's exclusive territory was not estopped, nor did it waive right to complain of secret sales by principal's representative at arbitrary price within agent's territory.

13. Estoppel ⚿54

There can be no waiver where one against whom it is asserted acted without full knowledge of facts, since it cannot be presumed in absence of such knowledge that there was intention to waive existing right.

14. Estoppel ⚿54

There can be no estoppel where facts are not known, since one cannot be presumed to have consented to something of which he had no knowledge.

15. Appeal and error ⚿1008(3)

In action by agent against principal and its representative for breach of exclusive sales agency contract which had been drafted and signed by representative and in which representative apparently intended to assume responsibility toward agent, construction of trial court that contract was binding on representative *held* consistent with terms of contract and binding upon appellate court.

16. Principal and agent ⚿41

In action against principal and agent for breach of contract which agent had drawn up and signed with apparent intention of being bound by contract, rule that agent contracting in purely representative capacity does not assume personally obligations which are imposed on his principal did not apply, since plaintiff's cause of action against agent was for breach of agent's contract, and agent was therefore properly joined as a defendant.

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Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Hacker Pipe & Supply Company against the Chapman Valve Manufacturing Company and J. T. O'Leary. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Arthur R. Smiley, Frederick D. Anderson, and Bertram L. Linz, all of Los Angeles, for appellants.

Joseph N. Owen, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff brought this action to recover damages alleged to have been suffered through breach of a contract by which plaintiff was appointed the exclusive jobber for the products of the defendant Chapman Valve Manufacturing Company (designated herein as "defendant"), in the territory of southern California. The breach alleged consisted of the making of direct sales by said defendant in plaintiff's territory in alleged violation of the agreement, by reason of which plaintiff was deprived of the profits it would have made had it handled the sales as jobber. J. T. O'Leary was joined as a defendant because he assumed certain obligations as one of the contracting parties. Plaintiff had judgment in the sum of $10,676.07. This amount was arrived at by applying the percentage of profit which plaintiff had realized upon its own sales during the life of the contract to the total amount of sales made by defendant in alleged violation of the agreement, the theory of the court resting upon the assumption that plaintiff would have made the sales in the usual course of its business, and at its usual profit, had it been allowed to do so. The basis adopted by the court for computing the damages was a correct one if the assumption was justified by the evidence. It is contended by defendant that the evidence wholly failed to establish that plaintiff would or could have made the sales in question, and that therefore plaintiff failed to establish any damages consisting of the loss of profits. It is the position of defendant that if an action lies for breach of the contract plaintiff is limited in its recovery to the actual amount of profit realized by defendant from the sales involved.

[1-4] It is well established that damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract. As stated in Pye v. Eagle Lake Lumber Co., 66 Cal.App. 584, 227 P. 193, 195, quoting from Kennett v. Katz Const. Co., 273 Mo. 279, 202 S.W. 558, " 'While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account.' * * * The law requires 'only that the best evidence be adduced of which the nature of the case is capable.' " It is held generally that the breach of an exclusive sales agency contract through the invasion of the territory of the agent (which is substantially the case in hand) will entitle the latter to the profits he would have made upon sales in the amount of those made by his principal in the invaded territory. Schiffman v. Peerless Motor Car Co., 13 Cal.App. 600, 110 P. 460, 462; Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 P. 312, 313. In ascertaining the amount of damage it is proper to assume that one who has an established sales agency would have been able to conduct his business in the usual manner, except for the interference, and it is therefore proper to take into consideration, in estimating profits alleged to have been lost, the volume of business done in the past and the percentage of profit made thereon. Schumann v. Karrer, 184 Cal. 50, 192 P. 849; Yaguda v. Motion Picture Publications, Inc., 140 Cal.App. 195, 35 P.(2d) 162; Erskine v. Marchant, 37 Cal.App. 590, 174 P. 74; Sanford v. East Riverside Irrigation District, 101 Cal. 275, 35 P. 865; National Oil Refining & Mfg. Co. v. Producers' Ref. Co., 169 Cal. 740, 147 P. 963.

The contract between the parties provided in part as follows: "The Chapman Company agree to sell their products to the Hacker Company at so-called branch house prices, which fluctuate with the valve market from time to time. These prices are established by the Chapman Company and are based on listed catalogue prices less discounts in parallel with published discounts of national valve manufacturers, namely, Crane Co. and Walworth Mfg. Co. These prices are based on F.O.B. docks, Los Angeles Harbor, expense from Los Angeles Harbor to delivery point to be assumed by the Hacker Company. The Chapman Company agrees to furnish their products on consignment to the Hacker Company to be stored at the Hacker Company Warehouse in Los Angeles at the Hacker Company expense. * * * It is understood and agreed that J. T. O'Leary, representing the Chapman Company, will control the prices given the Hacker Company and will work with them in the setting up of resale prices. On special jobs, where necessary to obtain prices from the Chapman Company home office, it is understood these prices are the ones which the Chapman Company will invoice the Hacker Company. J. T. O'Leary and the Hacker Company are to establish the resale prices to the customer in such instance. It is further understood and agreed, in cases where prospective customers express a desire, or where instances arise which will be of mutual advantage to all concerned, that the Chapman Company, through their representative, J. T. O'Leary, have the privilege to deal direct and invoice direct, goods sold to such customers. J. T. O'Leary, in such instances, is to establish by agreement with the Hacker Company the amount of compensation to be allowed them."

Between September 15, 1931, and July 19, 1934, defendant made sales in plaintiff's exclusive territory, aggregating $68,464.17. The branch house cost of the same merchandise amounted to $67,757.04. It is obvious, therefore, that had plaintiff made the sales at the prices for which they were made by defendant, the total selling price would have exceeded the cost of the goods to plaintiff, at the branch house cost price, by the sum of $707.13. In awarding plaintiff judgment the court found that plaintiff could have sold the merchandise at a profit to itself of $10,676.07.

The defendants contend that if they breached the contract they were liable at most for the amount of their own profit on the sales and that if they made none they owed plaintiff nothing by way of damages. Further than this, they recognize no duty toward plaintiff in the matter of direct sales. But we doubt that the case is so simple. Defendants point to the fact that the sales they made were to large oil companies, municipalities, and public agencies, and they contend that plaintiff failed to prove that it could have made the same sales at higher prices. Cases are cited upon this point which hold that it cannot be assumed that an agent could have sold goods for higher prices than those received by his principal upon sales made in the agent's territory. But we cannot accept the rule laid down in those cases as controlling here.

There were numerous flagrant breaches of the contract by defendants. In fact, when plaintiff objected to the practice of defendants in making sales secretly the latter replied by letter as follows: "The Hacker Pipe and Supply Co. have been conversant with circumstances surrounding such sales as have been made by Chapman Valve Manufacturing Co. direct and the Chapman Company policy is that it will continue to sell direct to such customers as their representative J. T. O'Leary may elect." When it is borne in mind that defendants were fixing their own prices on the products sold without consulting plaintiff and that O'Leary was receiving a commission on such sales as he made (which was the fact), it is apparent that defendants had no intention of respecting plaintiff's rights under the contract and considered that they could violate them with impunity. Are they to be allowed in such a case to sell at what would have been the cost of the goods to plaintiff and to say to it "there was no profit in the sales and therefore you have not been hurt"? Are they to be allowed to obliterate their contract and free themselves from their obligations by such unfair means? If such is the law an exclusive agency contract affords the agent no protection against a principal who chooses not to respect it. An agent would be at the mercy of the principal who came into the exclusive territory and sold to others at the same prices he charged his agent for like goods. The principal would have a convenient and inexpensive way of ridding himself of an undesirable contract. Of a similar situation the court said in Schiffman v. Peerless Motor Car Co., supra, "Another element entering into the consideration of such a question is that of the estoppel of defendant to deny that plaintiff would have made sale of these machines but for its violation of the contract. It does not lie in its mouth to say, 'You could not have sold these machines if I had filled your orders and had not devised a method whereby your employees could make these sales through another agency.'" It is true that it did not appear in that case whether the principal had sold for less than the prices the agent would have charged, but that fact has no bearing upon the legal principle announced by the court. Plaintiff had an established business in selling the Chapman Company valves. It had made sales in the sum of $65,065.64, and was diligently promoting further sales. If it was impossible to know with certainty the prices at which plaintiff could have made the sales in issue, the defendants and not plaintiff were responsible for the uncertainty, and they should bear the responsibility. That this is a just and wholesome rule cannot be questioned. Defendants were allowed to prove the conditions under which their sales were made in an effort to show that plaintiff could not have obtained higher prices. The court found, however, that plaintiff could have made such sales and defendants do not question this finding except by their assertion that plaintiff would have had to sell at the same prices which they received.

[5-8] The fact that the goods were sold by defendants furnished sufficient proof that they could have been sold by plaintiff. In some cases they were sold at prices that would have returned a profit to plaintiff. If the damages were uncertain it was because of the difficulty in proving the amount of profit plaintiff would have made and not in proving the volume of sales that it would have made. In Bredemeier et al. v. Pacific Supply Company, supra, it was said: "The rule that damages which are uncertain or contingent cannot be recovered does not apply to an uncertainty as to the amount of the benefit or gain to be derived from performance, but to an uncertainty or contingency as to whether any such gain or benefit would be derived at all. [Citing cases.]"

The fact that the exact amount of damage could not be determined does not defeat plaintiff's right to recover. Under section 3300 of the Civil Code, plaintiff was entitled to compensation for all the detriment proximately caused by the breach and for the detriment which in the ordinary course of things would be likely to result therefrom. The law does not require absolute certainty in fixing damages, although it does require as much certainty as possible under the proof which is available. Oftentimes it is necessary that the amount be left to the discretion of the court or jury. While such, of course, is not the rule in the present case, plaintiff was entitled to recover damages as specified in said section of the Code. Any uncertainty as to the amount of profit that plaintiff might have made upon the sales results solely from the arbitrary prices fixed by defendants upon the goods which they sold secretly. Defendants, having taken the matter into their own hands, and having refused plaintiff an opportunity to make the sales or assist in making them, cannot be heard to say that the arbitrary prices which they fixed were the highest that could have been obtained. They cannot profit by their own wrong.

[9-11] There is a further reason why defendants cannot be heard to complain of the method adopted by the trial court in assessing damages. The contract provided that defendant O'Leary was to agree with plaintiff upon the compensation the latter should receive on sales made directly by defendants. The court found that it was the intention of the parties that plaintiff should receive compensation on all such direct sales. This construction of the agreement, properly drawn from its terms and the circumstances of its execution, is binding upon an appellate court. Scott v. Sun-Maid Raisin Growers Ass'n (Cal.App.) 57 P.(2d) 148; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34. The compensation not being stipulated in the contract, it will be presumed that the parties intended that it should be in a reasonable amount. Defendants denied plaintiff the opportunity to agree upon the amount. They sold at prices which secured their own profit without concerning themselves with plaintiff's right to compensation. The amount of plaintiff's damage was determined by the court upon the basis of plaintiff's customary percentage of profit. This was a proper basis, and in fact the only fair one which the court could have adopted if the court had undertaken to determine directly what would have been a reasonable compensation to be received by plaintiff. It was the only alternative to the theory of defendants that by fixing arbitrary prices at which they would sell they thereby placed a limitation upon the damages which plaintiff could recover, namely, such profit as the defendants themselves made. When this obnoxious theory was rejected, the court was required to adopt some sound basis for the measurement of the damages. It was the duty of defendants in all events to act in the highest good faith toward plaintiff. When they undertook to make direct sales upon their own responsibility, they were in duty bound to sell at the highest prices obtainable. Their course of conduct lends support to the belief that they were satisfied when they had made a profit for themselves. They would have the court say to plaintiff, as they have said, "You have no redress because you cannot prove that you could have sold the goods at a higher price if you had been given the opportunity to use your abilities in the effort." But it is far more just to say to defendants, "You cannot by your own deliberate acts cast the issue of plaintiff's damage into the realm of uncertainty and thereby escape a just liability." To accede to the views which defendants urge upon us would be to encourage the violation of exclusive agency contracts from which principals might wish to be relieved, and it would constitute an admission of the inadequacy of the law to exact compensation for those whose rights had thus been violated. The court has found that plaintiff could have made the sales which were made by defendants, which implies that they could have been made at the prices which would have earned plaintiff its customary profit. If the best of evidence to prove this fact was not before the court, plaintiff was in no way to blame. Upon the question of damages the conclusion of the trial court was just and fair, and the amount awarded was not unreasonable.

Among the defenses raised by the answer of defendant Chapman Valve Manufacturing Company were those of waiver and estoppel, under which it was claimed that plaintiff waived objection to, and was estopped from complaining of, the transactions of which it now complains. Upon this appeal an elaborate argument is presented in an effort to convince this court that the findings of the trial court against the claims of estoppel and waiver are without support in the evidence.

[12] After the contract was executed in 1931, defendant moved its stock to the warehouse and salesroom of plaintiff, where the products of defendant were prominently displayed, and from which place of business deliveries were made upon sales made by defendant as well as those made by plaintiff. Defendant's agent, O'Leary, had his office there. Mr. Hacker and Mr. O'Leary discussed a few of defendant's sales, but there were others in a considerable number as to which Hacker had no knowledge or information. The direct sales made by defendant were in large part secretly made, and plaintiff's information concerning the same was generally no more than that which could be acquired without assistance from the representatives and employees of defendant. We think the trial court was justified in believing that Hacker, in withholding objection to defendant's sales, concerning which he had some information, depended upon O'Leary to act in good faith and in the interests of plaintiff as well as those of defendant, and that he further believed that whenever possible O'Leary would obtain prices for goods sold directly which would admit of a substantial compensation to plaintiff. This would have been the more reasonable because of the fact that O'Leary was a stockholder and secretary of plaintiff corporation and a member of its board of directors. Plaintiff was warranted in taking the fact of this relationship into consideration in judging whether it was being honestly treated by O'Leary in the transactions which he handled directly for the defendant corporation. But the fact appears to have been that large sales were made by O'Leary without any knowledge on the part of Hacker or any other representative of plaintiff, and solely in the interests of defendant. It was not until after plaintiff learned of many sales secretly made and notified O'Leary that it would stand upon the terms of the contract and insist upon being compensated on such sales that defendant's true position was revealed. At that time O'Leary wrote the letter from which we have quoted, and without offering any excuse therefor other than plaintiff's insistence that the contract be complied with, O'Leary, on behalf of defendant, gave three months' notice of termination of the agency, in accordance with a provision of the contract allowing such termination. This appears to have been the first disclosure of the attitude of defendant and O'Leary with respect to their intention to ignore the rights of plaintiff. We cannot see that consent to a few sales would be binding upon plaintiff if the consent was given in ignorance of the fact that many other sales had been made or that defendant intended to make them. It is altogether unreasonable to suppose that plaintiff would have acquiesced in a course of dealing which would have obliterated its rights as defendant's agent while defendant was using plaintiff's salesroom and facilities for the conduct of its own business.

[13] There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. Craig v. White, 187 Cal. 489, 202 P. 648, 25 Cal.Jur. 926, 928. The evidence was ample to justify the belief that plaintiff's sales manager did not have full knowledge of the facts.

[14] What we have said upon the question of knowledge as bearing upon the defense of waiver is applicable as well to the pleaded defense of estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have consented to something of which he had no knowledge. 10 Cal.Jur., § 17, p. 633.

If Hacker did have knowledge of some of the sales and failed to object to them, it yet is not at all clear that his silence influenced O'Leary in any way, nor does it appear that the objection would have availed plaintiff anything. Defendant was claiming to act wholly within the terms of its contract. It contended then and contends now that it had the right to make direct sales in every case in which the same were made. It does not contend that plaintiff acquiesced in any departure from the methods prescribed by the contract. The trial court would have been fully justified in believing that the conduct of defendant was not influenced to any extent by the silence of plaintiff or its apparent acquiescence therein. The findings against the defenses of estoppel and waiver are supported by substantial evidence. It is unnecessary to decide whether Hacker had authority to waive performance of the contract by defendant.

[15, 16] Judgment was given against Chapman Company, and also against its codefendant, O'Leary. The latter contends that he was improperly joined as a party defendant and that no cause of action was alleged or proven against him. This posi-

tion cannot be sustained. We have already quoted the provisions of the contract which set forth the duties of O'Leary to plaintiff. His sole obligation was to "establish by agreement with the Hacker Company the amount of compensation to be allowed them" on business done directly by the Chapman Company. The agreement was entitled: "Agreement Chapman Valve Manufacturing Company, Indian Orchard, Mass. Hacker Pipe and Supply Co., Los Angeles, and J. T. O'Leary, Los Angeles." It was signed "The Chapman Valve Manufacturing Company by Thos. F. Maher, Hacker Pipe and Supply Company by A. C. Hacker, V. P., (Signed) J. R. Dickinson, J. T. O'Leary, Representing the Chapman Valve Mfg. Co." The trial court held that O'Leary was one of the contracting parties and was therefore liable in damages for the breach of the contract. He is the one who drafted the contract by the terms of which he assumed the personal responsibility of fixing by agreement with plaintiff the amount of the latter's compensation to be paid on sales made directly by his principal, the Chapman Company. While it is true that such compensation was to be paid by the latter company, the authority was vested in O'Leary to determine what that compensation should be, and while this was an arbitrary authority, he bound himself by the contract to perform his duties to plaintiff in good faith. It would appear that the element of personal responsibility and duty of O'Leary as an individual, as distinguished from his actions in a representative capacity, was within the contemplation and understanding of the parties, and constituted an integral part of their agreement. It is apparent, also, that in drafting the agreement O'Leary intended to assume a personal responsibility toward the plaintiff corporation of which he was a stockholder, director, and secretary. The court so understood the contract, and that construction which is clearly consistent with the terms of the writing is binding upon this court. Scott v. Sun-Maid Raisin Growers Ass'n, supra; Kautz v. Zurich Gen. A. & L. Ins. Co., supra. Such cause of action as plaintiff may have results directly from the breach of the obligations of O'Leary, to the performance of which he bound himself as well as defendant corporation by his contract, which, as we have noted, was executed by the defendant corporation independently of its execution by O'Leary. The rule that an agent contracting in a purely representative capacity does not assume, personally, the obligations which are imposed upon his principal does not apply. Plaintiff's cause of action against O'Leary was not for inducing a breach of the contract; it was for the breach of O'Leary's contract which constituted a breach of the Chapman Company's contract as well, and O'Leary was therefore properly joined as a defendant.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

17 Cal.App.2d 214

NORTH v. VINTON.

Civ. 9930.

District Court of Appeal, First District, Division 1, California.

Oct. 26, 1936.

Hearing Denied by Supreme Court Dec. 22, 1936.

1. Automobiles 🔑244(13, 36)

Evidence of bicyclist struck by passing automobile, tending to establish that motorist failed to give timely warning and that motorist failed to allow more than three feet leeway in attempting to pass, *held* to sustain jury's finding that motorist was guilty of negligence causing accident (St.1931, p. 2125, § 125(a, d).

2. Appeal and error 🔑1060(1)

In automobile accident case, that plaintiff's counsel asked several jurors on voir dire whether they held stocks or bonds or other securities in any automobile accident or casualty company or in any surety company *held* not prejudicial error.

3. Trial 🔑127

Courts will not hesitate to set aside verdicts where evidence that defendant is insured is improperly admitted; but, where defendant makes statement which may be fairly construed as an admission or acknowledgment of responsibility and as part of same statement makes incidental reference to fact that he carries insurance, entire statement is admissible.

4. Trial 🔑133(6)

In automobile accident case, doctor's testimony that defendant after discussing accident directed doctor to take care of plaintiff and stated that defendant was insured *held*

not prejudicial, where testimony relating to insurance was stricken out and jury admonished.

5. Trial ⚷133(6)

In automobile accident case, where plaintiff's stepfather, after testifying regarding defendant's statements as to accident, was asked if he had given entire conversation, reply that witness asked defendant if he had insurance *held* not prejudicial, where statement regarding insurance was stricken out and jury admonished.

6. Trial ⚷133(6)

In automobile accident case, court's alleged failure to direct jury to disregard statement of plaintiff's counsel regarding financial circumstances of plaintiff's family *held* not shown to constitute prejudicial error, where no part of argument was incorporated in transcript and court instructed jury to be guided solely by evidence.

◆

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Robert North, a minor, by Eva C. Myklebust, his guardian ad litem, against E. L. Vinton. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

R. M. Holstein, of Sacramento, and Jensen & Holstein, of San Jose, for respondent.

KNIGHT, Justice.

The defendant appeals from a judgment entered against him in conformity with the verdict of a jury in a personal injury action involving a collision between a bicycle which plaintiff, fourteen years of age, was riding, and an automobile driven by defendant. As the result of the impact plaintiff was rendered unconscious, and besides suffering numerous severe cuts and bruises about the head and face he sustained a fracture of the neck of the left humerus. Damages were assessed in the sum of $2,500.

The first ground of appeal is that the verdict and judgment are contrary to the evidence and the law, and it is based upon the following contentions: That no fact or circumstance was disclosed by the evidence tending to prove that defendant was guilty of any negligent act or omission that neither the actual nor proximate cause of the accident was revealed, much less judicially proved; and that in any event the circumstances attending the accident as shown by the evidence are such that no inference of negligence on defendant's part can be reasonably drawn therefrom without inferring also that plaintiff was chargeable with contributory negligence.

The accident happened during the noon hour on East Julian street midway in the block between North Fourth and North Fifth streets in San Jose. East Julian street is thirty-six feet wide, and plaintiff at the time of the accident was riding his bicycle westerly along the right-hand side thereof, toward North Fourth street and approximately eight feet from the right-hand curb. Defendant was traveling along the same street and in the same direction, behind and to the left of the bicycle. He was driving a sedan automobile, and was accompanied by his wife, who sat beside him on his right. There was no traffic within the block, and no automobiles were parked along the sides of the street. Both vehicles were following a course straight ahead, and the automobile was traveling less than twenty miles an hour. Overtaking the bicycle the defendant ran up parallel with and proceeded to pass it on the left side, allowing a leeway between the two vehicles of three or four feet; but in some manner the bicycle came in contact with the side of the automobile, near the rear, apparently the left fender, as shown by the dents thereon; and plaintiff was injured.

Just what happened to cause the bicycle to come in contact with the automobile no one seems to know. There were no eyewitnesses to the impact; neither the defendant nor his wife saw the bicycle strike the automobile, nor could plaintiff account for its having done so. His testimony was that he was unaware of the approach of the automobile; that he was not swerving in his course; that all of a sudden something struck him from behind and he "went up in the air and landed" and that is all he remembered until he regained his senses in the hospital. However, defendant's wife heard the impact and screamed. The automobile was stopped immediately, and upon alighting defendant and his wife found plaintiff lying on the pavement behind the right rear wheel of the automobile, wounded and unconscious. There was a conflict in the testimony as to whether defendant sounded his horn at any time before attempting to pass the bicycle. Defendant and his wife testified that they did sound the horn at least ten feet behind plaintiff and before they started to pass him. But plaintiff and a schoolmate who was riding a bicycle about fifty feet ahead of plaintiff denied having heard any horn; and plaintiff introduced other testimony which might have some tendency to show that defendant, in relating his version of the happening of the accident to a police officer and the doctor at the emergency hospital to which defendant drove plaintiff following the accident, failed to mention that he sounded his horn.

[1] In support of the jury's verdict plaintiff contends that the evidence establishes two distinct negligent omissions on the part of defendant which were the sole proximate cause of the accident: First, failure to give any warning, or at least a timely warning, with his horn before attempting to pass the bicycle; and, secondly, failure, under the conditions there present, to allow more than three feet leeway in attempting to pass the bicycle; and in this connection he cites subdivisions (d) and (a) of section 125 of the California Vehicle Act (St.1923, p. 557, § 125 (a, d), as amended by St.1931, p. 2125). As in force at the time of the accident, those subdivisions declared as follows: "The driver of an overtaking motor vehicle when traveling outside of a business or residence district, *and under other conditions when necessary to insure safe operation,* shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction"; and, "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof *at a safe distance* and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle." (Italics ours.) In view of the statutory traffic rules thus prescribed, it would seem that even though the bicycle swerved into the side of the automobile while the latter was passing, as seems probable from the cross-examination of defendant's wife, there would still remain the questions of fact for the jury to decide as to whether the swerving was the result of plaintiff's negligence, and if so whether it was the sole or a contributing cause of the accident; or whether the two omissions of defendant relied upon by plaintiff constituted negligence on defendant's part, and if so whether such negligence was the sole or a contributing cause of the accident. Stated in a different way, it would appear that this is another case of traffic accident, which so frequently happens, wherein the state of the evidence is such that different minds may reasonably draw therefrom different conclusions as to whether the plaintiff or the defendant, or both, were at fault. And in the present case, when all of the circumstances attending the happening of the accident are taken into consideration, particularly the width of the street and the fact that there was no traffic thereon, also the fact that the accident happened at noonday and that defendant saw plaintiff in plain view a considerable distance ahead before attempting to pass him, we are not prepared to hold, as a matter of law, that the inferences drawn by the jury that defendant was negligent in the operation of his automobile and that such negligence constituted the sole proximate cause of the accident are unsupported by the evidence.

[2] Nor do we find any merit in defendant's further contention that he was precluded from having a fair trial on account of certain questions propounded by plaintiff's counsel to several of the jurors on voir dire as to whether they held any stocks or bonds or other securities in any automobile accident or casualty company or in any surety company, and by the testimony given by two of plaintiff's witnesses wherein the matter of insurance was mentioned by them in relating certain declarations they claimed the defendant made to them at the emergency hospital shortly after the accident, concerning the circumstances thereof.

The questions propounded to the jurors were almost identical in form with those asked in the case of Daniel v. Asbill, 97 Cal.App. 731, 276 P. 149, and as there held, such questions are permissible, and if asked in good faith and are so framed that they do not convey the impression that the defendant is in fact insured, no error is committed. The questions here complained of do not transgress any of the limitations of this rule.

[3] With respect to the two witnesses whose testimony is made the subject of defendant's second complaint, it may be stated generally that while a reference to the fact that defendant is insured against liability may be highly prejudicial, and courts do not hesitate to set aside verdicts

of juries where such evidence is improperly admitted, it is a well-settled exception to the general rule that where a defendant makes a statement which may be fairly construed as an admission or acknowledgment of responsibility and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance, but solely because the reference to the insurance is part of the admission. Handley v. Lombardi, 122 Cal.App. 22, 9 P.(2d) 867, and cases cited; Harju v. Market Street Ry. Co., 114 Cal.App. 138, 299 P. 788; Noble v. Bacon, 129 Cal.App. 177, 18 P.(2d) 699. In other words, under the circumstances above stated the entire statement is admissible, even though it does reveal that the defendant carries indemnity insurance. King v. Wilson, 116 Cal.App. 191, 2 P.(2d) 833.

[4] One of the witnesses referred to was the doctor at the emergency hospital. He testified that he asked the defendant how the accident happened and that the defendant stated he was driving west on Julian street; that he was back of the boy, and in passing that he collided with him; continuing, the witness stated that defendant told him "to take care of the boy, that he was insured with the Pacific Indemnity Company — ." At this point counsel for defendant interrupted with an objection, and the court promptly struck out "the insurance part" of the answer. Testimony to the same substantial effect was given in the case of King v. Wilson, supra, and on appeal it was held admissible. However, and in any event, here, as in that case, the portion of the statement relating to insurance was stricken out and the jury admonished to disregard it. Consequently, under the circumstances stated, no prejudicial error appears. Weiner v. Mizuta, 6 Cal.App.(2d) 142, 44 P.(2d) 421; Bamber v. Belprez (Cal.App.) 58 P.(2d) 1325. In the cases of Squires v. Riffe, 211 Cal. 370, 295 P. 517, and Citti v. Bava, 204 Cal. 136, 266 P. 954, upon which defendant relies, the matter of insurance was sought to be introduced in connection with testimony which was wholly inadmissible in the case. As will be seen, therefore, those cases are not in point.

[5] The other witness was plaintiff's stepfather, who testified that in reply to his question as to the cause of the accident the defendant stated that he "was not sure," that he "wasn't paying enough attention," and that he collided with the boy. The witness was then asked by counsel for plaintiff if he had given all the conversation or if there was any more, and the witness replied, "Well there is conversation about—I asked him if he has got any insurance"; but before he could complete his answer defendant's counsel objected and counsel for plaintiff stated, "That may go out." Afterwards, on motion of defendant's counsel, the statement of the witness "regarding insurance" was stricken out by the court and the jury admonished to disregard it. It is apparent, therefore, that under the law as declared in the cases above cited no ground for reversal exists.

Besides interposing the objections and the motions to strike above mentioned, defendant, as was his legal right (Squires v. Riffe, supra), moved several times for a mistrial, and in each instance his motions were denied. The denial of the motions is not assigned as error, but defendant complains that the "brusque" manner in which the court ruled on the motions undoubtedly prejudiced defendant's case in the minds of the jury. In this respect the record shows that the remarks of the court in ruling on said motions, especially the last time, indicate a spirit of considerable displeasure which does not appear to have been warranted by the mere making of the motions, but in our opinion the remarks did not have the prejudicial effect upon the jury contended for by defendant.

[6] Lastly, defendant assigns as error the failure of the trial court to rule on his motion to direct the jury to disregard the statement "* * * whose family are not wealthy," which he asserts was made by plaintiff's counsel during the course of the latter's argument to the jury. But no part of the argument made by plaintiff's counsel is incorporated in the transcript, not even the sentence in which the above-quoted statement is asserted to have been used. Consequently, there is nothing in the record to show under what circumstances the remark was made. Moreover, the record discloses that the court instructed the jury, among other things, that in arriving at its verdict it should be guided solely and entirely by the evidence introduced, and should not be swayed or influenced in the slightest degree by sym-

pathy or prejudice for or against either party to the action.

The judgment is affirmed.

We concur: TYLER, P. J; CASHIN, J.

WEBER et al. v. PINYAN et al.*

Civ. 1961.

District Court of Appeal, Fourth District, California.

Oct. 19, 1936.

Hearing Granted by Supreme Court Dec. 17, 1936.

1. Statutes 🔑225¼

Statutes passed at same session of Legislature must be construed together.

2. Automobiles 🔑181(1)
Negligence 🔑89(1)

Automobile guest statute and imputed negligence act each created liability unknown under common law (Civ.Code, § 1714¼; St. 1931, p. 1693, § 141¾).

3. Automobiles 🔑181(1)

Automobile guest law did not abolish right of action for death or injuries of guest in automobile but merely changed proof required to permit recovery (St.1931, p. 1693, § 141¾).

4. Automobiles 🔑181(1)

"Willful misconduct" as used in automobile guest law, is intentionally doing something in operation of automobile which should not be done, or intentionally failing to do something which should be done under circumstances, disclosing knowledge, express or implied, that an injury to a guest would be probable result (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

5. Automobiles 🔑192(6)

Action based on willful misconduct of driver of borrowed automobile *held* maintainable by guest against owner of automobile, since "willful misconduct," being a degreè of negligence and not a separate tort, was imputable to owner (Civ.Code, § 1714¼; St. 1931, p. 1693, § 141¾).

6. Dismissal and nonsuit 🔑49

In automobile guest's action against owner and against driver of automobile, dismissal of action against driver *held* error where driver did not appear and did not request dismissal (Civ.Code, § 1714¼; St.1931, p. 1693, § 141¾).

GRIFFIN, Justice pro tem., dissenting in part.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Joyce Weber and husband against Bruce Robert Pinyan, also known as Bruce Robert Pinyon, and another. From an adverse judgment, the plaintiffs appeal.

Reversed, with instructions.

F. L. Richardson, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after sustaining a demurrer to a first amended complaint without leave to amend.

Plaintiffs are husband and wife. Norma Bird was the owner of an automobile in which Bruce Robert Pinyan took Joyce Weber for a ride as his guest. Pinyan used the car with the express permission of Norma Bird. Mrs. Weber was injured and this action followed. The amended complaint alleged acts of Pinyan which might have supported a judgment for plaintiffs, at least against him, under the rule laid down in Barcroft v. Adkins, 6 Cal.App.(2d) 180, 44 P.(2d) 379. Service of summons was not had upon Pinyan and he had not appeared in the action at the time of the judgment.

The principal question presented is whether an action based on the willful misconduct of the driver of a borrowed car can be maintained against the owner for injuries to a guest of the driver, under the provisions of section 1714¼ of the Civil Code and section 141¾ of the California Vehicle Act (St.1923, p. 517, § 141¾, as added by St.1929, p. 1580, as amended by St.1931, p. 1693) as those sections existed at the time of the accident on May 18, 1935. A decision of this question requires the careful interpretation of those sections, and a solution of the problem of whether the owner who consents to the use of her automobile by another and whose liability is based on statutory imputed negligence, is liable for injuries to a guest caused by the willful misconduct of the person to whom she lends her car. We will refer to section 1714¼ of the Civil Code as the Imputed Negligence Act, and to section 141¾ of the California Vehicle Act as the guest law.

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*For subsequent opinion see 70 P.2d 183.

[1-4] These two statutes were passed at the same session of the Legislature and therefore must be construed together. We must determine the intention of that body in adopting them, and if reasonably possible, should give them a harmonious construction. Each created a liability unknown under the common law. The Imputed Negligence Act created a new right of action not known before in California. Cook v. Superior Court, 12 Cal. App.(2d) 608, 55 P.(2d) 1227. The guest law placed a limitation on a former right of action having origin in section 377 of the Code of Civil Procedure and section 2096 of the Civil Code by changing "the nature and character of the proof required in each case." Krause v. Rarity, 210 Cal. 644, 293 P. 62, 66, 77 A.L.R. 1327.

"Willful misconduct," as used in the guest law, now has a settled definition in California "as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988, 990; Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194, 197. This definition substantially conforms to those used in other jurisdictions in the United States though in some states different names have been used to fit the definition. In some states "willful negligence" is a frequently used and often criticized term. Kelly v. Malott (C.C.A.) 135 F. 74. Restatement of the Law, Torts, § 500, uses the term "Reckless Disregard of Safety" to characterize a like culpability.

Courts have found difficulty in drawing a line of demarkation between gross negligence and willful misconduct. In Sorrell v. White, 103 Vt. 277, 153 A. 359, 363, the Supreme Court of Vermont said: "For present purposes it is unnecesary—perhaps, in any event, it is impossible—more exactly to locate the shadowy line of demarkation between the two. At best the boundary can only be approximated."

It must be conceded that the majority view of the courts of the land is to the effect that the difference between negligence and willful misconduct is one of kind and not of degree. Bordonaro v. Senk, 109 Conn. 428, 147 A. 136. It is also said that when willfulness appears the act ceases to be negligence. Thayer v. Denver & R. G. R. Co., 21 N.M. 330, 154 P. 691. These two cases illustrate the extreme view but from the many that support the view that willful misconduct is something different from negligence, we cite the following by way of illustration: Boneau v. Swift & Co. (Mo.App. St. Louis) 66 S.W.(2d) 172; Neary v. Northern Pac. Ry. Co., 41 Mont. 480, 110 P. 226; Central of Georgia Ry. Co. v. Stamps, 48 Ga.App. 309, 172 S.E. 806; Moore v. East St. Louis Suburban Ry. Co. (Mo.App.) 54 S.W.(2d) 767; Burns v. Chicago & A. R. Co., 229 Ill.App. 170; Holdhusen v. Schaible, 60 S.D. 275, 244 N.W. 392; Isaacson v. Boston, Worcester & N. Y. St. Ry. Co., 278 Mass. 378, 180 N.E. 118; Finkler v. Zimmer, 258 Mich. 336, 241 N. W. 851; Sorrell v. White, supra. In some of these jurisdictions degrees of negligence are not recognized. In none of the many cases from other jurisdictions that we have read does it appear that the courts had confronting them the precise question which is before this court under statutes similar to ours. However, we must admit that we have not been able to search the statutes of those states.

The courts of still other jurisdictions take a contrary view and have concluded that willful misconduct is a degree of negligence. For illustration, see the following: Stagner v. Craig, 159 Tenn. 511, 19 S.W.(2d) 234; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N.W. 42; Bolin v. Chicago, St. P., M. & O. Ry. Co., 108 Wis. 333, 84 N.W. 446, 81 Am.St. Rep. 911; McNeil v. Munson S. S. Lines, 184 Ala. 420, 63 So. 992; Kaler v. Puget Sound Bridge & Dredging Co., 72 Wash. 497, 130 P. 894, 20 A.L.R. 674; Lutfy v. Lockhart, 37 Ariz. 488, 295 P. 975.

When we turn to the decisions of California we find that they are not in harmony on the question we are considering. In weighing these cases it should always be borne in mind that prior to 1929, the year of the adoption of the imputed negligence act and the guest law, our courts had no occasion to determine whether willful misconduct was a degree of negligence or differed from it in kind. All that was being done was to endeavor "to locate the shadowy line of demarkation between the two." Sorrell v. White, supra. There was no occasion to decide the question now confronting us. Therefore anything said in any of the earlier cases must not be regarded as decisive in the interpretation to be placed on the imputed negligence act and the guest law.

We will first consider the cases lending support to the position of respondents that willful misconduct differs from negligence in kind and that therefore willful misconduct cannot be included in any logical definition of negligence.

A frequently cited case is that of Tognazzini v. Freeman, 18 Cal.App. 468, 123 P. 540, 543, where the court, in attempting to draw the line between negligence and willfulness, said:

"The evident conflict in the trial court's presentation of the vital issue in the case to the jury cannot be reconciled, or the charge of the court as a whole harmonized, upon the theory that the term 'negligence,' as used by the court in the instruction complained of, was broad enough in its legal signification to cover both the careless and the willful acts of the defendants. Ordinarily, and likewise in the law, there is a decided and well-defined distinction between mere 'negligence' and 'willfulness.' Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong, and it follows that the moment a person wills to do an injury he ceases to be negligent. [Citing cases.]

"Notwithstanding the confused and indiscriminate use at times of the terms 'negligence' and 'willfulness' by judges and text-writers, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in Holwerson v. St. Louis, etc., Co., supra [157 Mo. 216, 57 S.W. 770, 774, 50 L.R.A. 850], where it is said: 'By "negligence" is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By "willful negligence" is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term "willful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer.'"

The next frequently cited case which attempted to draw the dividing line between gross negligence and willful misconduct is Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, 512, where it is said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792."

These definitions in the Tognazzini and Helme Cases have been frequently quoted and cited in recent cases where the courts were attempting to draw the lines between ordinary negligence, gross negligence, and willful misconduct under the guest law. See Malone v. Clemow, 111 Cal.App. 13, 295 P. 70; Whiteford v. Yuba City Union H. S. Dist., 117 Cal.App. 462, 4 P.(2d) 266; Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279; Turner v. Standard Oil Co., supra; Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474; Meek v. Fowler, supra; Gimenez v. Rissen, 12 Cal.App.(2d) 152, 55 P.(2d) 292.

In the Gimenez Case the plaintiffs, guests, recovered judgment against their minor host, the driver of the car who was guilty of willful misconduct, and his parents who had signed the application for his operator's license. The judgment against the driver was affirmed, and that against his parents was reversed upon the ground that they were liable for his negligence but not for his willful misconduct. The imputed negligence act was not involved in that case but rather section 62 of the California Vehicle Act (St.1929, p. 522) as it then existed. That section made the parents who signed the application of the minor liable for his negligent acts, just as the imputed negligence act makes the owner who lends his car liable for the negligence of the borrower. It is apparent that there is no logical way of distinguishing between the Gimenez Case and the instant case. It must be construed as direct authority for holding that willful misconduct differs from negligence in kind and not merely in degree, and that a guest cannot recover from an owner who lends his car to another whose willful misconduct causes the injuries to the guest. A hearing by the Supreme Court was not asked in the Gimenez Case.

When we study the Gimenez Case and other California authorities we are forced to the conclusion that the results there reached were primarily founded on the definitions of ordinary negligence, gross negligence and willful misconduct as found in the Tognazzini and Helme Cases. In a study of the definitions in these two cases, and the many cases citing or quoting them, we find two paramount thoughts running through all of them which seem to control the conclusions reached: (1) That negligence is opposed to diligence, signifies an absence of care, and is negative in its nature; and (2) "'Willful misconduct' means something different from and more than negligence" and is positive in its nature.

In one sense of the term it is entirely proper to define negligence as negative in its nature. There can be no negligence where one of the parties does not owe a duty to the other. When in the law we refer to negligence as the failure to perform a required duty owed by one to another it of course implies a neglect of duty and in that sense is negative. However, when we use negligence in the sense of referring to the act which constitutes the breach of duty it is improper to say that it is negative in nature for the act may be either negative or positive. In California where degrees of negligence are recognized, a failure to recognize this distinction will lead to mistake and error in construing the two statutes we are considering.

We may illustrate our meaning by using the familiar example of speed. The driver of an automobile owes the duty of not exposing another to unreasonable and unnecessary risk of injury. Where excessive speed produces this result it constitutes negligence. Speed of itself and standing alone does not constitute willful misconduct. Yet speed is the result of positive thought followed by direct muscular action. Depressing the throttle which causes speed is the result of intent and is a willful act, for the brain directs the muscular acts which cause the speed. When we refer to the negligent act of speeding we refer to a positive, intentional, and willful act. When we refer to the breach of the duty of not exposing another to the danger of injury from excessive speed, we may well classify that negligence as negative in its nature for it is the failure to use due care.

A frequently used and approved definition of "negligence" is found in Richardson v. Kier, 34 Cal. 63, 91 Am.Dec. 681, as follows: "'Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person.' (Broom's Legal Maxims, 329.)"

Observe that this definition is concerned with the acts which may constitute negligence among which is "doing something which a prudent and reasonable man would not do." When we do something we act affirmatively and often intentionally. The other part of the definition refers to the negative, that is the failure (omission) to do something. It seems clear from this long-accepted definition that some negligent acts are negative and others positive in their nature.

Willful misconduct is "intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Meek v. Fowler, supra. That definition was written in a motor vehicle guest case. To make it general, the phrases, "in the operation of a motor vehicle" and "to a guest," should be eliminated. With them deleted it exactly conforms to one phase of the definition of negligent acts which is last quoted, with the added proviso that in willful misconduct the circumstances of the case disclose "knowledge, express or to be implied, that an injury * * * will be a probable result." Thus these two definitions are of identical acts which may constitute either willful misconduct or negligence with the only distinguishing feature between the two being the probable results to be expected. As the acts constituting negligence and willful misconduct may be the same it seems conclusive that the two differ only in degree and not in kind when we have to distinguish them by the circumstances under which they are performed as indicating the probability of ensuing injury.

In Gibbons v. Naritoka, 102 Cal.App. 669, 283 P. 845, 847, it is said: "Liability for injuries sustained may attach, not only for the result of one's deliberate negligent acts, but also for his failure to exercise due care in the performance of his duty or in the management of his property. Negligence may consist of affirmative acts or careless omissions. Section 1714, Civ.Code. Mr. Justice Henshaw says in the case of Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 518, 111 P. 530, 532, Ann.Cas.1912A, 642: 'Negligence may be active or passive in character. It may consist in heedlessly doing an improper thing, or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not.'"

We can attach little importance to the often repeated statement that "'Willful misconduct' means something different from and more than negligence." Such a statement is factually and technically true and still is no reason for holding that willful misconduct differs from negligence in kind under the two laws we are considering and in California where degrees of negligence are recognized. Krause v. Rarity, supra. It is also true that ordinary negligence means "something different from and more than" slight negligence, and the same is true of gross negligence when compared with ordinary and slight negligence. Each of them constitute a degree of negligence. Of course, willful misconduct is different from and more than negligence because in willful misconduct there must appear the added element of knowledge of the probability of injury. In that respect alone it differs from and is more than negligence, but it does not follow from that fact that willful misconduct is different in kind and not merely in degree from negligence. Instead, the definitions of negligence and willful misconduct which we have quoted would indicate that the difference between the two under the guest law and the imputed negligence act is one of degree only.

When we turn to the cases adopting the opposite view from those supporting the position of respondents, we find arguments which force us to the conclusion that the judgment of the trial court must be reversed.

In the early case of Esrey v. Southern Pacific Co., 88 Cal. 399, 26 P. 211, it was held that a complaint alleging negligence would not support a judgment based on willful and wanton acts. However, this case was again before the Supreme Court in 103 Cal. 541, 37 P. 500. The complaint had been amended alleging willful and wanton acts on the part of the servants of defendant. The court there held that the cause of action had not been altered by the amendment and rejected a plea based on the statute of limitations which would have run had a new and different cause of action been alleged in the amendment. It follows that the court must have been of the opinion that a willful tort differed from ordinary negligence only in degree and not in kind and that a new cause of action had not been alleged in the amended complaint.

In the case of Meek v. Fowler, 35 P.(2d) 410, a majority of the members of this court expressed the opinion that willful misconduct was a degree of negligence and did not differ from it in kind. A hearing was granted by the Supreme Court [3 Cal.(2d) 420, 45 P.(2d) 194], but an expression of its views on this question was withheld. This court by way of dicta reiterated its views on this question in the case of Hall v. Mazzei, 57 P.(2d) 948.

The case of Manica v. Smith, 138 Cal. App. 695, 33 P.(2d) 418, 420, in which a hearing was denied by the Supreme Court, is authority for holding that under the guest law willful misconduct is a degree of negligence and not a tort separate and distinct from negligence. In that case the court said:

"It is also asserted there is a fatal variance between the allegations of the complaint to the effect that the plaintiff's injuries were sustained as a result of the manner in which the automobile was operated, amounting to gross negligence on the part of Smith, and the evidence which was adduced at the trial which clearly shows that he was guilty of willful misconduct.

"We are of the opinion the conduct of the defendant Smith in recklessly driving the automobile in the manner above related amounts to gross negligence, and that it also constitutes willful misconduct.

"There is no variance between the allegations of the complaint that the manner in which the defendant Smith drove the car amounted to gross negligence, and the proof which was adduced at the trial indicating that he was also guilty of willful misconduct. The only negligence which is alleged was that he operated the machine in such a grossly negligent manner that the accident occurred. Negligence may be alleged in general terms. It is immaterial that he [the plaintiff] characterized the conduct of the driver as gross negligence, if in fact it was more aggravated so as to constitute willful misconduct. In truth, it included both. * * *

"From the foregoing definitions it is evident that acts or conduct which merely amount to gross negligence may not be aggravated enough to also characterize them as willful misconduct. Upon the contrary, acts which do amount to willful misconduct may also include gross negligence. In the present case, while the conduct of Smith does amount to willful misconduct, we are satisfied that it also constitutes gross negligence."

When the guest law was first enacted (Stats.1929, c. 787, p. 1580), it took away the right of action of the guest for ordinary negligence and made the "owner, or driver or person responsible for the operation" of a motor vehicle liable only for death or injury caused by intoxication, willful misconduct, or gross negligence. At common law no action lay for a tortious injury which resulted in death. Upon passage of the original guest law the question immediately arose as to the effect which the new statute, doing away with actions for negligence in guest cases, would have upon pending actions for death of a guest caused by the ordinary negligence of his host driver. In holding that such actions would not abate, the Supreme Court in Krause v. Rarity, supra, said:

"It cannot be doubted that section 377 of the Code of Civil Procedure and section 2096 of the Civil Code should be read together. When so considered with reference to the present controversy, they would mean that the heirs on September 12, 1927, had a cause of action against the defendant Rarity for the death of Krause, and that Rarity's liability would be tested by the rule of ordinary care. Suit was brought on November 2, 1927, alleging a cause of action under the then existing law on ordinary negligence which is the same as the want of ordinary care as provided in section 2096. Judgment on the verdict was entered September 22, 1928, and the notice of appeal was filed November 19, 1928. Pending the appeal and on August 14, 1929, section 141¾ of the California Vehicle Act was enacted.

"It is apparent that, if the new section had been enacted without the proviso [permitting recovery for gross negligence, wilful misconduct or intoxication], the rule contended for by the defendant Rarity would apply, the plaintiffs' cause of action would have been wiped out, and no recovery could be had on the judgment against said defendant, for the reason that said judgment has not become final. In such case the Legislature would have been unrestrained by constitutional barriers, and its intention, in the absence of a saving clause, would have been conclusively manifest. But the Legislature did not stop with the enactment of the portions of the statute which would have worked a repeal irrevocably, but added the provision which in effect continued the right of action on account of the death of the guest. In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery."

A similar question was presented after the Legislature had deleted the words "or gross negligence" from the statute (chapter 812, p. 1693, Stats.1931), leaving the "owner, or driver or person responsible for the operation" of the automobile responsible only for injuries or death caused by intoxication or willful misconduct. This question was answered in the case of Stotts v. Blickle, 220 Cal. 225, 30 P. (2d) 392, 393, where, after quoting a portion of the opinion in Krause v. Rarity, which we have quoted, that court said: "This language is clearly applicable to the situation presented by the 1931 amendment. It may well be that 'wilful misconduct' differs more radically from 'gross negligence' than 'gross negligence' differs from 'ordinary negligence.' Nevertheless the matter is still one of the nature of proof required to establish the culpability of the defendant. The right of action against a host for wrongful death of a guest is no more destroyed by the 1931 amendment than by the 1929 statute."

If willful misconduct were not a degree of negligence, but a definitely distinct, separate, and different tort, the Supreme Court could not have reached the conclusion it did in the Stotts Case. The right of action in death cases, given by section 377 of the Code of Civil Procedure, depended upon section 2096 of the Civil Code, which provides that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." In other words, the gratuitous carrier owed his guest the duty of ordinary care and was liable for ordinary negligence under that section. The heirs of a guest whose death was caused by the ordinary negligence of his host could recover up to August 14, 1929, the effective date of the first guest law which limited the recovery to cases where either intoxication, willful misconduct, or gross negligence was proved. In accidents happening between that date and August 14, 1931, they could only recover where the death was caused by intoxication, willful misconduct, or gross negligence. Where an accident happened after August 14, 1931, the heirs could only recover for death caused by intoxication or willful misconduct, gross negligence having been eliminated from the guest law as a ground of recovery, but they could recover where there was ordinary negligence and the accident happened prior to August 14, 1929, and where there was gross negligence and the accident happened between that date and August 14, 1931. Stotts v. Blickle, supra; Krause v. Rarity, supra. The right of action in death cases did not exist at common law and was purely statutory. Section 377 of the Code of Civil Procedure and section 2096 of the Civil Code gave the heirs the right of recovery for ordinary negligence of the host. In this respect the ground of recovery, ordinary negligence, was the same as under the imputed negligence act. If willful misconduct, as used in the guest law, were a tort separate, different, and distinct from negligence, the provision in the amended guest law that in death cases no recovery could be had except where death had been caused by intoxication or willful misconduct, and the elimination of all reference to negligence, would have resulted in the abatement of all such actions based on ordinary or gross negligence. The reason for this is found in the rule that where a right of action did not exist at common law, but was created by statute, and was not protected by the State or Federal Constitutions, a repeal prior to final judgment of the statute creating the right of action would abolish the right of action and defeat a recovery. People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L.R.A.(N.S.) 934, Ann.Cas. 1912B, 1148; Krause v. Rarity, supra. Such actions based on negligence did not abate upon the amendment of the guest law providing that the recovery could be had only on proof of intoxication or willful misconduct. Stotts v. Blickle, supra. The conclusion necessarily follows that under the imputed negligence act and the guest law, willful misconduct is a degree of negligence and does not differ from it in kind.

The case of Walling v. Rugen, 3 Cal. App.(2d) 471, 39 P.(2d) 827, is of compelling force. A guest suffered injuries and brought action against her host, and the owner of the automobile, alleging willful misconduct. She recovered judgment against both defendants. The judgment against both was affirmed on appeal and a hearing was denied by the Supreme Court. The case cannot be distinguished from the instant case. While the question of whether willful misconduct was a degree of negligence or a different, separate, and distinct tort was not discussed, it is obvious that the judgment against the owner of the car was unsupportable unless willful misconduct as used in the guest law be a degree of negligence and not a different tort.

[5] It follows that under the guest law and the imputed negligence act, the willful misconduct of Bruce Robert Pinyan, if any, should be imputed to Norma Bird, and that the demurrer of Norma Bird to plaintiffs' first amended complaint should have

been overruled. Any other conclusion would produce a most illogical result. While we are discussing a guest case, the results reached must be of general effect. If it should be finally decided in California that willful misconduct is not a degree of negligence, but a separate and distinct tort, that conclusion must be controlling in all automobile accident cases involving imputed negligence and not merely in guest cases. For illustration, let us assume that Pinyan had driven the Norma Bird automobile into another automobile and that in so doing he was guilty of willful misconduct. The injured occupants of the other automobile could not recover from the owner, Norma Bird, if willful misconduct is not a degree of negligence, while they could recover from her had Pinyan been guilty of only ordinary negligence. Thus, in so far as the owner is concerned, and under the statutes we are considering, a premium would be placed on the great recklessness of the driver by holding that willful misconduct is a separate tort and not a degree of negligence. We cannot believe that the Legislature intended any such result. This belief is strengthened by the use of the word "owner" in the guest law as it appeared in the California Vehicle Act. If the Legislature did not intend to have the willful misconduct of the driver imputed to an absent owner, there was no reason for having placed the word "owner" in the guest law and so doing was an idle act. The conclusion that the Legislature intended to have the willful misconduct of the driver imputed to the owner under the two statutes is somewhat strengthened by the case of Taylor v. Joyce, 4 Cal.App.(2d) 612, 41 P.(2d) 967, where it is said that, under the language of the guest law, the intoxication of the driver may be imputed to the owner and that the owner need not be personally intoxicated to permit the guest to recover from him.

Another question is presented by the pleadings but is not seriously considered in the briefs. It is alleged in the amended complaint that Pinyan was intoxicated and that the "injuries sustained by said plaintiff, Joyce Weber, were due to the * * * intoxication * * * of the defendant Bruce Robert Pinyan." The driving of an automobile while intoxicated is an act prohibited by statute. It is usually held that the violation of a statute brings the act within the definition of negligence per se. If driving an automobile while intoxicated is negligence per se, that negligence might be imputed to the owner of the car under the terms of the imputed negligence act. This probably furnishes sufficient ground for reversal of the judgment. However, as this question is not developed in the briefs, and as we are of the opinion that a determination of the question of imputing to the owner the willful misconduct of the person who operates her automobile with her consent is sufficient for the decision of this case, we prefer to place our conclusions on the ground we have first discussed rather than upon the question of the intoxication of the driver being imputed to the owner.

[6] The action against Pinyan should not have been dismissed as he had not appeared and did not request dismissal. He was liable to plaintiffs if his willful misconduct or intoxication, if any, proximately caused Mrs. Weber's injuries and they should have been permitted to have proceeded against him without regard to their right of recovery from Norma Bird.

The judgment is reversed, with instructions to the trial judge to overrule the demurrer of Norma Bird and permit defendants, or either of them, a reasonable time within which to answer.

I concur: BARNARD, P. J.

GRIFFIN, Justice pro tem (concurring and dissenting).

I concur and dissent.

This is an action brought by the plaintiffs, as husband and wife, to recover damages against the owner for personal injuries alleged to have been sustained by the wife while riding as a guest in an automobile involved in an accident.

The amended complaint alleges that on the 18th day of May, 1935, defendant Norma Bird was the owner of a certain Ford V-8 automobile; that on that date the defendant Bruce Robert Pinyan was operating the same with the consent and permission of the owner; that Joyce Weber was riding as a guest; that while Pinyan was driving at a high and reckless rate of speed he attempted to embrace her and to pull her over toward him; that he placed his right hand and arm around her shoulders and body and attempted to kiss her and in so doing took one or both hands off the steering wheel; that while he was attempting to embrace and kiss and hug her the automobile ran off the road and was wrecked and Joyce Weber was injured; that Pinyan was at that time intoxicated, but his intoxication was then unknown to Joyce Weber; that by reason of the misconduct and intoxication of Pinyan the plaintiff suffered injuries, all of which were due to the carelessness, negligence, recklessness, intoxication, and willful misconduct of Pinyan and to the high rate of speed at which the automobile was driven and his attempt to embrace the plaintiff.

The court sustained the general demurrer of defendant Norma Bird to the amended complaint without leave to amend, and dismissed the action. Plaintiffs were unable to personally serve the summons on Pinyan. Thereupon they filed notice of appeal from the judgment and have brought the case here for review.

This action is brought under the provisions of section 1714¼ of the Civil Code, as it existed at the time of the accident: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." And section 141¾ of the California Vehicle Act provided generally: "Any person who as a guest accepts a ride in any vehicle, * * * and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle, * * * the burden shall be upon plaintiff to establish that such intoxication or wilful misconduct was the proximate cause of such death or injury or damage."

It will be noted that the original enactment of this section, Stats.1929, c. 787, p. 1580, provided: "Nothing in this section * * * shall be construed as relieving the owner * * * from liability for injury * * * proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver."

The amendment to said section (Stats. 1931, c. 812, p. 1693) deleted the provision in reference to gross negligence and applied the liability only in case of intoxication or willful misconduct.

If the allegations set out in the amended complaint constitute willful misconduct or intoxication within the meaning of section 141¾ of the California Vehicle Act, then it becomes essential to determine whether such willful misconduct may be imputed to the owner of the car.

Upon this latter proposition the appellants urge, and they are supported by some authority, that because section 1714¼ of the Civil Code provides that the owner of an automobile, used with his implied or express consent, is liable for the "negligence" of the user, a recovery can be had against such owner for the willful misconduct or intoxication of such user in the operation of such vehicle. We shall not attempt to reconcile the several definitions and applications given to the phrase "willful misconduct" as employed in our so-called guest statute. Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510; North Pacific Steamship Co. v. Industrial Accident Commission, 174 Cal. 500, 163 P. 910; Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474; Walker v. Bacon, 132 Cal.App. 625, 23 P.(2d) 520. The definition given in the case of Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988, 990, and adopted in the case of Meek v. Fowler, 3 Cal.(2d) 420, 45 P. (2d) 194, 197, will suffice for a determination of this issue: "'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

This definition in Meek v. Fowler, supra, followed the reasoning and definition declared in the case of Helme v. Great Western Milling Co., supra: "'The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence.' * * * It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to *misconduct* as distinguished from *neg-*

ligence, and that this misconduct must be willful." (Italics mine.)

Any negligence might be termed misconduct. Willful misconduct as used in this statute means neither the sort of misconduct involved in negligence nor the mere intent to do the act which constitutes negligence. As has been repeatedly declared, "willful misconduct" means something more than negligence, more, even, than gross negligence. Howard v. Howard, supra; North Pacific Steamship Co. v. Industrial Accident Commission, supra.

Negligence is carelessness whether greater or less in degree, and tends to be negative in character while *willful misconduct* is something of a more positive nature involving the intentional doing of a wrongful act. Turner v. Standard Oil Co., supra.

By striking the words "gross negligence" from the statute, the Legislature could have meant nothing else but to take away from the guest the right to recover in cases where the injury complained of was caused by the *negligence* of the driver. It intended to restrict the right of recovery from the driver to willful misconduct and intoxication. Any other construction would deny the true meaning and import of the terms "gross negligence" and "willful misconduct" and nullify the plain intent of the Legislature.

This precise point was determined to be the law in Gimenez v. Rissen, 12 Cal.App.(2d) 152, 55 P.(2d) 292, holding that where negligence, by definition, is opposed to diligence and signifies the absence of care, and is negative in its nature, implying a failure of duty, it excludes the idea of intentional wrong and it follows that a person who wills to do an injury ceases to be negligent.

If "willful misconduct" is a species of and included in the term "negligence," then it follows that the liability for willful misconduct is imputed to the owner, but if "willful misconduct" is not embraced within the term "negligence," even though some of the elements of negligence may be included in the term "willful misconduct," then the rules of statutory interpretation would seem to dictate that the Legislature's intent was to confine such imputation of liability to cases of negligent conduct rather than willful misconduct. I think the latter contention should be sustained.

The Legislature (California Vehicle Code, § 352 [St.1935, p. 145]) seemed to recognize a distinction between the terms "negligence" and "willful misconduct" regarding the imputed liability for civil damages for the negligence of a minor, which provides that the liability shall not be limited to the negligence of the minor but shall include his willful misconduct as well.

For the reasons herein expressed the judgment in favor of Norma Bird should be affirmed, and the judgment dismissing the action against Bruce Robert Pinyan should be reversed.

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17 Cal.App.2d 225

WEST AMERICAN FINANCE CO. v. PACIFIC INDEMNITY CO.

Civ. 9915.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

1. Insurance ⚷285

Where dishonesty of an agent, whose fidelity is guaranteed under a bond, exists before or at time surety on bond becomes bound and principal conceals dishonesty from surety at time of obtaining bond, surety is not liable for loss resulting therefrom.

2. Insurance ⚷332(1)

Where there is continuing guaranty for fidelity of an agent and principal discovers that agent has been guilty of dishonesty in course of services and continues him in service without revealing such dishonesty to guarantor, principal cannot afterwards have recourse to guarantor to make good losses which arose from dishonest acts of such person during subsequent service.

3. Insurance ⚷285

Mere nondisclosure of circumstances affecting situation of parties which are material for surety to be acquainted with and are within knowledge of person obtaining surety bond is undue concealment relieving surety from liability under the bond, even though not willful or intentional or with view to any advantage to person obtaining bond.

4. Insurance ⇨285

Fidelity bond insuring finance company against defalcations of officers and employees *held* unenforceable because of concealment of material facts, where surety was not informed at time of execution of bond that majority members of board of directors were then engaged in fraudulent practices which resulted in enormous losses to finance company.

5. Principal and agent ⇨180

General rule that agent will not be presumed to have communicated to principal transaction in which agent is acting in an interest adverse to that of his principal is inapplicable, where agent is in fact acting for his principal, even though agent may have an opposing personal interest.

6. Corporations ⇨428(12)

Knowledge of officers of corporation of their own fraudulent acts *held* imputable to corporation so as to void fidelity bond secured by officers insuring their honesty, where officers were in fact acting for corporation in the fraudulent transactions, even though having personal interests opposed to those of corporation.

7. Insurance ⇨332(1)

Fact that fidelity bonds which were executed to protect finance company without finance company's disclosing fraudulent practices of the officers covered by the bond were negotiated by an employee of finance company who was ignorant of fraudulent practices which were being carried on *held* not to render bonds enforceable, since company and not employee was party to the contract of guaranty and all benefits of contract inured exclusively to company.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the West American Finance Company against the Pacific Indemnity Company. From an adverse judgment, the plaintiff appeals.

Affirmed.

See, also (Cal.App.) 61 P.(2d) 969; (Cal.App.) 61 P.(2d) 970.

Courtney L. Moore, of San Francisco, for appellant.

Redman, Alexander & Bacon and A. B. Weiler, all of San Francisco, for respondent.

KNIGHT, Justice.

This is one of three actions brought by the appellant, West American Finance Company, a corporation, against the respondent, Pacific Indemnity Company, a corporation, to recover from the latter the total sum of $90,000 claimed to be due under three successive fidelity bonds issued by the indemnity company insuring the finance company against loss from dishonest acts of its officers, clerks, and employees. The complaint in the first action was filed on September 15, 1931, and a demurrer thereto was sustained. On May 18, 1932, an amended complaint was filed, and at the same time complaints in the second and third actions were filed. Demurrers were interposed to each, and those demurrers were also sustained. On September 6, 1934, amended complaints were filed in all three actions, and on March 12, 1935, demurrers thereto were sustained without leave to amend, following which judgments were entered in favor of the indemnity company, and the finance company has taken an appeal from each judgment. The three appeals are presented in separate records, and are numbered respectively Civil Nos. 9915, 9914, and 9913; but all involve the same fundamental questions and therefore may be disposed of in one opinion.

The first action (appeal No. 9915) was based on a bond applied for prior to and issued on March 28, 1928. The insurance thereunder covered a period between April 8, 1928, and April 8, 1929, and according to the allegations of the complaint guaranteed against loss by "larceny, embezzlement, theft, or any other fraudulent or dishonest act, wrongful abstraction, or wilful misapplication, committed by the president, treasurer, or active assistant treasurer at Los Angeles * * * occasioned by the act" of such officers or through their connivance with others. The maximum amount of the indemnity was $25,000 for dishonest acts of the president, $25,000 for like acts of the treasurer, and $10,000 for those of the assistant treasurer at Los Angeles.

The second action (appeal No. 9914) was based on a bond issued on April 8, 1929. By its terms it continued in force until September 15, 1930, and called for a maximum indemnity of $20,000 against loss, so the complaint alleges, sustained "by reason of any dishonest act of any of the officers or employees" of the finance company during the existence of the bond.

The third action (appeal No. 9913) was based on a bond issued on or about September 15, 1930, which ran for a year, and the complaint alleges that it indemnified the finance company to the extent of $10,000 against loss "through any dishonest act wherever committed, of any employee, which term was designated to include all officers, clerks and other persons in the immediate employ of the insured."

It appears generally from the allegations of the complaints that on March 12, 1928, which was prior to the issuance of any of said bonds, the president and the treasurer of the finance company, namely, R. T. Harper and J. C. Hadley, and two others, namely, J. E. Scully and J. A. Sinclair, constituted the four majority members of the board of directors of the finance company; and these four owned all the stock of a corporation known as the First Mortgage Bond Company. The latter corporation in turn owned a majority of the stock in several interlocking corporations including the appellant company. That is to say, the First Mortgage Bond Company, which was owned by the four majority members of the board of directors of the finance company, owned the majority of the stock of the California Securities Company; the California Securities Company in turn owned a majority of the stock of the Empire Finance Corporation; and the Empire Finance Corporation in turn owned a majority of the voting stock of the appellant finance company. Therefore, by reason of their ownership of all of the stock in the First Mortgage Bond Company, the four individuals named controlled the management, policies, and affairs of all of said corporations. It further appears from the allegations of the complaints that prior to and at the time of the application for and issuance of the three successive bonds here sued upon, said four majority members of the board of directors of the finance company, acting under corporate authority as such, had been and they were then actually engaged in carrying on certain business transactions with the interlocking corporations and with themselves and others, which resulted in large financial losses to the finance company, and which are now claimed to have been fraudulent; also that acting under the same authority said directors appropriated certain sums of money to different purposes which are now claimed to be dishonest. No disclosures whatever were ever made by any one to the indemnity company prior to or at the time of the issuance of any of the bonds, nor during the period of duration thereof, or the manner in which the insured company was being dominated and controlled by said four directors as the result of their ownership of the stock voting power in the interlocking corporations. Nor were any disclosures ever made to the insurer of any of the practices which were being carried on by the four directors constituting the majority of the board of the insured company and which practices are now claimed to have been fraudulent. Nor did the indemnity company have any knowledge whatever of such practices until demand was made upon it by the insured company to make good the losses brought about thereby. In other words, it appears from the face of the complaint that while the majority of the board of directors of the insured company were as such directors engaged in carrying on and receiving the benefits of the practices which are now claimed to be fraudulent, they were taking out these indemnity bonds insuring their own fidelity.

The demurrer to each complaint was based on some eighteen general and special grounds, and the first important disputed question presented is whether the specific transactions complained of, which resulted in the losses the insured company is now seeking to recoup from the bonding company, fell within the scope of the insuring clauses of said bonds. As alleged in the three complaints these transactions in substance were as follows:

(a) On March 12, 1928, which was immediately prior to the writing of the fidelity insurance, these four directors thus controlling, through the medium of their four successively controlled corporations, the finance company, caused the latter to enter into a contract appointing the First Mortgage Bond Company its sole and exclusive broker for the handling of all of the funds of the finance company, thereby giving to the First Mortgage Bond Company the exclusive right to negotiate and procure mortgage loans for the finance company, and giving it first call on all of the funds of the finance company available for investment. The agreement further provided that as compensation for its services in loaning the funds of the finance company, the First Mortgage Bond Company should receive a sum equal to one-half of any brokerage which might be collected from borrowers and in addition should receive all commissions on insurance in connection with said loans. As a result of this contract the First Mortgage Bond Company received during the period of the first bond sued upon the sum of $76,971.43, which amount was divided among said directors. On February 5, 1929, Harper resigned as president of the finance company, and he was succeeded by M. A. Strang; and between the date of his resignation and April 8, 1929, the finance company, pursuant to the terms of the agreement of March 12, 1928, paid to the First Mortgage Bond Company the additional sum of $1,300.

(b) On March 23, 1928, and immediately prior thereto, L. E. and W. A. Moses were two of the other directors of the finance company. They had a relative named A. C. Moses, who with another person, both of whom were without funds, owned a leasehold on a silica deposit in Nevada, which was subject to a lien for $55,000. The property had never been operated and had never produced any revenue, and before it could be operated required the expenditure of large sums of money for the purchase and installation of machinery and for development work. On the date above mentioned, L. E. and W. A. Moses, with three of the four directors who owned the First Mortgage Bond Company, knowing the speculative character of the venture and without obtaining any sound security, caused the appellant company to finance the enterprise to the extent of $65,700. The venture was a complete failure, and the finance company suffered a total loss of the entire amount of money so advanced.

(c) On December 17, 1928, the finance company, likewise through these same four directors, loaned to the California Securities Company, which as stated was controlled by them, the sum of $13,000 at a time when the California Securities Company was known to be insolvent.

Also (d) on December 17, 1928, as the result of connivance between Harper and the other three majority directors, the finance company accepted the obligation of the California Securities Company for $20,000 in liquidation of a mortgage for that amount which the finance company held on property belonging to Harper, thereby releasing Harper's property from the lien of the mortgage. Both the loan of $13,000 to the California Securities Company and its obligation of $20,000 to the finance company were complete losses to the finance company.

(e) In December, 1928, it appeared likely that the four directors might lose control of the finance company to the preferred and class A stockholders of the Empire Finance Corporation, which as stated was the controlling stockholder of the finance company; whereupon these four directors, conniving with certain outsiders, entered into and carried out a scheme to acquire 51 per cent. of the class A and preferred stock of the Empire Finance Corporation. In carrying out this scheme they caused the finance company to advance $75,000 which was used to purchase stock of the Empire Finance Corporation; and this $75,000 was subsequently repaid to the finance company by delivering to it forty-three second mortgages, many of which were "sour," and the net result to the finance company was a loss of $25,000.

(f) On or about March 28, 1928, Harper and Scully entered into a scheme to profit by the use of the finance company's funds in building an apartment house. They were aided and assisted by Sinclair and Hadley, the other two directors. Scully purchased the land, and the four directors caused the finance company to advance to Harper and Scully under the guise of a loan to Scully's sister, Josephine, the total sum of $390,000. The venture proved a losing one, and to escape their obligation to the finance company Scully and Harper caused the finance company to accept a deed to the apartment house and to cancel Harper's and Scully's obligations to the finance company. As a result of this transaction the finance company suffered a loss of $130,000.

(Appeal No. 9914.) On or about February 5, 1929, Harper disposed of his stock in the First Mortgage Bond Company, and C. A. Gibson became a director and officer therein, and in the California Securities, the Empire Finance, and the West American Finance Companies. Therefore, from and after that date and until September 15, 1930, Gibson, Hadley, Scully, and Sinclair, by reason of their control of the capital stock in the First Mortgage Bond Company, controlled also the management, policies and affairs of the interlocking corporations, including the appellant company.

(a) On December 31, 1929, the finance company had overpaid the First Mortgage Bond Company $37,644.18; that is, the First Mortgage Bond Company owed that amount to the finance company on account of moneys due the latter under the contract of March 12, 1928, and for advances made by the finance company to the First Mortgage Bond Company; and said four directors of the finance company, in order to make it appear that the First Mortgage Bond Company had paid its obligation in full, caused the First Mortgage Bond Company to purchase 400 shares of preferred and 1800 shares of class A stock of the finance company for the sum of $4,835.28 and the finance company to purchase 2100 shares of its own preferred stock for $7,350.97. Then by false book entries it was made to appear that the finance company had loaned this $7,350.97 to the First Mortgage Bond Company, and that the First Mortgage Bond Company had made the purchase of the 2100 shares of stock. Thereupon they caused the First Mortgage Bond Company to purport to sell these two blocks of stock to the finance company for $34,400. In other words, they caused the First Mortgage Bond Company to purchase stock for $12,186.25, of which $7,350.97 was advanced by the finance company, and then caused the First Mortgage Bond Company to purport to sell to the finance company for $34,400 the same stock which had actually cost $12,186.25; and thus it was made to appear that a large portion of the debt owed by the First Mortgage Bond Company to the finance company had been liquidated. These overpayments to the First Mortgage Bond Company thus liquidated had theretofore been distributed by it to the four directors.

(b) About November 1, 1929, Scully, Sinclair, Hadley, Gibson, Neil I. Ross, and T. Alan Ross were in control of a corporation known as the Consolidated National Securities Company; and Gibson, Ross, and Ross were also interested in the Inland Finance Company, which was insolvent. Gibson, Ross, and Ross, together with four directors who constituted the First Mortgage Bond Company, caused the finance company to purchase stock of the Inland Finance Company for $34,792, at a time when they knew that the stock was worthless, and afterwards to sell said stock to the Consolidated National Securities Company, which also was in a failing condition. In payment of the stock the Consolidated gave the finance company its promissory note secured by second mortgages, which at the time were not worth more than $10,000. The result was that the finance company suffered a loss of $24,792.

(Appeal No. 9913.) (a) Between September 15, 1930, and March 18, 1931, Gibson, Hadley, Sinclair, Scully, Ross, and Ross continued in control of the management of the finance company and the Consolidated National Securities Company, and as directors of the finance company they entered into an arrangement with the Consolidated National Securities Company, which, as stated, was insolvent, to collect obligations due and owing to the finance company. The Consolidated collected $2,641.57, and then by false book entries the finance company made it appear that it had loaned this amount to the Consolidated National Securities Company. The amount of the collections was therefore a total loss to the finance company. (b) Between September 15, 1930, and December 20, 1930, the directors of the finance company used $410 of the company's funds for the purpose of incorporating the Western Capital Company, in which some of its directors were interested. (c) In January, 1931, said directors used $6,000 of the finance company's funds in the defense of a personal action brought against them by certain stockholders wherein the directors were charged with misappropriations of the company's funds. (d) And in March, 1931, in a stockholders' proxy fight, said directors used the company's funds to purchase shares of its own stock and paid therefor $6,827.62 in excess of the market value of the stock so purchased.

Nowhere in any of the complaints was it alleged directly on inferentially that the minority stockholders or the creditors of appellant company were not aware of the situation existing in said corporation as to its domination and control by said four directors, or of the particular transactions in which said directors were engaged in carrying on, as set forth in the three complaints. Respondent contends, therefore, that in the absence of such allegations it must be presumed that all parties interested in the appellant company not only acquiesced in but also approved of said transactions, and that such being the case the corporation is now precluded from asserting as against the respondent that said transactions were fraudulent. It is unnecessary to inquire into this point, however, for the reason that so far as we are here concerned it may be assumed, as appellant contends, that all of said transactions were fraudulent, and still under well-settled rules of law the insuring clauses of the bonds were unenforceable against the surety because of the nondisclosure to the surety of fraudulent practices which at the time the successive bonds were applied for and issued, were being carried on under the name of the corporation and in the exercise of its corporate powers.

[1-4] **In this regard it may be said to** be a fundamental principle of the law of fidelity guaranty that if dishonesty of an agent, whose fidelity is guaranteed under a bond, exists before or at the time the surety on the bond becomes bound thereby, and the principal conceals it from the surety at the time of obtaining the fidelity bond, the surety is not liable for the losses resulting therefrom; furthermore, that where there is a continuing guaranty for the fidelity of an agent and the principal discovers that the agent has been guilty of dishonesty in the course of his services and he continues him in the service without revealing such dishonesty to the guarantor on the fidelity bond, the principal cannot afterwards have recourse to the guarantor to make good any losses which may arise from the dishonest acts of such person during the subsequent service. Roberts v. Donovan, 70 Cal. 108, 9 P. 180, 11 P. 599. Furthermore, as held in American National Bank v. Donnellan, 170 Cal. 9, 148 P. 188, Ann.Cas.1917C, 744, the mere nondisclosure of the circumstances affecting the situation of the parties which are material for the surety to be acquainted with and are within the knowledge of the person obtaining the surety bond, is undue concealment even though not wilful or intentional or with a view to any advantage to himself. Manifestly, therefore, in the present case, the nondisclosure of the fraudulent practices which were being carried on by the majority members of the board of directors under their corporate powers at the time of the application for the issuance of these successive fidelity bonds, and which resulted in the enormous losses the corporation now seeks to compel the surety to make good, constituted concealment from the surety of the material facts upon which it was clearly entitled to be informed before it could intelligently decide whether under the existing conditions it would assume the risk to be imposed upon it by the fidelity bonds. In fact, it would appear from the allegations of the complaints that such concealment was not unintentional. Respondent in its brief puts it this way, that "the stage was set for the making of the very claims" now sued upon. And appellant in its brief chooses to sum up the situation as follows: "A small group of men functioning under a corporate screen had by the acquisition of voting stock control of successive corporations finally acquired control of the management of a financial institution of large assets, whereupon by various devices they proceeded to use these assets in private ventures for the personal enrichment of the directors and officers. If these private ventures turned out to be unprofitable they were immediately turned back to the West American Finance Company, thereby relieving the officers and directors of the obligations and thereby causing the West American Finance Company to shoulder the losses." And to the foregoing may be added that while this group of men were thus proceeding to fasten these losses on the corporation's shoulders they were at the same time, as the governing board of directors of the corporation, obtaining from respondent fidelity bonds insuring their own honesty for the very purpose of placing the corporation, and incidentally themselves as the owners of the majority of the vote controlling stock therein, in a position to recoup from the surety the losses which they were bringing about by their own wrongful acts.

Appellant contends, however, that where an agent is perpetrating a fraud against or otherwise acting adversely to his principal, the agent is then acting beyond the scope of his authority, and any knowledge acquired by him of his own fraudulent acts is not imputed to his principal; that it follows therefore that where, as here, the officers of a corporation carry on fraudulent operations against the corporation their knowledge of their own fraudulent acts is not imputed to the corporation so as to void a fidelity bond insuring their honesty.

[5, 6] The rule in this respect is stated by the Supreme Court in the case of McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75, 76, as follows: "Where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction. Commercial Bank v. Burgwyn, 110 N.C. 267 [17 L.R.A. 326] 14 S.E. 623; McDonald v. Randall, 139 Cal. 246, 72 P. 997. This is no doubt the general rule regarding the imputing to a principal of notice of facts known to an agent who is, in the particular transaction in question, acting in an interest adverse to that of his principal. But," continues the court, "the rule is not without exceptions. If the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, 'it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction,

and the law will therefore presume, in favor of third persons, that he made such communication.' Bank of Pittsburgh v. Whitehead, 36 Am.Dec. 186, note; Le Duc v. Moore, 111 N.C. 516, 15 S.E. 888." The exception above noted is restated in California Jurisprudence (vol. 6A, pp. 1169, 1170, § 665) as follows: "The rule that knowledge of an officer acquired in the course of his duties is presumed to have been communicated to the corporation is subject to the exception that where his dealings were with the corporation in a transaction in his own behalf, it will not be presumed, as a general rule, that he communicated to the corporation facts affecting the transaction. This exception is itself subject to an exception, however. If the officer is in fact acting for the corporation in the transaction, even though he may have an opposing personal interest, it is his duty, notwithstanding his interest, to communicate to his company any facts in his possession material to the transaction. In such case the law will presume in favor of third persons that he made such communication; and it is immaterial that he took some personal benefit from the fraud." To the same effect, see 1 Cal.Jur. 852; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; State Savings, etc., Bank v. Winchester, 25 Cal. App. 691, 145 P. 171. We are convinced that the facts of the present case, as they are set forth in the complaints, bring it clearly within the scope of the foregoing exception, and that therefore the knowledge of the majority members of said board of directors of their own fraudulent transactions was imputed to the corporation itself, even though said majority members were beneficially interested in the frauds so consummated, to the detriment of the corporation.

[7] Appellant calls attention to certain allegations of the complaints to the effect that the bonds were negotiated by an employee having charge of its insurance department who was ignorant of any of the fraudulent practices which were being carried on. But obviously such ignorance on his part is entirely immaterial so for as concerns the question of the enforceability of the bonds for the simple reason that it was the corporation itself and not the employee who was making application for the bonds; the corporation itself and not the employee became the other party to the contract of guaranty and was named as the insured therein; and all of the benefits of the contract inured exclusively to the corporation.

It is our conclusion, therefore, that upon the grounds above discussed the trial court was justified in sustaining the demurrers to the conplaints without leave to amend.

The judgment herein is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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17 Cal.App.2d 767

WEST AMERICAN FINANCE COMPANY (a Corporation), Plaintiff and Appellant, v. PACIFIC INDEMNITY COMPANY (a Corporation), Defendant and Respondent.

Civ. 9913.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Courtney L. Moore, of San Francisco, for appellant.

Redman, Alexander & Bacon and A. B. Weiler, all of San Francisco, for respondent.

KNIGHT, Justice.

This appeal is companion to and raises questions identical with those considered and determined in the case of West American Finance Company, a Corporation, v. Pacific Indemnity Company, a Corporation, 61 P.(2d) 963, this day decided.

Therefore, upon the grounds and for the reasons set forth in the opinion in that case, the judgment in the present case is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

17 Cal.App.2d 768

WEST AMERICAN FINANCE COMPANY (a Corporation), Plaintiff and Appellant, v. PACIFIC INDEMNITY COMPANY (a Corporation), Defendant and Respondent.

Civ. 9914.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1936.

Hearing Denied by Supreme Court
Dec. 28, 1936.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Courtney L. Moore, of San Francisco, for appellant.

Redman, Alexander & Bacon and A. B. Weiler, all of Los Angeles, for respondent.

KNIGHT, Justice.

This appeal is companion to and raises questions identical with those considered and determined in the case of West American Finance Company, a Corporation, v. Pacific Indemnity Company, a Corporation, 61 P.(2d) 963, this day decided.

Therefore, upon the grounds and for the reasons set forth in the opinion in that case, the judgment in the present case is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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17 Cal.App.2d 221

PEOPLE v. GUMP.

Cr. 1903.

District Court of Appeal, First District, Division 2, California.

Oct. 27, 1936.

1. **Incest 🔑15**
   Infants 🔑20
   Rape 🔑54(1)

Convictions for incest, rape, and violation of juvenile court law *held* sustained by uncorroborated evidence of prosecutrix, though complaint was not timely and had not been made until trouble had arisen between accused and prosecutrix over her associations with others and though prosecutrix' story was improbable in that she claimed that her relations with accused had continued six years without her mentioning them to any one (Pen.Code, § 954).

2. **Criminal law 🔑1212**

Conviction of second offender for incest, rape, and violation of the juvenile court law for the same act, sentences to run concurrently, *held* not to authorize punishment of defendant as an habitual criminal under statute declaring one to be an habitual criminal who shall have been previously three times convicted upon charges separately brought and tried and who shall have served separate terms (Penal Code, § 644, as amended by St.1935, p. 1699).

3. **Criminal law 🔑200(7)**

Where defendant had been convicted of incest, rape, and violation of juvenile court law for commission of single act and sentences were imposed to run concurrently, double jeopardy was not involved, since defendant was not sentenced to serve separate terms for same offense (Pen.Code, § 954).

4. **Indictment and information 🔑125(41)**

Prosecution under single information for incest, rape, and violation of juvenile court law, all for commission of same act, and judgment of guilty as to three crimes charged, was not prejudicial error, since matter is one of policy rather than of error or lack of jurisdiction (Pen.Code, § 954).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Edgar Roy Gump was convicted of incest, rape, and a violation of the juvenile court law, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Judge.

The defendant was tried before a jury upon an information in three separate counts charging incest, rape, and a violation of the juvenile court law. He was found guilty on all three counts and sentenced to Folsom prison on the first and second and given a suspended county jail sentence on the third. He appeals from the judgment and from the order denying a new trial.

His first ground is the inherent improbability of the evidence of the prosecutrix. She had been living for many years with her father, her brother, and her grandmother at the latter's home. She testified to an act of intercourse on August 31, 1935. She was then sixteen years old. A few days later she left her grandmother's home and went to work at a "speakeasy" operated by Mr. and Mrs. Esparza. The defendant, who was the father of the prosecutrix, objected to her association with these parties, and a fight followed, after which Mrs. Esparza persuaded the prosecutrix to make the charge to the authorities. This occurred in February, 1936, and this was the first complaint which the girl made to anyone about the alleged occurrence in August, 1935. When called as a witness she testified that these relations with her father began when she was ten years old and continued regularly until she left the grandmother's home. On cross-examination she explained that she had not told her grandmother because she was afraid she would not believe her.

[1] In his argument attacking the sufficiency of the evidence, the appellant emphasizes the failure of the prosecutrix to make timely complaint of the alleged attack and also the complete lack of any corroborating evidence. Counsel frankly concedes that neither factor is essential to a conviction of the crime charged, but he urges that they are persuasive evidence of the improbability of the story of the prosecutrix. There is much force in the argument that it is highly improbable that these relations could have existed for a period of six years without mention to anyone, and grave suspicion is cast upon the story when it is shown that it was only told after trouble had arisen between father and daughter over her relations with others. But these suspicions are not sufficient to support appellant's plea that the judgment should be set aside. The jury believed the testimony of the prosecutrix, and the trial judge was satisfied to let the verdict stand. We cannot say that the testimony is so inherently improbable that there is not evidence to support the verdict.

[2-4] Appellant raises the additional point that he is made to suffer excessive punishment because he has been convicted three times of the same offense. There is no question as to the fact. All three counts of the information related to the same act which occurred on August 31, 1935. All the evidence tending to prove each of the three charges described but one act and one set of circumstances. The question thus raised is whether all three verdicts should stand, thereby designating appellant as one convicted of three criminal offenses within the terms of section 644 of the Penal Code defining "habitual criminals" and therefore not eligible for release on parole. The question becomes one of importance to appellant because of the admission at the trial of a prior conviction for which he served a term in the state penitentiary. If the appellant had been brought to trial before the effective date of the 1935 amendment to section 644 (St.1935, p. 1699), the question would have presented some merit, but, since his conviction was had while that section as amended was operative, the question is answered by the amendment itself. That section provides that one shall be deemed an habitual criminal to be punished by imprisonment for life, without parole, who shall have been previously three times convicted "upon charges separately brought and tried, and who shall have served separate terms." These limitations clearly eliminate the appellant from the operation of the section as he was not separately tried on the several charges and could not serve separate terms because his sentences were made to run concurrently. On this inquiry we have assumed, as both parties to the appeal have assumed, that the provisions of section 644 apply to the offenses with which appellant was charged, though they are not so defined in the code section. No other statute has any application to this particular question. Section 954 of the Penal Code authorizes the state to charge in one information two or more offenses of the same class of crimes. Double jeopardy is not involved unless the party is sentenced to serve separate terms for the same offense. The information and the judgment are both within the terms of the statutes, and the point raised is, therefore, merely one of policy rather than one of error or lack of jurisdiction. The matter of policy involved in the various sentences is one which must be left with the trial court. There is no prejudicial error which

would call for the intervention of an appellate court.

The judgment and order are affirmed.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.

17 Cal.App.2d 278

PEOPLE v. MARECK.

Cr. 1492.

District Court of Appeal, Third District, California.

Nov. 2, 1936.

Hearing Denied by Supreme Court Nov. 30, 1936.

1. Indictment and information 🔑159(2)

Amendment to indictment by district attorney under order to the effect that the offenses of murder and of robbery of two different persons which were charged in three counts were all connected in their commission, *held* not erroneous where it was a fair inference from evidence that defendant and his accomplices were engaged in conspiracy to commit series of crimes, and that the crimes charged resulted from such conspiracy (Pen.Code, §§ 954, 1008).

2. Criminal law 🔑1186(4)

Error, if any, in permitting amendment to indictment so as to charge that crimes were all connected in their commission, and were part of same act, *held* not to require reversal of conviction as having resulted in miscarriage of justice, even if crimes were not connected and were not properly joinable in one indictment (Pen.Code §§ 954, 1008; Const. art. 6, § 4½).

3. Criminal law 🔑1186(4)

Evidence that alleged accomplice of defendant was fugitive at time of defendant's trial *held* not prejudicial, so as to require reversal, since it had no tendency to incriminate defendant (Const. art. 6, § 4½).

4. Criminal law 🔑1119(4)

Alleged prejudicial remarks of district attorney during closing argument which were made in response to something said by counsel for defendant could not be considered by reviewing court where no statement appeared in transcript to which district attorney's remarks were responsive (Rules of the Supreme and District Courts of Appeal, rule 2, § 7).

5. Criminal law 🔑778(11)

Refusal of instruction on flight *held* proper where evidence of flight was not relied upon as tending to show guilt (Pen. Code, § 1127c).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Andrew Mareck, alias Andrew Hess, was convicted of murder, and of robbery, and to have suffered a prior conviction, and he appeals.

Affirmed.

Nathan C. Coghlan and William E. Ferriter, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Originally an indictment was returned charging defendant in count 1, of murder, in count 2, robbery of one Jack Snyder, in count 3, robbery of one Mabel Daniels, and count 4, of a prior conviction. No complaint is made of count 4, so we may disregard it in our consideration of the objections to be noted later.

To this indictment a demurrer was interposed alleging in effect that more than one offense was attempted to be charged; that it did not appear that the several offenses were connected in their commission, and that they were not offenses of the same class as required by section 954 of the Penal Code.

This demurrer was sustained, and the court ordered the indictment amended, which was done by the addition by the district attorney of an allegation in each of the three counts that the crimes charged in the various counts were all connected in their commission. A demurrer interposed to this amended indictment was overruled, and upon the trial the defendant was convicted of first-degree crimes on all the charges, and his previous conviction found to be true. From the judgment of conviction and the order denying a new trial, this appeal is taken.

[1,2] The first point urged by appellant was that these amendments to the in-

dictment by the district attorney were illegal for the reason the amendments concerned a subject which was in the exclusive province of the grand jury to determine, and that the allegations were contrary to the known facts. The amendment was made by the district attorney by order of the court under the provisions of section 1008 of the Penal Code and consisted, as already pointed out, in the addition of an allegation that each of the first three counts of the crimes charged in the various counts were all connected in their commission. No change was made in the character of the crimes charged, the purpose and effect of the amendment being to set forth in specific terms that the various offenses were all connected with their commission and were part of the same act.

It is conceded by appellant that "this amendment might have been considered mere matter of form had the three offenses actually been committed in the same transaction and the indictment failed to have contained the necessary allegations to justify the joinder." If such was a fact, we fail to see where appellant was prejudiced by the amendment. Each count was complete within itself and each was sufficient to and did support a separate verdict.

The evidence reveals, and it is admitted by defendant, that the robbery charged in count 3 was connected with the murder charged in count 1. The evidence also reveals that appellant, who resided in San Francisco, left that city late in the evening of February 25, 1933, in a green sedan, accompanied by his wife and one Feltz, also known as Hoyt, and drove to Santa Rosa, arriving there about 1 o'clock on the morning of February 26th. They registered at a hotel in that city, but during the day checked out and went to an apartment occupied by a man named Thatcher, where they were later joined by Cardinale and Jones, personally known to appellant. During the evening the five men went to a resort known as "101 Ranch," where the robbery charged in count 2 took place. They then returned to Thatcher's apartment, where they were joined by one Gingg, also an acquaintance of appellant. After remaining in the Thatcher apartment a short time, appellant and Gingg went to the Buon Gusto Hotel, had a few drinks, and then returned to the apartment. Then defendant, with Gingg in defendant's green sedan automobile, followed by Jones, Cardinale and Feltz in another car, returned to the Buon Gusto Hotel, where the murder charged in count 1 and the robbery charged in count 3 were committed. All of the crimes were committed the same evening within a space of time variously estimated from one to five hours, and were participated in by all of the men with the exception of Gingg, who was not present at the commission of the crime at the 101 Ranch.

A fair inference from the evidence is that these men conspired together and assembled at the Thatcher apartment for the purpose of engaging in a series of crimes and that the robbery at the 101 Ranch and at the Buon Gusto Hotel was the result of such conspiracy; that the personnel of the gang was essentially the same throughout the evening; that appellant's green sedan was used in each instance to convey members of the gang to and from the scenes of the crimes, and that Thatcher's apartment was in each case the headquarters for operations. The fact, therefore, that defendant and his accomplices were engaged in a conspiracy to commit a series of crimes connects all of the crimes together in their commission sufficiently to entitle the prosecution to charge the defendant with such crimes in one indictment. However, even if it be conceded that the crimes charged were not connected in their commission and not properly joinable in one indictment, nevertheless the error had not resulted in a miscarriage of justice. Section 4½, art. 6, Const.; People v. Aguinaldo, 3 Cal.App.(2d) 254, 39 P.(2d) 505.

[3] Appellant also complains that the sheriff of Sonoma county was permitted to testify that at the time of the trial he held warrants of arrest for two of the accomplices of appellant, and had been unable to effect their capture. Also complaint is made that an officer of the prison at San Quentin was permitted to testify that a picture in evidence was that of Hoyt, one of the alleged accomplices, and that he knew him by name and number and had a certified copy of his commitment to the prison. Appellant contends that while the flight of an accomplice from the scene of the crime might be admissible as a part of the res gestæ, his continued status, being an act of an alleged coconspirator after the termination of the conspiracy, could not bind appellant and was not admissible. Appellant cites in support of his position the case of People v. Stanley, 47 Cal. 113, 17 Am.Rep. 401. However, in People v. Lorraine, 90 Cal.App. 317, 265 P. 893, 900, the court in discussing the rule set forth in the

Stanley Case, supra, said: "Assuming, however, for the purpose of discussion, that there is some remote analogy in fact or principle between the case at bar and the Lee Chuck [78 Cal. 317, 20 P. 719] and Stanley Cases, it is evident that the latter are not to be taken as decisive of the present appeal, because the judgments of reversal therein were rendered during that period of time when it was the established law of this state that error being shown in the admission of testimony was presumed to be prejudicial unless the contrary clearly appeared. Since then, as is well known, an important change has been made in the state Constitution which effectually abrogated the rule theretofore governing appeals; and in the present state of the law, injury must affirmatively appear to the reviewing court, after an examination of the entire cause, including the evidence, and from the nature of the error itself, before a judgment of conviction will be reversed (People v. Watts, 198 Cal. 776, 247 P. 884); and the burden of showing such prejudicial tendency of error is upon appellant (8 Cal. Jur., p. 601). * * * Even though it be assumed, therefore, that error was committed in admitting the testimony, it would not constitute ground for reversal, for, as held in People v. Stokes, 5 Cal.App. 205, 89 P. 997, evidence of the acts of a coconspirator after the accomplishment of the purpose of the conspiracy, even though incompetent and erroneously admitted, is harmless if those acts throw no light upon the issue as to whether the alleged conspirator on trial was a participant in the commission of the crime."

If, therefore, Hoyt was a fugitive at the time of the trial of appellant and his flight was indicative of guilt, it related only to the guilt of Hoyt, and, standing alone, had no tendency to incriminate the appellant.

[4] Certain portions of the closing argument of the district attorney to the jury calling to their attention previous murders of police officers are cited as misconduct. It seems, however, from a reading of the portion of the arguments appearing in the record that the remarks of the district attorney were in response to something said by counsel for appellant. Section 7 of rule 2 of the Rules of the Supreme Court and District Courts of Appeal provides that whenever statements, opinions, or arguments are made in response to any statement made by or on behalf of the defendant, such latter statement shall also be transcribed. No such statement or argument appears in the transcript. We are, therefore, unable to pass upon that objection. People v. James, 133 Cal.App. 751, 24 P.(2d) 859; People v. Lawyer, 1 Cal.App.(2d) 1, 35 P.(2d) 1036; People v. Gregory, 12 Cal.App.(2d) 7, 54 P.(2d) 770; People v. Bragdon, 103 Cal.App. 20, 283 P. 881, 884.

In People v. Bragdon, supra, the court, in discussing alleged misconduct of the district attorney, in his argument said: "Complaint is made of intemperate language used by the district attorney in his argument to the jury, made in reply to statements of counsel for the defendant. The transcript does not contain such statements, as required by rule 2, section 7, of the Rules of the Supreme Court and District Courts of Appeal, and in the absence thereof this court is left in the dark as to the provocation, if any, which induced the district attorney to use the language of which complaint is made. The language so used is not of such character as to constitute prejudicial misconduct if the provocation was great."

[5] A point is made by appellant that the court erred in refusing to give a requested instruction on flight. The refusal was proper, for evidence of flight was not relied upon as tending to show guilt. Section 1127c, Pen.Code. Certain other alleged errors are called to our attention, but, if errors, they were harmless, and appellant was not prejudiced thereby.

A review of the entire evidence must convince any unbiased mind that the defendant was fairly tried and justly convicted, and in spite of the exceptions taken to the amendment of the indictment, the admission of certain evidence, and failure to give certain instructions, and the alleged misconduct of the district attorney, it does not appear that the defendant was prejudiced thereby or precluded from offering a full defense, nor was he prevented from receiving a fair trial upon the issues presented. We fail to see how a jury could have reached any other verdict upon the evidence properly admitted than that which they did.

The judgment and order from which the appeal is taken are affirmed.

We concur: **PLUMMER, J.; THOMPSON, J.**

17 Cal.App.2d 195

PEOPLE v. GOLDABER et al.

Cr. 1906.

District Court of Appeal, First District, Division 2, California.

Oct. 22, 1936.

Rehearing Denied Nov. 6, 1936.

Hearing Denied by Supreme Court Nov. 19, 1936.

1. Criminal law 🔑1169(2)

In prosecution for conspiracy to commit petty theft, accused could not complain of admission of testimony of conspirator where such conspirator's entire testimony could have been eliminated and state's case against conspirators would have been complete (Pen.Code, § 182, subd. 4; §§ 484, 1111).

2. Conspiracy 🔑24

"Criminal conspiracy" is generally defined as a confederation or combination of two or more persons to accomplish some criminal or unlawful purpose (Pen.Code, § 182, subd. 4).

[Ed. Note.—For other definitions of "Criminal Conspiracy," see Words & Phrases.]

3. Criminal law 🔑511(3)

In conspiracy prosecution, unlawful combination need not be proved by direct evidence other than that of conspirator, but such element may be inferred from facts and circumstances, and where direct evidence of actual workings of conspirators supports logical inference that they were working under an "unlawful combination" to accomplish criminal act, fact of conspiracy is established, and testimony of conspirator is thereby corroborated for all purposes required by statute (Pen.Code, § 182, subd. 4; §§ 484, 1111).

4. Criminal law 🔑722(3)

Accused convicted of conspiracy to commit petty theft by selling goods under false pretense that accused were only making gifts for advertising purposes could not complain of district attorney's reference to accuseds' transactions as "tricky" and "trickery," where evidence disclosed that accuseds' conduct was conceived with purpose of tricking public and public authorities, and jurors could easily see trickery of scheme (Pen.Code, § 182, subd. 4; §§ 484, 1111).

◆

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Louis Goldaber, M. E. Grossman, and another were convicted of conspiracy to commit petty theft, and named parties appeal.

Affirmed.

M. F. Grossman, Leo A. Sullivan, of Oakland, and A. G. Thompson, of El Cerrito, for appellant Grossman.

John F. O'Brien, of Oakland, for appellant Goldaber.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendants Goldaber, Grossman, and Katz were tried together on an information charging conspiracy to commit the crime of petty theft in violation of section 484 of the Penal Code. The jury found all three guilty, but Katz has not appealed. Separate appeals have been taken by each of the other two from the judgments and from each of the orders denying a new trial.

Grossman operated a jewelry store in the city of Oakland where he had tried to conduct auction sales but was unable to procure the necessary permit. He made an agreement with Goldaber and Boust whereby they undertook to sell the goods in Grossman's store without a permit. The three agreed to split the net profits of each day's sales, 37½ per cent. to Grossman, the same to Goldaber, and 25 per cent. to Boust. The defendant Katz was hired by Boust to help with the sales. Boust was not prosecuted, and he appeared as a witness for the state.

The parties looked over the goods in Grossman's store, and Goldaber told them it was not the right kind of merchandise for such a sale; so the parties met in San Francisco the next day where they purchased large quantities of cheap needles, styptic pencils, pens, collar buttons, perfume, and wallets. The next day they opened the "sale" by inviting people to enter the store on the representation that articles were to be given away for advertising purposes. All were told that nothing was to be sold. Pencils, needles, and other articles of little value were handed the customers, and then Goldaber advanced his new method of selling goods, which the parties denominated an "action" sale instead of an auction sale. To illustrate, he would exhibit a ring which he represented to be worth $187, but which was not worth more than $5. He would tell the customers that he was not selling the ring, that he had no right to make a sale, and then would ask, "If this was sold, would you give ten dollars for it?" This was continued until he got what he thought to be the highest or final bid. When some customer announced he would give $35, Goldaber would reply, "Let's see if you have thirty-five dollars." Then, as one witness testified, "So I showed him my thirty-five dollars and that was the last I seen of my thirty-five dollars." Each transaction was the same—the customers were asked how much they would give if the article were for sale; they answered, or bid, as in an ordinary auction. Then Goldaber required them to give evidence that they had the money and, when this was handed over, the customer was given the article bid for and compelled to accept it. In every instance testified to, the articles thus sold were worthless baubles or secondhand jewelry of practically no value. Throughout the transactions Boust and Katz acted as the ballyhoo or "tip" and "pitch" men, Goldaber was the "spieler," and Grossman was the cashier and bookkeeper.

[1-3] Evidence of these transactions was given by Boust, a coconspirator, and by numerous witnesses to the sales. All defendants were linked to the conspiracy by evidence of their participation in the overt acts, this evidence coming from eyewitnesses to the acts of each conspirator. For this reason we find no merit in appellant's complaint over the admission of the testimony of Boust. If his testimony stood alone there would be some ground for such complaint, but his entire testimony could have been eliminated and the case of the state against the conspirators would have been complete. Section 182 of the Penal Code declares that: "If two or more persons conspire: * * * 4. To cheat and defraud any person of any property * * * or to obtain money or property by false pretenses." Generally a criminal conspiracy is defined as a "confederation or combination of two or more persons" "to accomplish some criminal or unlawful purpose." 5 R.C.L. p. 1061. But it is not the law of this state that the unlawful combination must be proved by direct evidence other than that of one of the conspirators. This element may be inferred from the facts and circumstances. Where, as here, the direct evidence of the actual workings of the conspirators supports a logical inference that they were working under an "unlawful combination" to accomplish a criminal act, the fact of conspiracy is established (People v. Yeager, 194 Cal. 452, 473, 229 P. 40; 8 Cal. Jur. p. 178), and the testimony of the coconspirator is thereby corroborated for all the purposes required by section 1111 of the Penal Code.

[4] The appellant Grossman raises the additional point that the district attorney was guilty of misconduct in referring to their transactions as "tricky" and "trickery." We are unable to follow appellant in this argument. No one could read the evidence of the conduct of these parties without concluding that it was conceived with the purpose of tricking the public and the public authorities as well. The evidence of this stood out so clearly that it cannot be assumed that any juror needed the suggestion of the district attorney to see the trickery of appellant's scheme of selling their goods under the false pretense that they were only making gifts for advertising purposes. But, if such was the effect of the questions, the state had the right to show that the conspirators knew the unlawfulness of the transactions in which they agreed to engage.

The judgments and the orders denying new trials are all affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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17 Cal.App.2d 309

ZAREMBA v. WOODS et al.

Civ. 5636.

District Court of Appeal, Third District, California.

Nov. 2, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

1. Wills 🔑166(2)

Evidence *held* to sustain finding that will whereby deceased left all his property to his doctor, and agreement whereby doctor was to receive all property left by deceased in consideration of taking care of him during his lifetime, were obtained by undue influence.

2. Trusts 🔑110

Evidence *held* to sustain finding that, in securing probate of will obtained by undue influence, beneficiary was guilty of extrinsic fraud in method adopted to prevent heir of deceased from receiving knowledge either of death or of probate proceedings (Probate Code, §§ 326–328).

3. Contracts ⚷94(1)

Fiduciary relationship existing between patient and his attending physician charged physician with utmost fairness in all business transactions with patient.

4. Trusts ⚷95

Action of beneficiary of will procured by undue influence, in making statement in petition for probate of will that deceased left no heirs, thereby preventing heirs from receiving knowledge either of testator's death or of probate proceedings, constituted "extrinsic fraud" in procuring decree, entitling heir to decree adjudging that beneficiary held property in trust (Probate Code, §§ 326–328).

5. Trusts ⚷359(2)

Action in equity will lie to have beneficiary of will procured by undue influence declared to be trustee because of extrinsic fraud in securing probate of will.

6. Judgment ⚷443(1), 444

"Extrinsic fraud" authorizing relief against decree consists in deception practiced by successful party in keeping his opponent in ignorance of proceeding, while "intrinsic fraud" is perjured testimony given at trial.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

7. Trusts ⚷95

Where extrinsic fraud is shown to exist in securing probate of will, successful party may be held to be a trustee for benefit of those who are entitled to receive property of estate.

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Hugo T. Zaremba against Walter Wayne Woods individually and as executor of the estate of Adolph Erich Zaremba, deceased, and another. From an adverse judgment, defendants appeal.

Affirmed.

C. E. Christopher and James C. Bone, both of Alhambra, for appellants.

Sherer & Daugherty, Harry A. Daugherty, Elmer B. F. Collier, and Marshall Stimson, all of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff obtained a judgment and decree to the effect that a certain agreement and will executed by Adolph Erich Zaremba were procured by undue influence; that in the securing of the probate just referred to Walter Wayne Woods was guilty of extrinsic fraud. The decree further adjudged that all of the property in possession of the defendant Walter Wayne Woods was held in trust by him for the benefit of the heirs of said deceased, and of the persons entitled to receive the same upon distribution thereof. From this judgment and decree the defendants appeal.

The will and agreement just referred to were executed on or about the 12th day of October, 1932. The death of Adolph Erich Zaremba occurred on or about the 29th day January, 1933. At the time of his death the deceased was of the age of forty-nine years.

The second paragraph of the will contained, among other things, the following: "First: I hereby declare that I am a single man, and that I have no wife, child, grandchild, father, or mother living, and no next-of-kin, with the exception of my brother Hugo Zaremba, who is now living, and inasmuch as he is well provided for, I make no provision for him by this, my last will."

The extrinsic fraud relied upon by the plaintiff as committed by Walter Wayne Woods (known and hereinafter referred to as "Dr. Woods") is based upon the petition filed by him for the probate of the will of Adolph Erich Zaremba, deceased, in which the statement appears that the deceased left no heirs; that this statement was made for the purpose of preventing the heirs of the deceased learning of the passing of Adolph Erich Zaremba, and of the fact of his having made a will in favor of Dr. Woods—the will in question having left all the property of the deceased to the doctor—and it also being specifically stated in the will that the deceased had a brother named Hugo Zaremba. The will further recited that it was made in recognition and appreciation of the skillful care and professional medical treatment rendered by the doctor to the testator. The agreement to which we have referred provided for the doctor taking care of the deceased during his lifetime, and to receive in compensation whatever property was left by the deceased. In this connection it may be stated that the record shows that the deceased was in receipt of a trifle more than $200 per month; had to his credit a bank account of $500, and up to the time of the drawing of the instruments referred to had paid the doctor in full for his services and had also loaned the doctor $200 in addition, which appears not to have been repaid.

For several years prior to his death, Adolph Erich Zaremba had been in poor health, being afflicted with tuberculosis. He had lived with a family by the name of Buck for over eleven years. About two years before the death of Zaremba, Dr. Woods was called to attend him, and from that time until the death of Zaremba, continued to act as his attending physician. During the time that Dr. Woods was so acting as the attending physician of Zaremba, he learned of the execution of a will by Zaremba, leaving to the Buck family all of his property. He learned of the execution of this will by reason of being requested to act as a witness thereto. The will was admitted to probate on the 8th day of March, 1933. The plaintiff did not learn of the fact of there being a will or of its probate until more than six months had elapsed. He acquired such knowledge upon coming to California for the purpose of visiting his brother, and for the first time ascertained that his brother had died on the 29th of January, 1933. The time having elapsed for the contest of the probate of the will referred to, the plaintiff filed his complaint in equity, based upon the alleged extrinsic fraud of the doctor in concealing the fact of the deceased having relatives; it being alleged in the complaint that the statement in the petition that the deceased died without leaving relatives was known by the said doctor to be false, and was fraudulently made for the purposes of concealing the fact of the death of Adolph Erich Zaremba, and of the proceedings for the probate of his will.

[1, 2] The testimony in this case is so voluminous that instead of setting forth the salient provisions thereof, we adopt the concise statement made by the trial judge, which sets forth clearly the extrinsic fraud practiced by Dr. Woods, and also facts showing beyond controversy the obtaining of the will and agreement referred to by undue influence:

"This is a suit by the brother of Adolph Erich Zaremba who was a Spanish and World War veteran and who was receiving during a considerable part of his lifetime a total incapacity pension of one hundred dollars per month. It seems that he was shell-shocked and wounded in World War while in France, and after his return to America he developed tuberculosis. A little more than two years before his death he commenced to have hemorrhages, and was a very sick man from that time until his death. Of course he gradually became more and more weak physically and less and less able to take care of himself. After it became necessary for him to have a nurse the federal government allowed him fifty dollars a month additional, for nurse hire. * * * He then came to California and persuaded Mrs. Buck to rent a room to him, and told her that if she would let him live with her and occupy that room until his death he would make a will leaving everything he possessed to her. At that time he had ten thousand dollars life insurance policy with the federal government and was drawing fifty-seven dollars and fifty cents ($57.50) per month from it which had to be deducted from the principal amount of the policy. He lived with Mr. and Mrs. Buck for over eleven years, and at the time he had his first hemorrhage Mrs. Buck on her own initiative called her own physician, Dr. Walter Wayne Woods, to attend him. He continued to attend him until his death.

"Shortly after Woods was called to attend Zaremba, Woods, at the request of Zaremba and Mrs. Buck, acted as a witness to a will which was made by Zaremba, leaving his entire estate to Mrs. Buck, and in the event of her death before Zaremba died, to her surviving husband. Dr. Woods learned the contents of that will at the time, and as Zaremba gradually grew worse and as the probability of the term of his life decreased proportionately, Dr. Woods formed the intent and purpose to induce Zaremba to revoke the will he had made leaving all his property to Mrs. Buck and her husband, and to make a new will in which he would leave all his property to Dr. Woods in consideration of the doctor taking care of him and furnishing a nurse for him up to the time of his death.

"Dr. Woods was not able to carry out this design and purpose when he first conceived it because his wife absolutely refused to have a tuberculosis patient in their home on account of their children. About the month of July, 1932, however, Dr. Woods learned of a residential property which had a house on the front part of the lot, which was suitable for him and his family, and also had in addition thereto an apartment over the garage which was on the rear end of the lot. This property belonged to an estate and a Mrs. Harris was executor thereof, and was likewise the sole beneficiary of the estate which was indebted to Dr. Woods in a substantial sum of money for professional services given by him to the decedent who had been nursed by Mrs. Harris, who had served as a nurse on quite a number of other cases under Dr. Woods prior to that time. The decedent last mentioned was also living in the house of Mrs. Buck at the time that Mrs. Harris and Dr. Woods attended him.

"Dr. Woods negotiated with Mrs. Harris for the purchase or rental of the aforesaid residential property, and in negotiating for the purchase thereof, he told Mrs. Harris that he wanted to get the property so he could get Zaremba to move into the flat over the garage which was then occupied by Mrs. Harris herself, and that he wanted to do this because he was convinced that if he could supply a home for Zaremba close to himself, he could induce Zaremba to revoke the will under which he was leaving all of his property to Mrs. Buck, and induce him to make a new will leaving all of his property to Dr. Woods, and that the amount of the life insurance which Dr. Woods thus received would be sufficient to enable him to purchase the aforesaid property if he failed to borrow the money for that purpose from his father-in-law who lived in San Francisco and whom he was going up to see with the purpose of borrowing money for that purpose from him, if possible.

"Mrs. Harris testified to all of this, and also, that upon his return from San Francisco Dr. Woods made an oral agreement with her to purchase the property, with the understanding that he was to pay for the same with the money which he would receive from the government life insurance policy of Zaremba. * * *

"Dr. Woods got possession of this real property on or about August 12, 1932, with the further agreement that during the pendency of his purchase thereof he was to pay sixty dollars ($60) per month for the entire property. Thereupon, and within a day or two thereafter, he took Zaremba in his automobile and showed him the apartment over the garage and rented the same to him completely unfurnished for thirty dollars ($30) per month.

"Dr. Woods testified that Zaremba paid him for his services in full down to the date that Zaremba took possession of the apartment, and that Zaremba agreed orally with the doctor, at the time he looked at the apartment, that if the doctor would let him remain there until his death, he would revoke the will under which he gave all his property to Mrs. Buck, and would make a new will giving all his property to Dr. Woods, if the doctor would also take care of him until the time of his death, and furnish him with the necessary nurses. The doctor testified that he then and there agreed to do so.

"Later, an attorney selected by Dr. Woods prepared a written agreement to the effect of the foregoing, and also prepared a will to the foregoing effect, and Dr. Woods took this attorney to Zaremba and introduced him.

"This attorney testified that Dr. Woods left before the attorney talked with Zaremba about the proposed will, and that Zaremba told him what he wanted to put in the will, and that in the first will he prepared he inserted the statement that Zaremba had one full brother, but that Zaremba did not know whether or not he was living, as he had not heard from him for several years, and that when he took the first draft of the will to Zaremba, the latter insisted that the aforesaid statement must be eliminated, as he had heard from his brother within the last or preceding two years, and that his brother was living in Chicago, Illinois.

"I am convinced that the statement in the first draft of the will about Zaremba not knowing whether his brother was dead or not, and that he had not heard from him for years, was given to the attorney by Dr. Woods, who later made that same statement to the secretary and stenographer of the attorney who tried this case for Dr. Woods, and thus lead her to insert in the petition for the probate of the will a statement to the effect that the testator left no heirs-at-law surviving him. Moreover, from the relations between Dr. Woods and the decedent I am further convinced that Dr. Woods knew at the time he made that statement to the clerk or stenographer of his attorney in this case, that the full brother of the decedent was living in Chicago, Illinois, and that if notice was given to him in any way of the death of his brother he would doubtless come to California and resist the probate of the will leaving all of the property to Dr. Woods, and hence that this false statement was made by Dr. Woods to the stenographer of his attorney in this case with the intent and purpose of thereby preventing the full brother of decedent from receiving notice of his death, and from having his day in court in opposition to the probate of the aforesaid will. As a matter of law it seems to me, therefore, that Dr. Woods was guilty of extrinsic fraud upon the full brother of the decedent and upon the probate court of this state and county, and thereby prevented said full brother, the plaintiff in this case, from having his day in court in opposition to the probate of said will, because, said brother did not learn about the death of his brother until after the expiration of one year after the date of probate. * * *

"It must be kept in mind that the decedent took no independent advice from anybody in relation to the making of his will, and that the attorney who drafted the will was the attorney for Dr. Woods, and was, in fact, selected by Dr. Woods, and that attorney testified that he personally suggested the making of the written contract which is in evidence in addition to the will, because he felt that he represented both Dr. Woods and Zaremba, and which contract assigns to Dr. Woods all of the property of the decedent, particularly mentioning and including his life insurance policy, and everything else of every kind and character, and this assignment was to take effect immediately, in consideration of the promise of Dr. Woods to take care of decedent professionally and to furnish him with necessary nurses."

[3] It must be borne in mind that during all the time referred to, and covering all the transactions referred to in the foregoing excerpt from the opinion of the trial court, a fiduciary (misprinted "fictitious") relationship existed between Zaremba and Dr. Woods as his attending physician, and charged the doctor thereby with the utmost fairness in all his business transactions with Zaremba.

The record further shows that the value of the property for which Dr. Woods negotiated with Mrs. Harris was somewhat in excess of $16,000, and that his only hope of being able to purchase the same was through the means and methods of obtaining all the property that should be left by Adolph Erich Zaremba at the date of his death. It seems not to have occurred to the doctor that such a scheme embodied the rankest kind of fraud.

[4] The appellants upon this appeal contend that the evidence shows intrinsic and not extrinsic fraud, and that the third amended complaint filed to conform to the truth does not state facts sufficient to constitute a cause of action. The latter contention requires but little consideration. The complaint does set forth specifically the action of Dr. Woods in seeking to prevent knowledge of the will and of its probate being acquired by the heirs of the deceased, and that he knowingly and falsely stated in the petition for probate of the will that there were no such heirs. That in itself is an extrinsic statement. When the doctor appeared for the probate of the will and testified to such facts, his testimony would be considered before the court as intrinsic fraud, based upon which we may admit no suit in equity would lie. There is a clear line of demarkation, however, between a statement made in the petition for the probate of the will which would limit the giving of notices to heirs, and testimony in court to the effect that there were no such heirs, after the heirs had been notified of the proceeding for the probate of the will, as provided by the different sections of the Probate Code.

The contention is first made that there is no testimony showing that the doctor had any information or knowledge of the existence of any relatives of the deceased. This statement is directly contrary to the record which the doctor had in his possession. The will states specifically that the deceased had a brother named Hugo Zaremba. This will was filed by the doctor, and it is inconceivable that he did not have knowledge of its contents at the time he filed his petition for its probate, and the trial court, upon such a state of facts, was amply justified in concluding that the doctor did have knowledge of the existence of relatives left by the deceased.

For the purposes of a further discussion, it will be admitted that the petition filed by Dr. Woods for the probate of the will of Adolph Erich Zaremba, deceased, gave the probate court jurisdiction. That, however, is no answer to the alleged extrinsic fraud.

In support of their contentions, the appellants cite the case of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159, being a leading case, where the subject of intrinsic fraud is discussed, and where it was sought to set aside the decree on the grounds of fraud committed in the giving of perjured testimony. The court said: "And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." The court then goes on to state what constitutes extrinsic or collateral fraud, among which is keeping the unsuccessful party away from the court, or purposely keeping him in ignorance of the suit, etc.

The case of Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965, 969, 155 P. 98, relied upon by the appellants, is readily distinguishable from the case at bar. The Nicholson Case holds that an order admitting a will to probate is not void because of the omission to state in the petition the names and ages and residences which are not set forth therein. It is unquestioned that an action in equity will not lie to set aside the probate of a will simply because of such omission, or to hold the devisees in such case trustees for the heirs. In the case at bar it is not sought to set aside the will, nor is it sought to hold Dr. Woods trustee upon the simple fact alone that no heirs are mentioned in the will, but upon the false and fraudulent statement made in the petition for the purpose of preventing heirs learning either of the death of Zaremba or of the proceedings instituted by the doctor for the probate of Zaremba's will. After holding that the rule is absolute that a mere defect in the petition in not stating the names of heirs is not sufficient, the court does add: "The rule is absolute, save in cases where there has been a breach of duty arising from a fiduciary relation on the part of those securing the probate of the will, that the acts alleged to constitute extrinsic fraud must be such as to operate to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against its being admitted to probate."

The case of Monk v. Morgan, 49 Cal. App. 154, 192 P. 1042, deals only with defective notices and false testimony given in court. The defective notice in that case was held not to deprive the court of jurisdiction, and the perjured testimony given upon the hearing of the case was held to be intrinsic fraud. We find nothing in the case at bar to the effect that any of the parties had connived with heirs receiving notice.

Sections 326 to 328, inclusive, of the Probate Code, provide for the giving of notices. The omission of stating the fact of heirs in the petition filed by Dr. Woods necessarily prevented the clerk of the court from giving the notices specified in section 328, supra, to be given.

[5-7] That an action in equity will lie just as here instituted, we need cite only one case, to wit, Caldwell v. Taylor, 218 Cal. 471, 23 P.(2d) 758, 88 A.L.R. 1194. This case quotes at length from the case of U. S. v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. The distinction between extrinsic and intrinsic fraud is there clearly defined. The "extrinsic fraud" consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding. "Intrinsic fraud" is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to receive the property of the estate. While the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same.

In the case at bar it was necessary for the plaintiff to establish two facts: (1) That the agreement and will referred to herein were obtained by fraudulent practices, to wit, undue influence; and (2) that Dr. Woods was guilty of extrinsic fraud in the methods adopted by him to prevent the heirs of said deceased from receiving knowledge either of the death of the deceased, or of the proceedings for the probate of the will. Both of these propositions appear to us to be established beyond controversy.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

18 Cal.App.2d Supp. 769

ABROTT v. ATHANASATOS.

No. 663.

Appellate Department, Superior Court, City and County of San Francisco, California.

Aug. 18, 1936.

1. Chattel mortgages 🔑169

Where tenant selling restaurant and equipment took chattel mortgage on personalty as security for purchase money, and on purchaser's default foreclosed mortgage and took possession of premises and all property therein, including articles not covered by mortgage, tenant in thereafter transferring all property to landlord in consideration of release from lease was guilty of conversion.

2. Judgment 🔑641

Adjudication of bankruptcy referee that defendant was guilty of conversion *held* binding on defendant where he participated in full hearing and did not seek review of adjudication (Bankr.Act § 1(7), 11 U.S.C.A. § 1(7).

3. Judgment 🔑641

Bankruptcy referee's adjudication fixing value of property converted by defendant *held* res judicata in suit by bankruptcy trustee to enforce referee's order, where defendant had consented to referee's jurisdiction and did not seek review of referee's order (Bankr. Act § 1(7), 11 U.S.C.A. § 1(7).

◆

Appeal from Municipal Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by B. J. Abrott, as trustee of the estate and effects of James X. Psaltes, individually and doing business as the Lafayette Grill, bankrupt, against Geris Athanasatos. From a judgment, the plaintiff appeals.

Judgment reversed and cause remanded, with directions.

Torregano & Stark and M. C. Symonds, all of San Francisco, for appellant.

Morris Oppenheim, of San Francisco, for respondent.

JOHNSON, Presiding Judge.

The question in this case is whether, in an action in the municipal court by a trustee in bankruptcy, to recover the value of certain personal property alleged as part of the bankrupt's estate to have been converted by the defendant, the finding of the value of the property at a hearing before the referee in bankruptcy became res adjudicata and conclusive in the proceeding in the municipal court.

The defendant, who had originally been the owner of the Lafayette Grill, sold the restaurant and its equipment to James X. Psaltes in March, 1932, taking as security for payment of the purchase money a chattel mortgage of the personal property. Psaltes having made default in payment, the defendant foreclosed the chattel mortgage and bought the mortgaged property at the sale. He then, on April 3, 1930, took possession of the premises and of all the personal property therein, including allegedly certain groceries and other articles not described in the mortgage. After so taking possession, defendant surrendered possession of the premises to the landlord, and transferred to him all the personal property therein in consideration of the release of defendant from the obligations of the lease of the premises.

Thereafter on May 3, 1933, Psaltes filed a voluntary petition in bankruptcy, and after proceedings duly had he was adjudged a bankrupt; and at the first meeting of creditors plaintiff was elected trustee and in due time qualified as such.

On or about July 12 the trustee filed with the referee a petition for an order requiring this defendant to propound his claim to certain personal property, of stated values, as set forth in the petition, alleged to be assets of the bankrupt's estate of which the defendant had taken possession, and which upon demand of the trustee defendant had failed to surrender.

By a verified claim dated August 24 defendant made claim to ownership of all the property mentioned in the trustee's petition except an exhaust fan, a radio, and the lot of groceries. The trustee by filing objections joined issue as to ownership in defendant; and in due course the matter came on for hearing by the referee, both parties being present with their respective attorneys. After considering the evidence presented and briefs filed by the attorneys, the referee in an opinion filed May 9, 1934, recited the facts as shown by the evidence and reached the conclusion that under the law the trustee was entitled to an order sustaining his objections to the allowance of defendant's claim, and that title to the disputed articles was vested in the trustee. Accordingly, by an order dated May 24, 1934, the defendant's claim was disallowed, and it was adjudged that the trustee was vested with title of the property in dispute, the value of which was set opposite each article, and also of the articles of which defendant made disclaimer, valued at $535. The total value fixed by the referee was $1,746.48.

No application for a review of the referee's order was made by defendant; and for the purpose of enforcing the order, the trustee instituted his action in the municipal court on June 21, 1934, praying for judgment for $1,746.48 with interest.

[1] From an examination of the transcript of the proceedings in the lower court, the controversy between the parties does not appear to have been over the valuations of the referee, except in regard to the lot of groceries. The referee, acting upon the testimony of the bankrupt and certain of his employees, fixed the value of the groceries at $200, while defendant, in contradiction of all the witnesses, insisted that there had been no groceries on hand when he took possession. Defendant's real opposition to the trustee's claim in the lower court centered upon defendant's contention that there had been no conversion. This contention was based on an assertion that, though defendant had transferred all the property to the landlord in consideration of defendant's release from the obligations of the lease, it devolved upon the trustee to pursue the landlord, and not defendant, for recovery of the property or its value. There can be no question, however, that, when in substance defendant sold the property to the landlord for a valuable consideration received by defendant, he was exercising dominion over the property, and was guilty of conversion.

[2] That question was adjudicated by the referee in favor of the trustee after a full hearing in which the defendant participated; and we entertain no doubt that defendant became bound on that issue by the referee's order. See In re Faerstein (C.C.A.) 58 F.(2d) 942, and cases there cited.

No written findings were made in the municipal court, but instead of accepting the referee's valuations as an adjudicated fact, the court, though holding the trustee entitled to a recovery, gave judgment for only $300 and costs. There is nothing in the record to explain this figure, as no evidence was introduced other than the values set forth in the referee's opinion and order.

The trustee having appealed from the judgment rendered, the question now before us is as to the binding effect of the referee's order. In other words, does the rule of res adjudicata apply to the referee's determination both as to conversion and as to the value of the property affected by his order?

Section 1 of the Bankruptcy Act in subdivision (7), 11 U.S.C.A. § 1(7), states: "'Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." In MacDonald v. Plymouth County Trust Co., 286 U.S. 263, 52 S.Ct. 505, 76 L.Ed. 1093, the court had occasion to consider the status of the referee in connection with section 23 (b) as originally enacted and incorporated in 11 U.S.C.A. § 46(b). That section provides that suits by trustees shall be brought or prosecuted only in courts where, except for the bankruptcy, the bankrupt might have brought or prosecuted them, unless by consent of the proposed defendant. In the case above cited, there was a hearing by consent before the referee upon the trustee's petition to set aside certain transfers as voidable preferences. Drawing a distinction between the power of the referee to decide the issues in such a suit brought before him without objection, and the power to compel the litigation of them before him over objection of the proposed defendant, the court said that, although it had never before definitely decided that question, it could perceive no reason why the privilege of procedure in a plenary suit could not be waived by consent. And declaring the referee to be vested with the powers of a court of bankruptcy to decide the issues in such a suit presented to him without objection, the court said (286 U.S. 263, at page 268, 52 S.Ct. 505, 507, 76 L.Ed. 1093): "While under the provisions of the Bankruptcy Act [11 U.S.C.A.] the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed, as it was here, by the consent of the parties to a summary trial of the issue presented. The referee therefore had power to decide the issues, and the Court of Appeals below should have considered the appeal on its merits." See, also, McCulloch v. Davenport Sav. Bank (D.C.) 226 F. 309, 311.

In Breit v. Moore (C.C.A.9th Cir.), 220 F. 97, 98, affirming the decision of Judge Dooling in Moore v. Breit, 211 F. 687, where the trustee, Moore, to enforce a ruling of the referee in his favor, brought suit in the District Court, and had judgment on the pleadings, in an action against Breit to recover the sum of $250 as the amount of a voidable preference, the Court of Appeals, speaking through Judge Ross, said (220 F. 97, at page 99): "No review of the foregoing findings, conclusions, or judgment was sought. Becoming final, and Breit refusing to return the money so received by him as a preference, the trustee brought this suit thereon in the court below to recover the account. The answer of Breit containing no denial of the judgment or of any of the proceedings on which it was based, the court below rightly gave the complainant judgment on the pleadings. Breit was no stranger to the proceedings before the referee. On the contrary, he presented his claim, contested the preference alleged to have been received by him—introducing proof in behalf of his contention—and then abided by the findings and decision against him. He thus had a trial before a competent officer of his own selection of the issue he now claims the right to have tried by a jury. The conclusive answer is that he is concluded by the adverse decision of the referee in which he acquiesced."

[3] So in this case no review of the referee's order was sought by the defendant; and he abided by the referee's decision. Having been once heard in the court of the referee, who by defendant's consent had jurisdiction to determine the controversy, defendant was concluded by the adverse decision of the referee, and had no right to litigate the same issues anew in the municipal court. Without protesting against the jurisdiction of the referee, defendant expressly submitted his claim to that court, and when after a full hearing the ruling was made against him, he acquiesced until the trustee sought, as in the Moore Case, to enforce the judgment of the referee in an appropriate action.

For further discussion of the subject reference may be made to Henderson v. Denious (C.C.A.) 186 F. 100, 105; Hargadine, etc., Co. v. Hudson (C.C.A.) 122 F. 232; McCulloch v. Davenport Savings Bank (D.C.) 226 F. 309, 312–315, containing quotations from several earlier cases; and Bachman v. McCluer (C.C.A.) 63 F.(2d) 580, 583, citing numerous cases.

In view of the finality of the referee's order, as established by the well-settled rule governing such matters, it must be held that plaintiff was entitled in his action in the municipal court to a judgment for the aggregate value of the property in question as fixed by the referee, namely, $1,746.48, with interest, as provided in section 3336, Civ.Code, from March 23, 1933, the date of conversion.

The judgment is therefore reversed, and the cause remanded to the municipal court, with directions to enter judgment in favor of plaintiff against defendant in conformity wtih the views above expressed.

We concur: CONLAN, J.; GOODELL, J.

7 Cal.2d 579

GREENLEE v. GREENLEE.

L. A. 15180.

Supreme Court of California.

Oct. 26, 1936.

1. Homestead ⚷41

Declaration of homestead by wife after her desertion by husband and his removal from premises *held* valid, as against contention that legal residence of wife followed residence of husband and that therefore she was not resident of property when declaration was made as required by statute, where wife was in fact occupying premises when she made declaration (Civ.Code, § 1263; Pol. Code, § 52).

2. Homestead ⚷5

Homestead laws should be given liberal construction (Civ.Code, § 1263).

3. Husband and wife ⚷298¾

Term "limited period" in statutes authorizing assignments in actions for divorce and separate maintenance, of homestead selected from separate property of either, to innocent party for limited period, meant period of natural life of such innocent party (Civ.Code, §§ 137, 146, subd. 4).

[Ed. Note.—For other definitions of "Limited Period," see Words & Phrases.]

4. Divorce ⚷249(6)
Husband and wife ⚷298¾

Under statutes, separate property of spouse from which homestead has been selected can be assigned to innocent party in divorce or separate maintenance actions, even though decree for divorce or separate maintenance is not rendered on grounds of either adultery or extreme cruelty (Civ.Code, §§ 137, 146, subds. 1–4).

5. Husband and wife ⚷298¾

Court awarding possession of homestead selected from husband's separate property to wife suing for separate maintenance without placing any limitation as to length of time of her possession, would be presumed, in absence of reasonably clear expression to contrary, to have intended to act within scope of its statutory authority and to award possession of homestead to wife during her lifetime only (Civ.Code, §§ 137, 146, subd. 4).

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Elizabeth Ada Greenlee against Warren Russell Greenlee, also known as Warren R. Greenlee, also known as W. R. Greenlee, wherein the defendant filed a cross-complaint. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 57 P.(2d) 959.

Randall & Bartlett and Henry G. Bodkin, all of Los Angeles, for appellant.

Louis T. Fletcher, of Los Angeles, for respondent.

CURTIS, Justice.

In this action, instituted by the wife against her husband for separate maintenance upon the grounds of desertion and willful neglect, the court rendered judgment in favor of the wife, the plaintiff in said action. Said judgment in part provides that: "It is further ordered, adjudged and decreed that plaintiff have in addition to the said fifty ($50.00) dollars per month possession of the real property described as Parcel No. 1, paragraph I of this decree, together with all furniture, household goods, and personal effects therein, and any and all rents therefrom; * * *"

The defendant appealed from that part of said judgment set forth in the paragraph just quoted in so far as it provides that the plaintiff have possession of the real property described therein. The grounds of the appeal are: (1) The real property of which the wife was given possession was the separate property of the husband, and no valid declaration of homestead was ever declared thereon by the wife; and (2) the court was without jurisdiction in this order to award the separate property of the husband to the wife for any period of time, much less for an unlimited period of time, even if she had declared a valid homestead upon said real property. The appeal is on the judgment roll alone.

The court found that the parties hereto were married on the 29th day of June, 1930; that they resided continuously on parcel 1, being the real property described in the paragraph of the judgment quoted above, from the first day of June, 1931, to and including the 31st day of October, 1932, being the date on which the defendant deserted plaintiff, and that plaintiff from said last-named date up to the trial of said action "was actually residing on the land and premises herein referred to and in the dwelling house situated thereon with her family." While so residing on said premises, the plaintiff executed a declaration of homestead in which she declared, among other facts, that the real property was the home of herself and her husband, the defendant herein. The declaration of homestead, the court found, was recorded on the 2d day of February, 1933, in Book 11,987, page 287, official records of the county of Los Angeles. The court further found that the parties hereto lived together as husband and wife from the date of their marriage on June 29, 1930, to and including the 31st day of October, 1932, when the defendant deserted and abandoned the plaintiff, and that there were no children as the issue of said marriage.

[1, 2] Under the foregoing findings of facts, the defendant claims that the court erred in its conclusion that the plaintiff executed and filed for record a valid declaration of homestead upon the real property which was awarded her by the judgment in this case. In support of this claim, the defendant reasons as follows: The party making a declaration of homestead must reside on the property at the time of making said declaration of homestead. Civ. Code, § 1263. The residence of the husband is the residence of the wife. Pol. Code, § 52. When the husband abandoned his wife and ceased to reside upon the premises in question, the legal residence of the wife followed that of her husband, and she ceased in a legal sense to be a resident of said premises from that time on, although she continued to occupy the same as a home. As the declaration of homestead was recorded after the desertion of the wife by the husband, it was invalid for all purposes. The main authority relied upon by the defendant in support of his claim is the case of Bullis v. Staniford, 178 Cal. 40, 171 P. 1064. In that action the facts are materially different from those now before us. The defendant Staniford owned a home in the city of Fresno, in which he resided with his wife and two sons. Subsequently and in 1912 he removed to Los Angeles and continued to reside there until the date of the trial in 1915. In 1912 the defendant leased the Fresno home to other parties and Mrs. Staniford moved to San Francisco to keep house for her elder son, who had established himself as a physician in the last-named city, and to be near her younger son, who was a student at Stanford University. In 1914, the Stanifords sustained financial reverses and Mrs. Staniford, who was still living in San Francisco, after consulting an attorney, went to Fresno and by an arrangement with the tenants then occupying their home, canceled the lease of said property and went into ostensible possession thereof. After remaining in possession of the premises from February 20 to February 24, Mrs. Staniford filed a declaration of homestead upon the property, and on March 1 she made a new lease of her home to her former tenants and returned to San Francisco, where she continued to remain. Under this state of facts the court held that Staniford was a resident of Los Angeles at the date of filing the declaration of homestead for record and that his residence was the residence of his wife. It accordingly set aside the declaration of homestead which the wife executed and filed upon the Fresno property and declared the same invalid. A mere recital of the facts of this case, we think, clearly shows that the factual situations in the two cases are so different that the cited case cannot be accepted as an authority for the decision of the case now before us.

On the other hand, we think the case of Michels v. Burkhard, 47 Cal.App. 162, 190 P. 370, 372, is practically decisive of the question now before us. In that action the husband, on the order of court, left the home in August, 1912, the wife continued to reside there, and in November of the same year, and while the husband was still absent, filed a declaration of homestead. The trial court in the divorce ordered the wife to leave the homestead premises, and she complied with the order and never returned to the premises. In a subsequent action a creditor of the Burkhards levied upon and sold the property under execution and then brought an action to quiet the title. The husband defaulted in said action, but the wife appeared and set up the homestead. The trial court ruled against her, but the appellate court reversed the judgment and sustained the validity of the declaration of homestead. In concluding its opinion in that case, the court expressed its views as follows (47 Cal.App. 162, at page 165, 190 P. 370): "To hold otherwise would be tantamount to denying the very right vouchsafed the wife under the specific terms of the statute. Subdivision 2 of the section covering this phase of the matter, too, would seem to preclude the idea that residence on the property in question by both spouses is necessary. At any rate, it is conceded that the declaration here involved complies with section 1263 of the Civil Code in every particular."

In that case there was another element present which to a certain extent militated against the validity of the homestead. It was there claimed that the motive of the wife in making the declaration of homestead was to harass her husband, and that she did not claim the homestead for the joint benefit of herself and husband. Notwithstanding this phase of the case, the appellate court sustained the act of the wife in making said declaration of homestead. In the present case no improper motive is attributed to the wife, but, on the other hand, all the evidence in the case shows that she acted to protect her rights from the acts of her husband, who, the court found, was fraudulently attempting to defeat her claim for maintenance and support, after he had failed to supply her with the necessaries of life and had deserted her and his home. To hold under these circumstances that she could not protect herself in a right to a home out of her husband's property would indeed be a harsh and most unjust rule. All that a husband would have to do in order to defeat his wife's right to a homestead would be to desert her, and from that moment on she would be powerless to preserve for herself a home in which to live. The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the Legislature. 13 R.C.L. p. 547.

The defendant further contends that the court has no authority in this action to award the separate property of the husband to the wife as a homestead for any period of time whatever, not even for an unlimited period.

[3, 4] It is admitted, and the court found, that the real property assigned to the wife was the separate property of the husband. Subdivision 4 of section 146 of the Civil Code provides that in divorce actions, if the homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party. The same limited power is given to the court in actions for separate maintenance. Civ.Code, § 137. The limited period for which the court may assign to the innocent party the homestead selected from the separate property of the other has been held to be for the period of the natural life of the former. Strupelle v. Strupelle, 59 Cal.App. 526, 531, 211 P. 248; Neary v. Godfrey, 102 Cal. 338, 36 P. 655; Hutchinson v. McNally, 85 Cal. 619, 24 P. 1071. The appellant contends, however, that the separate property of one spouse from which the homestead has been selected can be assigned to the innocent party only in cases in which the decree of divorce or for separate maintenance is granted upon the grounds of adultery or extreme cruelty, and relies upon Huellmantel v. Huellmantel, 117 Cal. 407, 49 P. 574, in support of such contention. While there is language to be found in the opinion in that case which apparently supports appellant's position, it is apparent, when said opinion is carefully examined, that this language was not necessary for the decision of any point at issue in said action and was therefore dictum. Moreover, the language relied upon is directly opposed to sections 137 and 146 of the Civil Code above referred to, and particularly to subdivision 4 of said section 146, which provides for the disposition of the separate property of either spouse from which a homestead has been selected upon the granting of a decree of divorce, and section 137, as we have stated, makes section 146 applicable to judgment for separate maintenance. Subdivisions 1 and 2 of section 146 provide for the disposition of the community property in the event of a divorce, and provides for a different division of the community property in case the divorce is rendered on the grounds of either adultery or extreme cruelty from that which may be made in cases where the decree is rendered on other grounds. Subdivisions 3 and 4 of said section 146 provide for the disposition of the homestead in case of divorce. Subdivision 3 relates to homesteads selected from community property and subdivision 4 to homesteads selected from the separate property of one of the spouses, but no distinction whatever is made in the power of the court to award the homestead, in either event, as to the grounds upon which the decree of divorce is rendered. The contention of the appellant that the court has power to award the homestead, selected from the separate property of one of the parties to the innocent party, only in cases where the decree is rendered on the grounds of either adultery or extreme cruelty is without merit.

[5] The contention of appellant that the court has power to assign the homestead selected from separate property to the innocent party for a limited period only, not exceeding the period of the natural life of the latter, and that the decree in the case now before us makes an absolute award of the homestead to the wife will now be given consideration. The judgment, as we have seen, decrees "that plaintiff have * * * possession of the real property described as parcel No. 1 of this decree together with all furniture, household goods and personal effects therein." It will be noted that the court only decreed that the wife shall have the possession of the parcel of land which had been selected as a homestead from the husband's separate property, without placing any limitation as to the length of time of said possession. Evidently she could not have possession of the property beyond the period of her natural life. While the language of the decree is not as clear as we would like it, we cannot say that the court intended to exceed its powers and award the homestead to the wife absolutely. The decree may fairly and reasonably be construed as giving to the wife the possession of the homestead during her lifetime. In the case of Simpson v. Simpson, 80 Cal. 237, 22 P. 167, the court had under review a decree of divorce whereby it purported to award to the wife the homestead in trust for the support of herself and children. In construing this decree the court held that the court had no statutory authority to create a trust in the homestead by the decree of divorce, but only to assign it to the innocent party absolutely or for a limited period. In its decision of the case the court applied a principle of interpretation which we think can well be held to be applicable to the decree in the instant action. In that case the court said (80 Cal. 237, at page 241, 22 P. 167, 168): "Another consideration tending to support the construction here given to the decree is that the law did not authorize the court to assign the homestead, or any equitable interest in it, to the children, nor to the wife in trust for any purpose; and, in the absence of a reasonably clear expression to the contrary, the court must be presumed to have intended to act within the scope of its authority, and not to exceed it." Applying this principle of construction to the decree before us, we cannot say that it definitely awarded the homestead to the wife absolutely or for any period of time beyond her lifetime, and in the absence of any reasonably clear expression of said intent, the court must be presumed to have intended to act within the scope of its authority and to award to the wife the possession of the homestead during her lifetime only. We think this is the only reasonable construction to give the judgment in this case, and, as so construed, it met the requirements and limitations prescribed by the two sections of the Civil Code cited above.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

7 Cal.2d 596

PACIFIC STATES SAVINGS & LOAN CO. v. O'NEILL et al.

S. F. 15615.

Supreme Court of California.

Oct. 27, 1936.

Rehearing Denied Nov. 23, 1936.

1. **Appeal and error** 🔑761

Assignments of error unaccompanied either by argument or citation of authority would not be noticed.

2. **United States** 🔑34

Sale by trustee named in deed of trust which provided for payment in gold coin of the United States *held* not void on ground that provision was against public policy after congressional resolution authorized discharge of obligation to pay gold coin by payment of any legal tender, since effect of resolution was to strike provisions for payment in gold (31 U.S.C.A. §§ 462, 463).

3. **Mortgages** 🔑358

Sale under trust deed en masse of three parcels of realty by trustee *held* not void where there was no allegation that greater sums would have been realized by separate sales, and where sale en masse at trustee's discretion was permitted by trust deed which had been executed before statute forbidding sale en masse, but exempting deed previously executed (Code Civ.Proc. § 694).

4. **Evidence** 🔑383(7)

Sale by trustee of land covered by trust deed *held* not void on ground notices of sale

did not remain posted on land for sufficient length of time, where recital in trust deed was to be conclusive proof of proper notice, and trustee's deed contained such recital, since recital was conclusive in absence of showing that objectors were entitled to equitable relief.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Pacific States Savings & Loan Company against Sophie O'Neill, and others. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

James F. Peck and Elizabeth Maxwell, both of San Francisco, for appellants.

John L. Mace, of Los Angeles, and Roy D. Reese, of San Francisco, for respondent.

THOMPSON, Justice.

The defendants appeal from a judgment rendered in favor of the plaintiff in an action in unlawful detainer brought pursuant to the provisions of section 1161a of the Code of Civil Procedure, after sale of the property to plaintiff by the trustee named in a deed of trust given to secure the repayment of $55,000 and interest thereon. In essence, the contentions relied upon by appellants may be stated as follows:

1. The sale was void because the note and trust deed provided for payment in gold coin of the United States, whereas the notice of default, the notice of sale, and the bid all proceeded upon the theory that the note was payable in lawful money. It is argued, indeed, that the trust deed requirement was void after June 5, 1933, the date when, by resolution of Congress, any obligation requiring the obligor to pay in gold coin was declared to be against public policy and any such obligation discharged by payment in any coin or currency which is legal tender.

2. The sale was en masse of three parcels of property, and, therefore, void, because contrary to section 694, Code of Civil Procedure.

3. The notices of sale did not remain posted on the land for a sufficient length of time.

[1] There are two other assignments, unaccompanied either by argument or citation of authority, and, under a well-established rule of appellate practice, we are not constrained to take further notice thereof.

[2] Concerning the first contention, it is sufficient to cite the case of Security-First National Bank of Los Angeles v. De la Cuesta (Cal.App.) 59 P.(2d) 542, 543, in which we denied a hearing and in which case we are in accord, so far as applicable here. It is there pointed out that the effect of the joint resolution passed by Congress (48 U.S.Stats. at Large, c. 48, p. 112 [31 U.S.C.A. §§ 462, 463]) was to "strike from defendant's contract the specification of gold coin as the medium of payment of the debt." It necessarily follows that all arguments grounded upon a contrary premise must fall.

[3] With respect to the assertion that the sale was void because the three parcels covered by the deed of trust were sold en masse instead of separately, it is to be observed that it is not claimed that a greater sum would have been realized by the latter method and also that the contract of the parties—the deed of trust—provides as follows: "The Trustee may sell said premises above described as a whole, or, in its discretion, in such parcels or subdivisions as it in its judgment may deem reasonable, and in conducting the same may act either in person or through an agent." At the time the deed of trust was executed, section 694, of the Code of Civil Procedure, did not mention sales under deeds of trust. The amendment to that section, adopted in 1931, specifically restricted its operation to deeds of trust thereafter executed. Obviously, therefore, the law as it stood at the time of the execution of the contract is applicable.

In the case of Bank of Sonoma County v. Charles, 86 Cal. 322, 24 P. 1019, 1021, it was held that the parties had the right to contract with respect to whether the property should be sold en masse or separately and that section 694, Code of Civil Procedure, related to sales "under executions in cases where there have been no contracts between parties as to the manner of the sale." See, also, Humboldt Savings Bank v. McCleverty, 161 Cal. 285, 119 P. 82; 25 Cal.Jur., p. 85.

[4] It is a sufficient answer to the last contention of appellants that, although the notices of sale were posted on the property on a day sufficient to give the required notice, they did not remain posted except for a few days, to point out that the deed of trust provides that, in the

event of a sale, the recital in the trustee's deed of giving of the notice of sale "shall be conclusive proof of * * * the due giving of such notice. * * *" The trustee's deed contains a recital of due notice. Under such circumstances, and in the absence of a showing which would have entitled the appellants to equitable relief, the recital must be accepted as conclusive. Mersfelder v. Spring, 139 Cal. 593, 73 P. 452; Cobb v. California Bank (Cal.Sup.) 57 P.(2d) 924, and cases there cited.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

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7 Cal.2d 619

HENRICKS v. METROPOLITAN LIFE INS. CO.

L. A. 15793.

Supreme Court of California.

Oct. 30, 1936.

Rehearing Denied Nov. 25, 1936.

1. Insurance ⚷367(1)

Statute providing for term insurance after default in premium payments on life policy is a nonforfeiture statute, purpose of which is to prevent loss of reserve to insured in event of nonaction on his part (Civ. Code, § 450).

2. Insurance ⚷367(1)

Under statute providing for term insurance after default in premium payments on life policies, life policy which contains any one of three alternatives set forth in statute, which alternative is made automatically operative in event of nonaction on part of insured, complies with statute (Civ.Code, § 450).

3. Insurance ⚷367(1)

Statute providing for term insurance after default in premium payments on life policy does not require exact statutory language to be embodied in policy, and, as long as language used accomplishes identically same result required by statute, there is sufficient compliance with statute (Civ.Code, § 450).

4. Insurance ⚷367(1)

Life policyholder will not be heard to complain that it is unlawful for insurer to confer upon insured greater rights than those required by statute (Civ.Code, § 450).

5. Insurance ⚷367(1)

Life policy which provided that, upon failure to pay premium after 3 years' premiums had been paid, insured should have option to have insurance continued for reduced amount of nonparticipating paid-up insurance payable at same time and under same conditions of policy, which paid-up insurance should have increasing cash surrender value equal to full reserve at date of surrender, or a loan value up to limits of cash surrender value, *held* to provide for one of alternatives of statute providing for term insurance after default in premium payments on life policy, and hence was valid (Civ.Code, § 450).

6. Insurance ⚷146(3)

Insurance policies should be liberally construed in favor of insured, but such rule of construction does not permit giving effect to one sentence of policy and complete ignoring of entire paragraph dealing with same subject matter.

7. Insurance ⚷367(1)

Insured could not contend that nonforfeiture provisions of life policy were conditioned on absence of indebtedness and therefore did not comply with statute because policy gave insured certain options "provided there be no indebtedness hereon," where policy also provided that indebtedness to insured would be deducted from cash value, and such indebtedness would also reduce amount of paid-up insurance for amount continued as term insurance in such proportion as indebtedness bore to cash value and due date of premium in default (Civ. Code, § 450).

8. Insurance ⚷367(1)

Life policy containing one automatic nonforfeiture provision may contain other alternatives different from those in statute providing for term insurance after default in premium payments on life policy, operative only upon election of owner of policy, since statute only prohibits contracts "contrary" to its provisions, and does not prohibit alternatives in addition to or different from those required by statute (Civ.Code, § 450).

9. Insurance ⚷367(2)

Life policy provision that any indebtedness of insured to insurer should reduce amount continued as extended term insurance in such proportion as indebtedness bears to cash value *held* valid (Civ.Code, § 450).

10. Insurance ⟹367(1)

Provision of life policy giving insured option of having policy continued on default as paid-up term insurance in amount of policy, but providing that amount of such insurance should be reduced in proportion indebtedness of insured to insurer bore to cash surrender value, *held* not void as discriminatory in imposing additional burden on insured indebted to insurer (Civ.Code, § 450).

11. Insurance ⟹367(1)

As respects whether insurer was liable for double indemnity under life policy for accidental death which occurred after policy had lapsed for nonpayment of premium, double indemnity clause was part of life policy (Civ.Code, § 450).

12. Insurance ⟹367(1)

Double indemnity benefits under life policy are not carried over to nonforfeiture insurance (Civ.Code, § 450).

13. Insurance ⟹367(1)

Insurer *held* not liable for double indemnity for accidental death which occurred after lapse for nonpayment of premiums of life policy which provided for accidental death benefits only if all premiums had been paid and if policy was not in force by reason of its nonforfeiture provisions, on ground that nonforfeiture value prescribed by statute applied to aggregate amount of insurance, since clause "amount of the face of the policy," within statute providing for paid-up nonparticipating term insurance in amount of the face of the policy, means the amount of policy without including double indemnity (Civ.Code, § 450).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Edythe H. Henricks against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals.

Modified and, as modified, affirmed.

Prior opinion, 53 P.(2d) 991.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, F. Elred Boland, Knight, Boland & Riordan, and J. W. Radil, all of San Francisco, and Newlin & Ashburn, of Los Angeles (E. Avery Crary, Paul Sandmeyer, and George W. Tackabury, all of Los Angeles, of counsel), amici curiæ.

Black, Hammack & McWilliams, Black, Hammack & Black, J. T. Enright, and Carey McWilliams, all of Los Angeles, for respondent.

PER CURIAM.

Plaintiff, as the named beneficiary, brought this action to recover on a life insurance policy issued by defendant on the life of her husband, Noah Henricks.

The basic facts are not in dispute, having been stipulated to by the parties, and are as follows:

On May 19, 1924, the defendant issued a policy of life insurance upon the life of Noah Henricks, a California resident, in the sum of $2,500. In consideration of an additional premium of $2 per year there was attached to this policy a supplementary contract providing that, if the insured died by accidental means as defined in the policy, an additional amount in the sum of $2,500 would be paid to the beneficiary. The premiums on the policy were paid by the insured up to February 19, 1932. The premium due on that date was not paid, nor were any further premiums ever paid. On May 8, 1932, the insured was drowned under such circumstances that defendant concedes that, if the double indemnity provision was still in effect, the death was accidental within its terms. At the time the policy lapsed by reason of nonpayment of premiums, it had a reserved value of $303.75. Prior to the date of the lapse, however, the insured had borrowed certain sums from defendant against the policy, which sums, together with interest, totaled $270.15. On February 19, 1932, the policy, therefore, had a net reserve value of $33.60. The policy contained certain alternatives, to be exercised at the election of the owner thereof, as to what should be done with this reserve. After due proof of death, on May 19, 1932, plaintiff, as the owner of the policy, delivered to the defendant the policy of insurance, together with a formal notice that she elected to receive for this reserve "term insurance from due date of premium now in default to the full extent permissible and purchasable with moneys now due under said policy by reason of surrender or loan values," in accordance with one of the alternatives contained in the policy. Because of certain limitations in the policy applicable to policyholders who were also borrowers, and hereafter discussed more fully, the amount due plaintiff under the option exercised by her, exclusive of double indemnity, was $277. This sum was tendered by defendant, but refused. It is plaintiff's theory that, under the terms of section 450 of the Civil Code (now sections 10151–10154 of the Insurance Code), she is entitled to term insurance for the full face of the policy, plus double indemnity in the same amount. The trial court rendered its judgment in favor of plaintiff in the sum of $5,000, from which judgment this appeal has been perfected. The decision of the trial court, as disclosed in its findings and conclusions, as well as in a written opinion, was based upon two main theories. In the first place, the trial court held that in order to be valid every life insurance policy made upon the life of a resident of this state, and delivered within this state, must provide that, in the event of lapse by reason of nonpayment of premiums, the owner of the policy shall have all three of the alternatives provided in section 450 of the Civil Code; that, inasmuch as the policy here involved contained at most but one of those alternatives, its nonforfeiture provisions were void and the automatic provision of section 450 was applicable; i. e., "term insurance in the amount of the face of the policy." The trial court found, in the second place, that the double indemnity supplementary policy was a life insurance policy within the meaning of section 450, and that its provisions in reference to nonforfeiture in the event of lapse were applicable to it.

Before the contentions of the parties can be adequately understood, it is necessary to refer to the nonforfeiture provisions of the policy, and to the provisions of the Code section in question.

The policy provides that, in the event premiums are not paid by the insured when due, certain options are available to the owner of the policy. The language of the policy, in this regard, is as follows:

"Options on Surrender or Lapse:—Upon failure to pay any premium or any part thereof when due, this Policy, except as otherwise provided herein, shall immediately lapse. If, however, the lapse occur after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall, upon written request filed with the Company at its Home Office together with the presentation of this Policy for legal surrender or for endorsement within three months from the due date of premium in default, be entitled to one of the following options:

"First—A cash surrender value.

"The Company in its discretion may defer the payment of the cash value for a period not exceeding ninety days after the application therefor is received by the Company.

"Second—To have the insurance continued for a reduced amount of non-participating paid-up insurance (including any existing additions to the credit of the Policy), payable at the same time and under the same conditions of this Policy. Such paid-up insurance shall have an increasing cash surrender value equal to the full reserve at the date of surrender, or a loan value up to the limit of the cash surrender value. Interest on loan under such paid-up insurance shall be payable annually in advance to the end of the policy year at the rate of six per centum per annum.

"Third—To have the insurance continued for its original amount as term insurance in whole number of months from due date of premium in default, without participation and without the right to loan, but with a cash surrender value decreasing each year and ceasing entirely upon the expiry of the extension term, which value shall be the full reserve in even dollars for each one thousand dollars of insurance at the date of surrender.

"If the owner shall not, within three months from the date of premium default, surrender this Policy to the Company at its Home Office for a cash surrender value or for endorsement for paid-up insurance or term insurance as provided in the above options, the policy shall be continued for a reduced amount of paid-up insurance as provided in the second option.

"The values of these options are mathematical equivalents, and have been calculated on the basis of the Metropolitan Intermediate Table of Mortality, as adopted by the Insurance Department of the State of New York for computing reserves hereunder, with interest at three and one-half per centum per annum (omitting fractions of a dollar per thousand of insurance) less a surrender charge not exceeding in any case two and one-half per centum of the face of the Policy; except that after the time for which premiums are payable as stated on the first page hereof, no surrender charge has been made. These values as computed produce the results set forth in the table herein at the end of the respective years. Values for other years (after the twentieth) will be computed upon the same basis for the entire reserve in even dollars, for each one thousand dollars of insurance, and for even months in the event of election of term insurance, and will be furnished upon request of the Insured.

"Any indebtedness to the Company under this Policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance in such proportion as the indebtedness bears to the cash value at due date of premium in default.

"The reserve for which funds are to be held upon this Policy shall be computed upon the Metropolitan Intermediate Mortality Table (as adopted by the Insurance Department of the State of New York), with interest at three and one-half per centum per annum."

Section 450 of the Civil Code reads in part as follows:

"Every contract or policy of life insurance hereinafter made by any person or corporation, with and upon the life of a resident of this state, and delivered within this state, shall provide, in event of default of any premium payment after three full annual premiums shall have been paid on such policy, that without any action on the part of the insured, the net value of such policy based upon the reserve basis used in computing the premiums and values thereunder (the policy to specify the mortality table and rate of interest so adopted) which net value shall be at least equal to its entire net reserve at the date of default, including that of dividend additions, if any, based upon a standard not lower than the American experience tables of mortality with interest at three and one-half per cent yearly, less a surrender charge of not more than two and one-half per cent of the face amount of the policy and of any existing dividend additions thereto and less any indebtedness to the company on or secured by the policy, shall be applied as a single premium to the purchase of one of the following stipulated forms of insurance:

"First—Paid-up nonparticipating term insurance in the amount of the face of the policy, plus dividend additions, if any, for such a period as the net value outlined above will purchase at the net single premium, at the attained age of the insured at the time of the lapse, based upon the reserve basis described in the policy; provided, however, that under endowment contracts the term shall not extend beyond the endowment period named in the original contract, and the excess value, if any, shall be applied as a net single premium to purchase in the same manner paid-up pure endowment insurance, payable at the end of the endowment period named in the contract if the insured be then living, or,

"Second—Paid-up nonparticipating term insurance in the amount of the face of the policy, plus dividend additions, if any, and less any outstanding indebtedness, for such a period as the net value outlined above will purchase at the net single premium, at the attained age of the insured, based upon the reserve basis described in the policy; provided, however, that under endowment contracts the term shall not extend beyond the endowment period named in the original contract, and the excess value, if any, shall be applied as a net single premium to purchase in the same manner paid-up pure endowment insurance, payable at the end of the endowment period named in the contract if the insured be then living, or,

"Third—Paid-up nonparticipating insurance payable at the time and on the conditions named in the policy for such an amount as the net value outlined above will purchase at the net single premium, at the attained age of the insured, based upon the reserve basis described in the policy.

"Provided, however, that the policy may be surrendered to the company, at its home office, upon due application by the legal owner thereof, within one month after date of premium default, for a specified cash value which shall be at least equal to the sum which would be otherwise available for the purchase of the automatic form of insurance provided therein; and provided, further, that the company may defer payment of such cash value for not more than six months after application therefor is made.

"No agreement between the company and the policy-holder or applicant for insurance contrary to the foregoing shall be held to waive any of the provisions provided above.

"Nonforfeiture value. Any life insurance policy issued upon the life of a resident of this state, and delivered within this state, which does not contain an automatic nonforfeiture value in conformity with the foregoing shall be construed as granting nonparticipating term insurance as provided in paragraph first of this section, and such a benefit shall be read into the contract."

The first question to be determined, under the provisions of the policy and the terms of the statute above quoted, is whether the nonforfeiture provisions of the policy are valid. The question presented in reference to the double indemnity provisions of the policy will be reserved for discussion later in this opinion.

If the alternatives provided in the policy are void, because of failure to comply with section 450, then, under the terms of the Code section, paragraph first thereof is applicable. Under this statutory provision the net reserve—$33.60—should be applied to the purchase of "paid-up nonparticipating term insurance in the amount of the face of the policy." It was stipulated that on February 19, 1932, the date of lapse, $33.60 would buy, at the insured's then age, $2,500 of this type of insurance for a period of 1 year and 11 months—a period beyond the death of the insured. If the terms of the statute are applicable, it follows that, on this branch of the case, the respondent is entitled to $2,500. On the other hand, if the nonforfeiture provisions of the policy are valid, then, under the alternative selected by the beneficiary—No. 3 of the policy—because of the provision in reference to the reduction of the face of the policy in proportion to existing debts, on the date of default, the $33.60 net reserve value would purchase $277 of paid-up nonparticipating term insurance for a term of 17 years, 3 months, and 15 days.

As already indicated, the first question presented is whether, under the terms of section 450 of the Civil Code, quoted supra, all policies of life insurance issued on the lives of California residents, and delivered in this state, must contain all three of the alternatives found in that section. The solution of this problem obviously turns upon the language of that section, interpreted in view of its purpose and intent. The section has apparently never been finally interpreted in this regard by any of the appellate courts in this state.

There is no difficulty presented in ascertaining the purpose of statutes such as section 450. Life insurance policies are commonly issued on a level premium basis; i. e., on such a basis that the premium paid by the insured remains the same during the premium paying term of the policy. Obviously, the premiums charged in the early years are more than sufficient to meet the anticipated mortality loss for those years. During the early years of the policy a surplus exists in the fund created by the payment of premiums, which in the later years of the policy takes care of the anticipated increased mortality losses in those years. This surplus thus created during the early years of the policy, is the reserve. Williams v. Union Central Life Ins. Co., 291 U.S. 170, 54 S.Ct. 348, 78 L. Ed. 711, 92 A.L.R. 693; Federal Life Ins. Co. v. Kemp (C.C.A.) 257 F. 265. When a policy lapses by reason of nonpayment of premium, if a complete forfeiture resulted, the insured would be deprived of this reserve. To prevent such a forfeiture, the states, by various types of statutes, of which section 450 is an illustration, have provided that this reserve must be applied by the insurance company in some way beneficial to the insured. This reserve could obviously be applied in any one of a number of ways; i. e., by direct payment of the net cash surrender value to the insured, or by the purchase of any one of several kinds of fully paid-up insurance. Because of these various possibilities the statutes of the several states differ radically. All of the statutes recognize that what was to be done with this reserve could not be made to depend solely upon the election of the owner of the policy, because, after the nonpayment of premiums, many insured took or would take no action at all to exercise their option. To protect such policyholders, the statutes quite uniformly have provided (as does section 450) that, in the event of nonaction on the part of the insured, or other owner of the policy, the reserve must be applied to the purchase of a specified type of insurance—so-called automatic nonforfeiture clauses. In order to permit each insurance company to adopt a nonforfeiture provision best suited to its method of doing business, many statutes listed several alternatives, all mathematical equivalents, and permitted the insurance companies to specify any one of these alternatives as the automatic nonforfeiture provision for its policies. Mutual Reserve Life Ins. Co. v. Roth (C.C.A.) 122 F. 853.

[1, 2] Section 450 of the Civil Code is plainly a nonforfeiture statute. Its obvious purpose is to prevent the loss of the reserve to the insured in the event of nonaction on his part. To carry out this purpose, the section provides that, in addition

to the cash surrender value, every "policy of life insurance * * * shall provide, in event of default of any premium payment after three full annual premiums shall have been paid on such policy, that without any action on the part of the insured, the net value of such policy * * * less any indebtedness to the company * * * shall be applied as a single premium to the purchase of one of the following stipulated forms of insurance," and then lists three alternatives. The section then provides that it is only when the policy "does not contain an automatic nonforfeiture value in conformity with the foregoing" that the first alternative in the statute "shall be read into the contract." When the statute is read fairly in its entirety, and when due consideration is given its purpose and intent, it is susceptible of but one reasonable interpretation, and that is, that when a policy contains any one of the three alternatives set forth in the statute, and that alternative is made automatically operative in the event of nonaction on the part of the insured, the policy complies with the statute.

Respondent relies upon Metcalf v. Metropolitan Life Ins. Co., 1 Cal.App.(2d) 481, 37 P.(2d) 115, 38 P.(2d) 401, as establishing a contrary construction. In that case the appellate court, by way of dicta, did pass upon the interpretation of section 450, and did hold that all three alternatives contained in the statute must be inserted in policies delivered in this state on the lives of residents of this state. In denying a hearing in that case this court stated, 1 Cal.App.(2d) 492, 38 P.(2d) 401: "The petition is denied. In denying said petition, we withhold our approval of that portion of said opinion relating to section 450 of the Civil Code." The question here presented was expressly left open for future determination.

Respondent also relies upon Eddie v. New York Life Ins. Co., 75 Cal.App. 199, 242 P. 501. A reading of that case clearly demonstrates that the point here under consideration was not even remotely involved. The inadvertent use of the plural form in that opinion, in incidentally referring to what is required by section 450, cannot be held to be a determination of that question.

The only other case in which section 450 has been interpreted in reference to the problem here presented is Maggiorini v. New York Life Ins. Co., 9 F.Supp. 630, a decision of the District Court, Northern District of California. In that case the federal court held that section 450 only requires that one of its three alternatives be included in life policies issued in this state. We have been informed that the above decision is not final, the causes having been appealed to the Circuit Court of Appeals. However, we are in accord with the conclusion therein reached.

After having concluded that life policies issued in this state need provide for only one of the automatic nonforfeiture alternatives set forth in section 450, the problem still remains as to whether the policy here involved does provide for one of the statutory alternatives.

It is appellant's contention that alternative No. 2 in the policy is identical with alternative No. 3 of the statute; that is, that in the absence of an election by the insured, the reserve must be applied to the purchase of paid-up nonparticipating insurance. It is respondent's position that alternative No. 2 in the policy differs from alternative No. 3 in the statute, and that therefore the policy does not contain one of the alternatives set forth in section 450.

[3-5] It is true that the option in the policy is couched in somewhat different language from that found in the statute. This is particularly true in reference to the language used in the policy and in the statute in describing the effect of existing debts. Thus the policy provides that, as far as alternative No. 2 is concerned, the amount of paid-up insurance, in the event there is an outstanding debt, shall be reduced "in such proportion as the indebtedness bears to the cash value at due date of premium in default." Section 450, in dealing with the same subject, makes allowance for existing debts by deducting them from the reserve value, and applies the balance as a single net premium to the purchase of paid-up insurance. Different formulæ are thus provided in the statute and the policy, but it is a matter of elementary mathematics that both formulæ reach identically the same result. Certainly it cannot be held that the statute requires its exact language to be embodied in the policy. As long as the language used in the policy accomplishes identically the same result required by the statute, there is a sufficient compliance with the statute. As a matter of fact, the policy provision in reference to alternative No. 2 apparently gives the policyholder greater rights than is required by alternative No. 3 in the statute; that

is, the policy gives the owner thereof certain privileges in reference to loan and surrender values apparently not granted by the statute. Certainly a policyholder will not be heard to complain that it is unlawful for the company to confer upon him greater rights than those required by the statute.

[6, 7] Respondent also contends that the nonforfeiture provisions of the policy are conditioned on the absence of indebtedness, and therefore do not comply with the statute. This contention is without merit. It is based upon a strained and unnatural construction of the policy provisions. The policy, as above quoted, in the first paragraph of its nonforfeiture provisions, gives the owner thereof certain options "provided there be no indebtedness hereon." If this were the only language in the policy referring to the effect of an existing indebtedness, we would agree with respondent that, since the statute does not provide that the existence of indebtedness shall prevent one of its three alternatives from automatically taking effect on lapse, a policy so providing does not comply with its terms. However, the policy is explicit as to the effect of an existing indebtedness. After providing for the three alternatives above quoted the policy provides: "Any indebtedness to the company under this Policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance in such proportion as the indebtedness bears to the cash value at due date of premium in default." This provision, as we have already held, in so far as it affects the purchase of fully paid-up insurance, is in exact accord with the statute. We are not unmindful of the rule that insurance policies should be liberally construed in favor of the insured (Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co., 158 Cal. 367, 111 P. 4), but that rule of construction does not permit the giving effect to one sentence of a policy and the complete ignoring of an entire paragraph dealing with the same subject matter (Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004; Williams v. Union Central Life Ins. Co., 291 U.S. 170, 54 S.Ct. 348, 78 L.Ed. 711, 92 A.L.R. 693). In the present case it cannot be held that the nonforfeiture provisions of the policy are conditioned on the absence of indebtedness—the policy expressly declares to the contrary.

[8] From what has already been said, it follows that, since section 450 does not require that all three of the alternatives therein contained must be inserted in every life policy issued in this state, but only requires that one of its alternatives be operative in the event of nonaction on the part of the insured, a policy containing one such automatic nonforfeiture provision may contain other alternatives different from those in the statute operative only upon the election of the owner of the policy. Section 450 only prohibits contracts "contrary" to its provisions, and does not prohibit alternatives in addition or different from those required by the statute.

[9] Respondent concedes that by formal notice served on the company she elected to accept alternative No. 3 in the policy. She further concedes that, under this alternative, as limited by the terms of the policy, she is entitled to but $277 term insurance. However, she contends that this alternative in the policy is invalid because, in so far as borrowing policyholders are concerned, it provides for a different result than is provided in the statute. This is undoubtedly true. The company has seen fit to provide that, in the absence of action on the part of the owner of a policy, one of the alternatives provided in section 450 shall automatically go into effect, but, if the owner elects, other alternatives not found in the statute are provided. These alternatives are purely optional. In the present case the owner of the policy, respondent here, elected to take advantage of one of these elective options, and formally notified the company of that fact. Under this alternative she is entitled to $277. That she selected wisely is shown by the fact that, had she done nothing, the automatic provision of the policy would have gone into effect, in which event she would have been entitled to paid-up insurance in the sum of but $94. Respondent relies on Gooch v. Metropolitan Life Ins. Co., 334 Mo. 191, 61 S.W.(2d) 704, 705, and Trapp v. Metropolitan Life Ins. Co. (C.C.A.) 70 F. (2d) 976, as establishing that the alternative No. 3 in the policy selected by her is invalid. Those two cases, in interpreting the identical provision here involved, did hold the provision invalid, but this conclusion was based upon the peculiar language of the Missouri statute there under consideration, language which is quite different from that found in section 450. The fallacy in respondent's position is that, if the

alternative voluntarily selected by her is invalid, then the automatic provision of the policy is applicable, and under this provision she would receive less than she will receive under the option selected.

[10] Respondent makes one other contention on this phase of the case that requires discussion, and that is that the alternative selected by her—alternative No. 3 in the policy—unlawfully discriminates between borrowing and nonborrowing policyholders. We agree with respondent that the company has seen fit to treat borrowers and nonborrowers differently under alternative No. 3 contained in the policy. That this is so can be easily demonstrated. Thus, if a nonborrower of the age of Henricks has a $2,500 life policy, and defaults in the payment of premiums, and at the time of default has a reserve of $33.60, and elects to accept alternative No. 3, he would be entitled to term insurance in the full sum of $2,500 for 1 year and 11 months. Henricks had exactly this same net reserve. His gross reserve was $303.75, but, after deducting his indebtedness, plus interest, the net reserve was $33.60. Because of the provision of the policy in reference to the effect of indebtedness, under alternative No. 3, he is not entitled to term insurance for the short period for the full amount of the policy, but only entitled to term insurance for $277 for a term of 17 years, 3 months, and 15 days. Of course, in this particular case, since the insured died within several months of his failure to pay premiums, it would be more beneficial to the beneficiary to accept the shorter term and the higher amount, but in many cases where the insured lives for some years after his default the contrary would be true. Why the insurance company has seen fit to treat two policyholders with identically the same reserve in this different fashion is not apparent, but we are of the opinion that such difference in treatment is not unlawful. Respondent cites Metropolitan Life Ins. Co. v. Lillard, 118 Okl. 196, 248 P. 841, Ringstad v. Metropolitan Life Ins. Co., 182 Wash. 550, 47 P.(2d) 1045, and Jeske v. Metropolitan Life Ins. Co., 113 Pa.Super. 118, 172 A. 172, as sustaining her position that such difference in treatment constitutes unlawful discrimination between policyholders. The reasoning found in these three cases is not persuasive. The Jeske Case, supra, has recently (May 25, 1936) been expressly overruled on this very point by the Supreme Court of Pennsylvania in Steuernagel v. Metropolitan Life Ins. Co., 322 Pa. 289, 185 A. 208. The Pennsylvania court cites many authorities to sustain its contention that such difference in treatment does not constitute unlawful discrimination—see particularly Neal v. Columbian Mutual Life Assur. Soc., 161 Miss. 814, 138 So. 353; Pilot Life Insurance Co. v. Owen (C.C.A.) 31 F.(2d) 862. The Washington and Oklahoma cases cited, supra, are not in point for the reason that they were decided under so-called discrimination statutes of those states which have no counterpart in this state. In the absence of such a statute, the following quotation from the Steuernagel Case, supra, correctly sets forth our views on this subject (322 Pa. 289, 185 A. 208, at page 212):

> "There may, of course, not be discrimination between policyholders of the same class, see Act of 1931, P.L. 904, 912, § 2, 40 P.S. § 477a, but the insured in this case was in the same class with all other borrowing policyholders; he was not in the class of nonborrowers; there is nothing to indicate that he was accorded different treatment than other borrowers. By borrowing, he selected the class. Having entered that class, he cannot demand settlement on the basis by which members of another class—nonborrowing members—would be entitled, because he took himself out of that class."

That the alleged discrimination is not unlawful is also demonstrated by the fact that, in this particular case, had the respondent seen fit to repay the loan as provided in the policy, she could have reinstated the policy in the class of nonborrowers, and thus have been entitled to term insurance in the full amount of the policy. Metcalf v. Metropolitan Life Ins. Co., supra. This, respondent did not see fit to do, and she must therefore be held bound by her own election.

[11-13] In the instant case the trial court also awarded to the beneficiary $2,500 by reason of the insured's accidental death. The trial court held that double indemnity was payable, even though premiums were in default, and the policy was in effect only by reason of its nonforfeiture provisions. We are of the opinion that this was error.

In the first place, the policy expressly provided that double indemnity was payable only in certain enumerated conditions: 1. That the death was accidental as defined in the policy; "2. that all premiums under said policy and this Supplementary Contract shall have been duly paid; and 3. that said policy shall not then be in force by virtue of any nonforfeiture provisions thereof." The policy is therefore explicit that the accidental death benefit was payable only if all premiums had been paid and if the policy was not in force by reason of its nonforfeiture provisions. The theory upon which the language of the policy was thus disregarded was that the supplementary contract was a part of an ordinary life policy, and that therefore the nonforfeiture values prescribed by section 450 applied to the aggregate amount of insurance.

We agree with respondent that the so-called supplementary contract was part and parcel of a life insurance policy, but that factor alone is not decisive. The premium for the double indemnity addition was $2 per year, and it is a stipulated fact that no additional reserves were carried over year to year to meet this risk. This is necessarily so because the premium for accidental death takes care of the risk for that year, and leaves no surplus. The risk of death by accidental means is no greater in the later years of the policy than it is in the early years. There is therefore no reserve to be credited to the insured upon lapse. The great weight of authority is in accord with the view that double indemnity benefits are not carried over to nonforfeiture insurance. Inter-Southern Life Ins. Co. v. Omer, 238 Ky. 790, 38 S.W.(2d) 931; Johnson v. Central Life Assur. Soc., 187 Minn. 611, 246 N.W. 354, 91 A.L.R. 1058; Orr v. Prudential Ins. Co., 274 Mass. 212, 174 N.E. 204, 72 A.L.R. 872; Great Southern Life Ins. Co. v. Jones (C.C.A.) 35 F.(2d) 122; Yarborough v. Atlantic Life Ins. Co. (C.C.A.) 84 F.(2d) 319; Valenti v. Prudential Ins. Co. (C.C.A.) 71 F.(2d) 229. The last-named case is of particular importance because it distinguishes New York Life Ins. Co. v. Rositzky (C.C.A.) 45 F.(2d) 758, relied upon by respondent. The reasoning and authorities cited in the above cases are convincing that the clause "amount of the face of the policy," appearing in section 450, means the amount of the policy without including double indemnity.

From what has beeen said it is obvious that respondent is entitled to but $277, plus interest to the date of tender.

The findings, conclusions, and judgment are modified in accordance with the views herein expressed.

As so modified the judgment is affirmed, both sides to bear their own costs on this appeal.

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7 Cal.2d 586

PEOPLE v. SHAVER.

Cr. 4017.

Supreme Court of California.

Oct. 27, 1936.

Rehearing Denied Nov. 23, 1936.

1. Criminal law ⚷438

In prosecution of husband, who admitted killing wife with iron pipe and knife, admitting photograph of wife in lifetime and others showing condition of dead body *held* not prejudicial.

2. Homicide ⚷166(9)

In prosecution of husband, who admitted killing wife, remoteness of evidence that two years before killing one of husband's charges of unfaithfulness was unfounded did not render it inadmissible, where evidence bore out prosecution's theory that husband was jealous of wife without cause, falsely accused her of associating with other men, and killed her acting under such emotions.

3. Criminal law ⚷554

In murder prosecution, court or jury are not obliged to accept defendant's version of circumstances leading up to killing.

4. Homicide ⚷347

Statement of husband, who admitted killing wife with iron pipe and knife, that he lost his senses and killed wife because she told him children were not his, after husband had accused wife of unfaithfulness and of allowing another man to sleep in house in presence of children, *held* for jury, as respects right to modification of first degree murder verdict to second degree murder or manslaughter (Pen.Code, § 1181, subd. 6, as amended by St.1933, p. 1341).

5. Homicide ⚷253(1)

Husband's admission that he killed wife with iron pipe and knife and immediately fled from state, nature of bruises and numerous knife wounds, of which any one of five could have caused death, and evidence that month before killing husband had attacked wife on street with knife, threatening to kill her, *held* to justify verdict of first degree murder (Pen.Code, § 1181, subd. 6, as amended by St.1933, p. 1341).

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Louis R. Shaver was convicted of murder in the first degree, and he appeals. Affirmed.

Willard W. Shea, Public Defender, and Hugh K. Forsman, Asst. Public Defender, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CURTIS, Justice.

Appellant was found guilty by the verdict of a jury of murder in the first degree. In the absence of any action of the jury trying the case fixing the punishment of the crime, the court pronounced judgment of death against defendant. From this judgment and the order denying his motion for a new trial, he has appealed.

The victim of defendant's crime was his wife. The crime was charged to have been committed on September 12, 1934. The parties had been married something over seven years prior thereto. As a result of the marriage they had two children, Richard and Louis. Appellant's wife had been previously married, and at the time of her marriage to appellant she had a little girl named Frances, the issue of her previous marriage. The parties lived in New York for a short time after their marriage, and then came to California, taking up their residence in the city of Oakland. As far back as 1932, the appellant entertained suspicions that his wife had not been faithful to him. Whether there was any foundation for such suspicions is not shown by the evidence. No direct evidence was given by any witness, not even by the appellant, that the appellant's wife had ever been unduly intimate with any member of the opposite sex. She was a fortune teller, and carried on that calling in order to support herself and children. Her followers consisted of men and women, but mostly women. The appellant had no regular employment, and contributed but little, if anything, to the support of the family. In April, 1934, the appellant's wife rented a two-room apartment from Robert G. Lee, in the city of Oakland. The family, consisting of appellant, his wife, and the three children, lived in this apartment up to the time of the wife's death, except that appellant left the family on August 4, 1934. He returned later, and on August 29, 1934, Mrs. Shaver rented a room for him on the floor above her own apartment. In the early part of August, 1934, an officer of the Oakland police department was called to the apartment occupied by Mrs. Shaver. He found Mrs. Shaver barricaded in the front room and the appellant in the rear room. Mrs. Shaver appeared frightened and almost hysterical. The children, some of whom were hiding under a table, were also frightened and hysterical. Mrs. Shaver told the police officer that her husband had attacked her on the street with a butcher knife which had been left at the scene of the attack, and that he had followed her home and chased her around the house with a steel, used for sharpening knives, and that she finally escaped him and barricaded herself and children in the front room. The knife was later found at the place where Mrs. Shaver stated that it had been left. The appellant was taken into custody by the police officer, and a charge of assault with a deadly weapon was lodged against him, but Mrs. Shaver refused to prosecute him, and the action was dropped.

On September 11, 1934, one of the appellant's children was brought to the police station at Oakland with a note pinned on his jacket, giving his name and address. The boy was taken to the address, but, on finding the doors locked, he was left with Mr. Lee, the landlord. The following day, Inspector Evans of the police department visited this address, which was the apartment theretofore occupied by Mrs. Shaver and her children, and found the three children at home. The front room was undisturbed, but in the back room one entire wall was found to be covered with blood. An attempt had apparently been made to wipe the blood from the wall. Blood was found on one of the beds and on one of the chairs in the room. In the kitchen stove was found a 12-inch pipe. Some partly burned rags were found in the stove. In a sideboard was found a 12-inch butcher knife. The inspector also noticed two fresh nails that had been driven into a small door directly under some steps. Against this door, a bed had been pushed. Prying open the door, the inspector found in a heap the dead body of Mrs. Shaver. The autopsy thereafter performed showed some twenty-five bruises, lacerations, stab wounds, and fractures upon her body. Among these wounds were a 1½-inch stab wound just below the sixth rib, a 1¼-inch stab wound just below the seventh rib, a 1½-inch stab wound on the left breast, a second 1¼-inch stab wound just below the seventh rib, and a stab wound below the ninth rib, besides a fractured nose and numerous bruises and lacerations upon the eyes, the lips, the ears, and scalp of the dead woman. The autopsy further disclosed that the chest and abdominal stab wounds had penetrated the left lung; had punctured the diaphragm five times, the stomach four times, and the liver and kidneys once each, and the aorta had been punctured. Death had been due to shock and hemorrhage from the stab wounds in the chest and abdomen.

Some fifteen months after the murder of Mrs. Shaver, the appellant was apprehended in Seattle, Wash., and returned to Oakland for trial. Appellant did not take the stand at his trial, but he made two statements, one to the officer, who returned him to California, and the other to the assistant district attorney. In these statements he admitted killing his wife by the use of the iron pipe and a black-handled knife. He admitted fleeing from the state and going under an assumed name until arrested. In these statements, he gave an account of the trouble between himself and his wife, which led up to his taking her life. We now quote from the signed statement of appellant as follows: "I got to talking to the wife about a man named Art Hayes. I accused her of being untrue to me and going with Hayes and allowing him to sleep in the house in front of my children. I got wild, and she said to me, 'You old son of a bitch and bastard, the children ain't your children.' I then lost my senses, and I reached over on the dresser and got a piece of one or one and a half inch piece of pipe, nearly a foot long, which was lying on the dresser where the children evidently brought it in from the plumbing shop next door and I hit her on the head with the pipe. I must have hit her two or three times and rushed her over to the bed near the closet. I either took the knife from her or picked it up from the floor. It was a sort of a French knife with a black handle about a foot long. I stabbed her with the knife and stabbed her a couple of times in the abdomen and also on the left arm. She was still standing either on or near the bed. Believe she was standing in the bed. She fell on the bed when I stabbed her. I then took her off the bed and laid her near the hallway door. I think she was dead at this time. I do not remember if she said anything to me or not. She may have screamed. Louis came into the hall and kept knocking on one of the doors. I do not know what he said. I let him into the front room and shut the folding doors and kept him in the front room. I began to see what I had done, and I went out and picked my wife up and put her into a closet under the stairway going upstairs. I then cleaned up the place and burned my pair of pants in the stove, and also the pipe. I nailed up the closet door. I may have put two or three nails in it. I cleaned the knife and I think I laid it on the sink after washing things up. After I cleaned up and got myself ready, I took Louis and went to school and called Frances out and gave her fifty cents and told her to get some lunch for her and Richard and told her if she had any money left they could go to a show. I took Louis with me to the bus station where I took a taxi to the park on Seventh street, put a note on Louis and pinned it on. I think I put his name and address on it. I thought someone would take him home and discover this affair. I put my wife in the closet, for I did not want the children to see their mother dead. After I left Louis I went to San Francisco that same night, took a Greyhound bus to Portland."

The statement of appellant from which this quotation is taken was the one made to the arresting officer who made notes of his conversation with appellant. Thereafter this officer dictated to a stenographer the statement made to him by the appellant, and the latter reduced the same to writing by means of a typewriter, and the typewritten statement was submitted to the appellant, who read it over and, after making a few slight corrections, signed the same and delivered it to the officer. It bears every evidence of being made after due and mature deliberation and under circumstances which justify implicit confidence in its accuracy and authenticity. The statement concludes with a narration of the appellant's wanderings after his arrival in Portland until his arrest in Seattle some eighteen months thereafter. The appellant offered no evidence in his defense.

[1] In support of his appeal, the appellant contends first that the trial court erred in admitting in evidence certain photographs marked as Plaintiff's Exhibits 1, 2, 3, and 4. Exhibit 1 is a picture of the deceased's body as it lay in the closet at

the time it was first discovered by the officers. The other three exhibits show the body of appellant's deceased wife in various positions after its removal from the closet. One of these pictures shows the body covered with bloodstains, the other two show a number of the stab wounds on the body, and one shows, in addition to these wounds, the long autopsy incision after it had been sewed up. The condition of the body as shown by these photographs in these various positions had been testified to by the officers and other witnesses sworn in the case. These photographs only brought out in more bold relief the true condition of the body of the slain woman. While they were evidence of the most damaging character against the appellant, it cannot be said that he was legally prejudiced by their introduction. They simply portrayed facts which the jury were entitled to have brought to their knowledge, and, if they impressed the jury more strongly than the narration of these facts by sworn witnesses, no harm in a legal sense was sustained by the appellant, and their admission in evidence cannot be held to be error. Authorities that photographs showing the position and condition of the body of a deceased person are admissible in evidence are numerous. We will only cite three cases recently decided by this court which sustain the action of the court in admitting said photographs in evidence. People v. Gomez, 209 Cal. 296, 300, 286 P. 998; People v. Burkhart, 211 Cal. 726, 732, 297 P. 11; People v. Sisson, 1 Cal.(2d) 510, 511, 36 P.(2d) 116.

In this connection the appellant complains that the jury were shown Exhibit 7, which was a picture of the deceased in her lifetime, while they were looking at photographs of her body taken after her death. The sharp contrast existing between these photographs taken before and after death, appellant claims, appealed to the passions of the jury and unduly prejudiced them against appellant. The contention is without merit for the reasons stated in the preceding paragraph.

[2] The prosecution called Mrs. Louise Gravatt, who testified that the Shavers in 1932, two years before the trouble which resulted in Mrs. Shaver's death, lived in an apartment house kept by her, and on one occasion while the couple were residing there, the appellant had accused his wife of being with another man, when in fact the wife was in a nearby park with her children and no other man was present. The only objection to this evidence was the remoteness of the time from the occasion testified to and the time when the present crime was committed. Appellant admits that remoteness of time is generally not sufficient to exclude evidence otherwise admissible, but calls attention to the fact that, so far as the record shows, the parties lived in conjugal harmony for almost two years thereafter, and that evidence of their former troubles only tended to inflame and prejudice the jury against appellant. This evidence bore out the theory of the prosecution that the appellant was without cause jealous of his wife and falsely accused her of associating with other men, and that acting under such emotions, he took her life. The remoteness of this evidence might lessen its weight, but did not render it inadmissible. People v. Gosden (Cal.Sup.) 56 P.(2d) 211.

We cannot say that the trial court abused its discretion in denying appellant's motion for a new trial on the ground of newly discovered evidence. Even had the newly discovered evidence been admitted, it would not, in our opinion, have changed the result of the trial.

Finally the appellant contends that the trial court erred in refusing to reduce the judgment of murder in the first degree to murder in the second degree or manslaughter, and appellant now asks this court to make such a modification in said judgment. The power to so reduce the verdict is given to the trial court and also to an appellate court by subdivision 6 of section 1181 of the Penal Code (as amended by St.1933, p. 1341), and it has been exercised by this court and the District Court of Appeal. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; People v. Connors, 124 Cal.App. 216, 12 P.(2d) 43. Appellant relies upon these cases in support of his contention that his crime should be reduced either to murder in the second degree or manslaughter.

Appellant presents this contention from two different angles: (1) That the court should and must accept appellant's version of the circumstances leading up to the killing which would make the offense that of manslaughter only; and (2) that if the court rejects the appellant's version of the circumstances surrounding the killing, as the prosecuting attorney asked the jury to do in his argument, the record will only support murder in the second degree.

[3, 4] There is no principle of law making it obligatory upon the court or the jury to accept appellant's version of the circumstances leading up to the killing. This principle is so well established that citation of authorities in support thereof becomes unnecessary. Evidently the jury refused to believe appellant's statement of the reasons that prompted him to take his wife's life. This was a question exclusively within their province to decide. Having decided the question adversely to appellant, this court is bound by their decision thereof as it is in the case of any other question of fact passed upon by the jury.

[5] We now approach the second angle upon which the appellant presents his contention for a reduction of the judgment —that is, if we reject the version of the appellant as to the circumstances under which he killed his wife, the evidence will only support a judgment of murder in the second degree. If we reject entirely the statement of the appellant as to his connection with the death of his wife, the remaining evidence in our opinion points irresistibly to him as the perpetrator of the crime, and that in killing his wife he was guilty of murder in the first degree. In the first place, the evidence shows that the appellant for a long period of time had made accusations of improper conduct on the part of his wife which led to most serious altercations between them. Only a month before she was found dead in a closet in her apartment, the appellant had attacked her on the street with a knife and threatened, if he did not then attempt to kill her. Upon a policeman being called, he found her barricaded in her home and the appellant endeavoring to assault her with a heavy steel instrument. Although arrested and a charge of assault with a deadly weapon lodged against him, Mrs. Shaver refused to prosecute, and the action was dropped. The body of Mrs. Shaver when found in the closet was covered with the wounds already described. The nature of these wounds indicate that they were inflicted with a deliberate and premeditated intent to take her life. Had there been only one bruise on her head, or a single knife cut on her body, it might perhaps be inferred that her death was accidental or was the result of a sudden quarrel or was committed by one in the heat of passion. But when the evidence shows that her head was virtually covered with contused wounds, sufficient to cause her death, and the remaining parts of her body had numerous wounds made with a knife or other sharp instrument, at least five of which were so serious that any one of them would have caused her death, we can only conclude that her assailant deliberately intended to take her life. People v. Ottey, 5 Cal.(2d) 714, 720, 56 P.(2d) 193. As to appellant's connection with the death of his wife, putting aside his own admission of the crime, the evidence shows that, although he had been living in the same apartment house in which his wife was then living, immediately after the crime he dropped out of sight entirely, and it was only after a year and a half search that he was located in Seattle, Wash., and charged with the crime, to which charge he made no denial. With this damaging evidence against him, he refused to take the witness stand at his trial and deny any of the charges against him. This evidence was sufficient to justify a verdict of murder in the first degree. People v. Murphy, 1 Cal.(2d) 37, 32 P.(2d) 635; People v. McQuate, 2 Cal.(2d) 227, 233, 39 P.(2d) 408; and People v. Ottey, 5 Cal.(2d) 714, 56 P.(2d) 193, supra. However, the case is made much stronger against the appellant when we consider his own admissions that he killed his wife with his own hand, and immediately fled from the scene of the crime. The jury was perfectly justified in accepting those portions of the appellant's statement which appeal to them while rejecting those that they did not believe. People v. Murphy, 1 Cal.(2d) 37, 40, 32 P.(2d) 635, supra. With this evidence before us, we are not able to bring ourselves to the conclusion that the judgment against the appellant should be reduced to murder in the second degree.

It is not necessary for us to discuss at any length the three cases relied upon by appellant in which there was a reduction of the judgment. The case of People v. Kelley, supra, has been given consideration in our opinion in the case of People v. Murphy, supra. The language used in the opinion in the Murphy Case is quite pertinent to the instant case, the two cases having many points of similarity. The other two cases relied upon by appellant are People v. Howard, supra, and People v. Connors, supra. In those cases the judgments were reduced from murder in the first degree to murder in the second degree for the reason that, if the jury should reject the statement of the defendant as to the manner in which the deceased met death, then there would be a dearth of evidence tending to show the conditions as they existed at the time of the homicide from which it might be reasonably held that the murder was in fact willful, premeditated, and intentional. No such condition exists in the present case, as we have shown that, if we exclude the entire statement of the appellant, there is then sufficient evidence to show him guilty of murder in the first degree. The instant case is much like the case of People v. McQuate, supra, where the two cases of People v. Howard and People v. Connors are discussed and distinguished from the McQuate Case.

An examination of the entire record in this case shows that it is singularly free from error, and a consideration of the facts proven and the law applicable to those facts convinces us that the appellant was legally convicted of the crime charged, and that the judgment against him and the order denying motion for a new trial should be affirmed.

It is so ordered.

We concur: WASTE, C. J., and THOMPSON, J.; LANGDON, J.; SEAWELL, J.; and SHENK, J.

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7 Cal.2d 642

ALLAN v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15465.

Supreme Court of California.

Oct. 30, 1936.

Rehearing Denied Nov. 25, 1936.

1. Boundaries 🔑20(1)

Grantor, by conveying unsold blocks and parts of blocks of tract of land, which he had subdivided, and map of which he had filed for record, divested himself of all interest in tract, including not only interest in lots and blocks which were unsold at time of conveyance, but also interest in streets fronting on lots and blocks within tract (Civ.Code, § 1112).

2. Boundaries 🔑20(1)

Where grantor conveyed unsold blocks and parts of blocks of tract of land, which he had subdivided, and map of which he had filed for record, deeds carried title of grantees to center of street in front of lots and blocks specifically described in deeds by number (Civ.Code, § 1112).

3. Boundaries 🔑20(1)

Grantor, by conveying unsold blocks and parts of blocks of tract, which he had subdivided, and map of which he had filed for record, conveyed to grantees his right, title, and interest in streets within tract which he had not theretofore sold or conveyed to others (Civ.Code, § 1112).

4. Boundaries 🔑20(1)

Where grantor conveyed to certain grantees unsold blocks and parts of blocks of tract, which he had subdivided, and map of which he had filed for record, inference was authorized that grantor conveyed all his interest in any streets within tract so as to bar his recovery of abandoned portions of certain streets contained within tract (Civ.Code, § 1112).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action to quiet title by Katherine Ruth Hayes Allan, as administratrix with the will annexed of the estate of Thomas Hayes, deceased, against the City and County of San Francisco. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Harry G. McKannay, William P. Caubu, and Paul B. Gibson, all of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter Dold, Chief Deputy City Atty., and E. P. Bergerot, all of San Francisco, for respondent.

CURTIS, Justice.

Action to quiet title to land situated in the city and county of San Francisco. The land in dispute formerly constituted a part of Ash and Birch streets, as shown on a map of the "Hayes Tract," filed for record in the office of the county recorder of said city and county on March 8, 1860. Those portions of said streets lying between Van Ness avenue and Franklin street which include the land in controversy were, by resolution of the board of supervisors, duly and regularly passed during the year 1928, vacated and ordered closed. The defendant, the city and county of San Francisco, is now the owner and in possession of all the land lying on either side of the abandoned portions of Ash and Birch streets and is in the possession and claims to be the owner of all the abandoned portions of said last-named streets. The plaintiff, as the personal representative of the original owner of the Hayes tract, who subdivided the same and caused the map thereof to be filed for record in the office of the county recorder of said city and county, brought this action to quiet her title to the easterly part of that portion of what was formerly Birch street, extending westerly from Van Ness avenue a distance of 109 feet and 9 inches, and also the south half of the easterly part of that portion of what was formerly Ash street, extending 109 feet and 9 inches westerly from Van Ness avenue. The defendant city and county of San Francisco filed an answer denying plaintiff's claim of ownership and a cross-complaint in which it asked that its title to said land be quieted. The action was tried by the court without a jury. Findings of fact were made in favor of the defendant upon all the issues presented by the pleadings, and judgment in accordance with said findings was rendered by the court. From this judgment the plaintiff has appealed.

It is conceded that Thomas Hayes was, at the date of the filing for record of the Hayes tract, the owner of the parcels of land now in dispute. The plaintiff contends that neither Thomas Hayes nor any of his successors in interest ever conveyed the fee to said land to any person whatsoever, and that upon the adoption of said resolution of the board of supervisors of said city and county vacating and abandoning Ash and Birch streets between Van Ness avenue and Franklin street, the land embraced in said streets and involved herein reverted to the estate of Thomas Hayes, deceased. The contention of the respondent, the city and county of San Francisco, is that the said Thomas Hayes, prior to his death, conveyed to other persons his right, title, and interest in and to the land in dispute, and that at the time of his death he was not the owner of said land, or any part thereof or of any interest therein. The respondent rests its contention that the said Thomas Hayes during his lifetime divested himself of all right, title, and interest in the said parcels of land upon five grant deeds executed by the said Thomas Hayes during his lifetime to the respective grantees named in said conveyances. Three of these deeds conveyed specific parcels of land fronting respectively upon the parcels of land here in dispute. The respondent contends that by these conveyances the said Thomas Hayes conveyed not only the land specifically described therein by metes and bounds and by lots and blocks, but also the land to the center of the streets in front of said respective parcels of land. We think it unnecessary to discuss the legal effect of said grant deeds, for the reason that we are of the opinion that by the execution and delivery by said Thomas Hayes of two other grant deeds, the said Thomas Hayes divested himself of all right, title, and interest in and to the disputed parcels of land. These two last-mentioned deeds were executed on April 30, and recorded on May 1, 1866, one to Henry F. Williams and the other to Charles Mayne. The description in both deeds covers the same property. Williams is deeded an undivided four-fifths and Mayne an undivided one-fifth of the said property. The description in each of said two deeds commences in the following manner: "All the certain pieces of land known as blocks and parts of blocks of Western Addition and designated on the map of what is known as Hayes Tract as follows, to-wit." Then follows the description of a number of separate lots and blocks by number and fractional parts of lots by metes and bounds. The description concludes as follows: "And all the other lots or parts of lots within the limits of said Hayes Tract not heretofore sold or conveyed by the said first party" (Thomas Hayes). The consideration for these conveyances is stated as $80,000 in Williams' deed and $20,000 in Mayne's deed.

[1] The effect of these deeds, we think, was to divest Thomas Hayes of all his interest in the Hayes tract, including not only his interest in the lots and blocks in said tract which at the date of the deeds here named were unsold, but also his interest in streets fronting on lots and blocks within said tract, but which lots and blocks had been previously sold by Hayes without disposing of the streets fronting thereon.

[2] "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." Section 1112, Civ.Code. Undoubtedly as to all lots and blocks specifically described in said deeds by number, the deeds

carried the title of the grantees to the center of the street in front of the land conveyed. Freelon v. Adrian, 161 Cal. 13, 19, 118 P. 220; Thorpe v. Los Angeles Gas & Electric Corporation, 115 Cal.App. 201, 205, 1 P.(2d) 37, 39; 2 A.L.R. 17, note.

[3] Appellant contends, however, as to those lots and blocks which Hayes had previously conveyed without including the streets in front of said lots and blocks, his deeds to Williams and Mayne did not pass to these grantees the fee to any part of the streets in front of said lots and blocks. It will be noted, however, that by these deeds Hayes conveyed to Williams and Mayne "all the other lots or parts of lots" not previously sold. Hayes originally owned all the lots in the tract. If by the sale of a lot bordering on a street in the tract, the title of the land to the center of the street passes to the grantee, as we have shown that it did, then the land in the street, subject to the right of the public, was a part of the lot fronting thereon. When, therefore, Hayes conveyed to Williams and Mayne all parts of lots not previously sold he conveyed to them his right, title, and interest in the streets within the tract which he had not theretofore sold or conveyed to others.

In support of her contention that the deeds to Williams and Mayne did not include the land covered by the streets, the appellant cites Thorpe v. Los Angeles Gas & Electric Corporation, supra, 115 Cal.App. 201, 204, 205, 1 P.(2d) 37, 39; Earl v. Dutour, 181 Cal. 58, 60, 183 P. 438, 6 A.L.R. 1163, and In re Dixon, 120 Cal.App. 635, 637, 638, 8 P.(2d) 881. In the case of Thorpe v. Los Angeles Gas & Electric Corporation, supra, the defendant agreed to pay the plaintiff $3,500 per acre for certain land which abutted upon public streets. Plaintiff claimed payment for the land so described including that within the streets, although his title thereto was subject to the use of the streets by the public. In deciding against him the court said, after quoting certain authorities: "The law as indicated by the authorities hereinabove stated has to do with determining the area embraced in real estate transactions involving land abutting upon public streets or highways, and is persuasive argument in support of the conclusion of the trial court that the plaintiff should not be paid, except upon conclusive evidence that the parties so intended, for the land to which he had no right of use or occupancy in any other degree or manner than is accorded to the public generally."

The two other cases relied upon by appellant are alike in the respect that they each involve the meaning of the term "lot" where property had been conveyed to or was owned by two persons in severalty, one owning, for instance, the westerly half and the other the easterly half of said lot and where the lot was bounded on its westerly side by a public street. In these cases the court held that the street was no part of the lot, and each owner was entitled to one-half the lot, exclusive of the street. The reason given for adopting this construction is stated as follows: "In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word 'lot' was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot * * * which is set apart for private use and occupancy." Earl v. Dutour, supra, 181 Cal. 58, at page 60, 183 P. 438, 6 A.L.R. 1163.

In none of these cases was the direct question involved as to whether a street is a part of the lot abutting thereon.

In construing the deeds from Hayes to Williams and Mayne, it will be observed that Hayes conveyed to these grantees all lots, blocks, and parts of lots not theretofore sold by him. His intention was evidently to dispose of all his remaining interest in the Hayes tract. No intention is to be found expressed in either of these deeds, on Hayes' part, to reserve to himself any interest in the streets as shown by the map of said tract. What interest could he have had in said streets after he had dedicated them to the public and had sold all lots and blocks within the tract? In the case of Merchant v. Grant, 26 Cal.App. 485, 489, 147 P. 484, 486, the court, in discussing the applicability of section 1112 of the Civil Code to the facts of that case, made the following comment:

"The rule is well established that the conveyance of a lot bounded upon a street in a city carries the land to the center of the street. And it was held, in Bissell v. New York, etc., R. Co., 23 N.Y. 61, 'there is no distinction in this respect between streets of a city and county highways.' The rule, it was said, 'seems to be based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to adjoining land, such intention will never be presumed.' Devlin on Real Estate (3d Ed.) vol. 2, § 1028a." Continuing, the court on page 490 of 26 Cal.App., page 486 of 147 P. observes that: "It would seem to us to be unreasonable to hold that the grantors of Van Alen intended to retain in themselves the ownership of the land included in the highway which could have been of no possible use to them and might result to the serious injury of their grantee. All the circumstances and facts are opposed to any such presumption."

A similar expression is found in the opinion of the Court of Appeals of the state of New York in the case of Johnson v. Grenell, 188 N.Y. 407, 81 N.E. 161, 13 L.R.A.(N.S.) 551, where the court said: "The grantees of Mrs. Grenell, in this case, had the right to rely upon the application of the rule that a grantor will not be supposed to have reserved the title to the road bounding a grant of lands, if its control ceased to be of importance to him by reason of his having parted with all of his interest in the lands adjoining it."

This court in its decision in Brown v. Bachelder, 214 Cal. 753, 755, 7 P.(2d) 1027, 1028, has expressed itself along the same lines in the following statement: "From a consideration of the description in the deed through which defendant Bachelder claims title to the parcel to the south of the strip in controversy, we are impelled to the conclusion that said deed carried the title of Bachelder to the center line of said 60-foot strip. Section 1112, Civil Code, provides as follows: 'A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.' See, also, section 831, Civ.Code, and section 2077, subd. 4, Code Civ.Proc. That the presumption is highly favored in the law is made clear by the discussion of this court in Anderson v. Citizens' Sav. & Trust Co., 185 Cal. 386, 197 P. 113. The owner and dedicator of the street in the instant case contemplated that it should be reserved to public use. In the event of an abandonment or failure to accept a dedication, a strip of land the width of a street can be of little use to the dedicator who has parted with title to all lands on both sides of the street, as was done by the original dedicator in the instant case, and it will not in such circumstances be presumed that he intended to retain the fee as a remnant of his private estate."

[4] In view of the principles announced in these authorities, as applied to the deeds from Hayes to Williams and Mayne, whereby he sold to them all unsold lots and blocks in the Hayes tract, it cannot be presumed that he intended to retain the fee to any of the streets in said tract. On the other hand, we think the reasonable inference to be drawn from his disposal of all the lots and blocks in said tract is that he intended by said deeds to convey to the grantees therein named all the right, title, and interest then owned by him in said tract of land, which would include any street or streets not previously conveyed by him to other persons.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

In the Matter of ESTATE of Mary S. DAVIS, Deceased.

L. A. 15690.

Supreme Court of California.

Nov. 6, 1936.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

William L. Kuehn and Franz R. Sachse, both of Los Angeles, for appellant Elizabeth S. Bancroft.

Robert H. Gillmore, G. Randolph Miller, and Gerald C. Kepple, all of Whittier, for appellants Jennie Skinner and John K. Davis.

Eckman & Lindstrom, Arthur W. Eckman, and Ralph G. Lindstrom, all of Los Angeles, for respondent Busy Bee Home Soc.

James J. Kirby, of Oakland, for respondent Blanche McGavic.

In Bank.

WASTE, Chief Justice.

The order heretofore made, pursuant to oral stipulation of counsel, and motion whereby it was ordered that the decision herein of the District Court of Appeal, Second Appellate District, Division 1 (59 P.(2d) 547) be adopted as the decision of this court and that remittitur issue forthwith, is hereby vacated and set aside. The remittitur issued heretofore, pursuant to said stipulation and order, is hereby recalled, and the cause is hereby resubmitted as of this date.

LOS ANGELES GAS & ELECTRIC CORPORATION v. CITY COUNCIL OF CITY OF SEAL BEACH et al.*

Civ. 1996.

District Court of Appeal, Fourth District, California.

Nov. 4, 1936.

Rehearing Granted Nov. 30, 1936.

1. Municipal corporations ⚷956(2)

While intent of act imposing a limitation on expenditures by cities and other political subdivisions was to limit amount to be raised by taxation to a stipulated increase over corresponding amount for next preceding year, Legislature intended to limit only that part of amount to be raised which was within control and discretion of body fixing the amount to be raised (St.1935, p. 1254).

2. Municipal corporations ⚷964

Where lands have been purchased at delinquent sale under provisions of 1915 bond act, city council is required to levy a special tax and to pay proceeds into redemption fund which ultimately goes to pay bonds which have been issued, and if city council refuses to make such levy, council will be compelled to do so (Gen.Laws 1931 and Supp.1933, Act 8209; St.1935, p. 1254).

3. Municipal corporations ⚷956(2)

Amount to be raised by city by 10-cent levy for deficiency bond fund purposes relating to lands which had been already purchased at delinquent sale by city, which amount was imposed upon city by statute and with respect to which city council could not exercise its discretion, *held* not included within limitation imposed by act providing that levy shall not exceed by more than 5 per cent. expenditures of immediately preceding fiscal year (Gen.Laws 1931 and Supp.1933, Act 8209; St.1935, p. 1254).

◆

Proceeding in mandamus by the Los Angeles Gas & Electric Corporation to compel the City Council of the City of Seal Beach and others to revise a proposed tax levy.

Alternative writ discharged, and application for peremptory writ denied.

Le Roy M. Edwards and Samuel Poorman, Jr., both of Los Angeles, for petitioner.

Burr A. Brown, of Encinitas, for respondents.

BARNARD, Presiding Justice.

In this proceeding the petitioner seeks to compel the respondents to revise a tax levy for the fiscal year 1936–1937, which is claimed to be in excess of that permitted by the act of June 25, 1935, imposing a limitation on expenditures by cities and other political subdivisions. Stats.1935, p. 1254.

The petition alleges that the respondent city council on August 6, 1936, acting under an appropriate ordinance of the city of Seal Beach, adopted a budget for said city for the fiscal year 1936–1937 and thereby appropriated the several sums therein set forth to the respective purposes and departments of said city; that an ordinance is being prepared and will be adopted levying upon the assessed valuation of the property in said city a rate of taxation upon each $100 of valuation sufficient to raise the amount set forth in said budget less the estimated amount of other receipts; that the expenditures provided for in this budget and upon which the tax levy will be based, exclusive of expenditures specifically excluded from consideration by the provisions of the 1935 act referred to, exceed by more than 5 per cent. the expenditures of the immediately preceding fiscal year; that said excess has not been authorized by a majority vote of the electors of said city or by the state board of equalization; that the allowable expenditures of said city for the fiscal year 1936–1937 for all purposes subject to the limitation prescribed by the act amount to $31,819.49; and that the proposed expenditure appropriations of said city for said fiscal year, for these purposes, amount to $39,335. The prayer is for a writ of mandate commanding the respondents, in preparing and adopting any ordinance levying a tax on real and personal property for said city for the ensuing fiscal year (1) to omit from said expenditure appropriations for said fiscal year (exclusive of expenditures exempted from consideration by the terms of the act) the sum of $7,515.51, being the excess of the proposed expenditure appropriations over the allowable expenditures for the ensuing fiscal year; and (2) to omit from said ordinance any tax rate which would produce any aggregate sum in excess of the total amount of the expenditures that, under the limitations of the act referred to, may be lawfully made by said city for the fiscal year 1936–1937.

An alternative writ was issued in accordance with the prayer of the petition. From the amended answer and return filed by the respondents it appears that, following the service of the writ and in an attempt to comply therewith, the original tentative budget which proposed $40,535 for general operating expenses was amended by eliminating therefrom certain items which total $9,500. The amended budget calling for $31,035 for general fund purposes was adopted and an ordinance passed fixing the tax rate at $1.20 upon each $100 of taxable property within said city as being necessary to raise the amount required.

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*For subsequent opinion see 63 P.2d 326.

The petitioner concedes that the allowable amount of expenditures for general fund purposes for the ensuing year, under the terms of the act, is $31,819.49. The amount now sought to be raised for such purposes, $31,035, is within this limit. It therefore appears that the respondents have complied with the first of the orders set forth in the alternative writ.

The petitioner contends, however, that the second order has not been complied with for the reason that one item included in the budget finally adopted, and in the tax levy, does not come within any of the exceptions provided for in the 1935 act, and that the amount thus to be raised should be added to the $31,035 covering items admittedly within the limitations provided by the act which, if done, would raise the amount of expenditures subject to the provisions of the act to an amount in excess of the 5 per cent. increase permitted thereby. In making the tax levy under the budget as finally adopted and in apportioning and fixing the rate for various purposes the respondent council included a levy of ten cents on each $100 of taxable property for the "deficiency bond fund under the 1915 act," the same being allocated to fourteen improvement districts. It is petitioner's contention that the amount to be raised from this particular levy does not come within any of the exceptions contained in the 1935 act and that this sum must be included in the amount of expenditures subject to the 5 per cent. limitation contained in the act.

While there is some variance in the figures used by the respective parties hereto, this difference has been waived by the petitioner, and the entire controversy, as here submitted, is as to whether the amount to be raised by this 10-cent levy for deficiency bond fund purposes should be included in that part of the expenditures which is subject to the 5 per cent. limitation. The petitioner argues that under the Improvement Bond Act of 1915 (Stats.1915, p. 1441, as amended, Deering's Gen.Laws 1931 and Supp.1933, Act 8209) the city may be a purchaser at any delinquent sale, that in the event the city elects to purchase any of the land sold at delinquent sale it does not pay the bond, but is merely required to pay into the redemption fund the amount of the delinquent assessment, that the city council may, and if demanded by the tax collector, must, in levying the annual tax for municipal purposes, levy a special tax for the purpose of paying for the lands purchased or to be purchased at such tax sales, that the special tax thus contemplated is not a tax to pay an improvement bond, but is a tax to pay for lands purchased or to be purchased at tax sales, and, therefore, that such a tax for the purpose of creating such a redemption fund does not come within the exception, contained in the act of 1935, of "expenditures to pay interest and redemption charges on bonds."

[1, 2] In discussing this limitation act the court in Holmes Investment Co. v. Board of Supervisors, 1 Cal.(2d) 482, 35 P.(2d) 542, 543, said: "It seems, generally speaking, that fixed obligations are excluded and obligations of varying amounts for current items are affected by the restriction." While it seems clear that the intent of the act was to limit the amount to be raised by taxation to a stipulated increase over the corresponding amount for the next preceding year, it seems equally clear that it was the intention of the Legislature to limit only that part of the amount to be raised which was within the control and discretion of the body fixing the amount to be raised. This clearly appears from the exceptions contained in the act including "other than expenditures to pay interest and redemption charges on bonds heretofore or hereafter issued" and "or to any additional expenditures * * * made necessary by legislative action." Where lands have been purchased at delinquent sale under the provisions of the 1915 bond act the city council is required to levy a special tax and to pay the proceeds into a redemption fund which ultimately goes to pay bonds which have been issued. If a city council refuses to make this levy, it will be compelled to do so. American Co. v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622, 626; Southern California Roads Co. v. San Luis Obispo County, 4 Cal.(2d) 220, 48 P.(2d) 34; Union Safe Deposit Bank v. Menlo Park, 3 Cal.(2d) 264, 43 P.(2d) 811; Thompson v. City of La Mesa, 9 Cal. App.(2d) 542, 50 P.(2d) 504. It would be a strange situation if a city could be compelled through mandamus proceedings to

levy the tax thus required and at the same time could be ordered by the same or another court not to make the levy because it would result in an increase in taxes in excess of the 5 per cent. permitted by the 1935 act. If we assume, without holding, that the levy contemplated by this provision of the 1915 bond act might technically be said to take the form of establishing a fund for the purchase of real property rather than being for the purpose of directly paying bonds which have been issued, the result is the same and the effect is identical in so far as the purpose of the 1935 act is concerned. Regardless of whether the bonds are paid directly or indirectly, the tax must be levied, and the matter is not within the control or discretion of the tax-levying body.

If the item of expenditure here in question was not intended by the Legislature to be included in the exception covering expenditures to pay interest and redemption charges on bonds issued, it certainly is included in the other exception, expenditures made necessary by legislative action. In American Co. v. City of Lakeport, supra, in considering the effect of a debt limitation provision of the Constitution upon the deficiency bond fund required by the 1915 Improvement Bond Act the court said:

"Article 11, § 18, of the Constitution, prohibits a city from incurring 'any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors. * * *' It is contended that the liability imposed by sections 12 and 16 of the act is violative of this provision. The answer to this objection has already been given in several prior decisions in this state, and it is briefly, first, that the constitutional provision does not apply to an obligation or liability imposed by law as distinguished from one incurred voluntarily by the municipality. * * *

"That the present obligation to feed the bond redemption fund by taxes is not voluntary, but imposed by statute, seems too clear for dispute."

[3] So far as appears, the deficiency bond fund here in question related to lands which had been already purchased at delinquent sale by the city of Seal Beach. Under such circumstances, under the act of 1915, the city was required to levy the assessment and in a very real sense the expenditure was made necessary by the action of the Legislature in adopting the 1915 act. In our opinion the item in question, being one imposed upon the city by statute and with respect to which the council was not at liberty to exercise its discretion, is not included with in either the letter or the spirit of the limitation imposed by the 1935 act.

The alternative writ is discharged, and the application for a peremptory writ is denied.

We concur· MARKS, J.; JENNINGS, J

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17 Cal.App.2d 353

CALIFORNIA PAC. TITLE & TRUST CO. v. CALIFORNIA MINING & DREDGING SYNDICATE et al.

Civ. 10108.

District Court of Appeal, First District, Division 2, California.

Nov. 5, 1936.

1. Appeal and error 🔑781(1)

Questions involved in appeal may become moot and abstract by act of parties, act of court, lapse of time, act of Legislature, or act of God.

2. Appeal and error 🔑139

Merely nominal party to action cannot appeal, but appellant must have substantial, immediate, and pecuniary interest in subject-matter of litigation.

3. Appeal and error 🔑781(5)

Questions presented by appeal of receiver for foreign corporation from order denying his motion to intervene in action against foreign corporation and to vacate default judgment entered therein were moot, requiring dismissal of appeal, where receivership had ended without affecting rights of parties by virtue of decision of Supreme Court affirming order discharging receiver which ended the receivership.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the California Pacific Title & Trust Company against California Mining & Dredging Syndicate. From an order denying the motion of Leo Kaufmann, receiver for the California Mining & Dredging Syndicate, to intervene and to vacate the judgment in favor of the plaintiff, the receiver appeals.

Appeal dismissed.

Simeon E. Sheffey, of San Francisco, and Errol C. Gilkey, of Oakland, for appellant

Pillsbury, Madison & Sutro, Eugene M. Prince, and Gerald S. Levin, all of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff sued the defendant to recover on several promissory notes. That action was brought and tried in the superior court in San Francisco.

As the latter was a foreign corporation, service was made by attaching certain lands in Humboldt county and publishing the summons. The defendant did not appear, and on August 31, 1934, judgment by default was entered in favor of the plaintiff. Later execution issued, and the property so attached as aforesaid was sold.

About ten months after the judgment was entered certain stockholders commenced an action in partition. That action was brought in Humboldt county. In that action the trial court made an order, appointing Leo Kaufmann receiver of the defendant corporation. Later the trial court made an order discharging the receiver, and he appealed therefrom. However, the said order so appealed from was affirmed on August 7, 1936. Margaret Alta Richards v. California Mining & Dredging Syndicate, Leo Kaufmann, Receiver and Appellant (Cal.Sup.) 60 P.(2d) 126, 127.

In the meantime the receiver appeared in the first action and made a motion to vacate the judgment in favor of the plaintiff and to intervene. His motion was denied and he appealed from that order also. The transcript was filed and all briefs were prepared and filed prior to the decision above mentioned by the Supreme Court. Moreover a stipulation was entered into and filed by the terms of which said appeal could be submitted on briefs on file. However, after said decision was filed the plaintiff served and filed a notice of motion to dismiss the appeal or to affirm the judgment. In support of its motion it presented an affidavit. No evidence in opposition was offered by the appellant or otherwise. On the hearing the cause was submitted pursuant to said stipulation and together therewith the plaintiff's motion was also submitted.

[1-3] The contention of the plaintiff is that all questions presented by this appeal have, by reason of the decision of the Supreme Court, become moot. It is settled law that "the questions involved in an appeal may become moot and abstract, by reason of some act of the parties, an act of the court, by lapse of time, by act of the legislature, by act of God, and perhaps in other ways. * * *" 2 Cal.Jur. 125, § 13. And, as said in Hamilton Trust Co. v. Cornucopia Mines Co. (C.C.A.) 223 F. 494, at page 499, Mr. Justice Morrow speaking for the court, "It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal." In Mills v. Green, 159 U.S. 651, at page 653, 16 S.Ct. 132, 133, 40 L.Ed. 293, a leading case on the subject, Mr. Justice Gray, speaking for the court, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." When, on August 7, 1936, the Supreme Court decided that Leo Kaufmann was properly discharged, the effect of the discharge was to end the receivership. 53 C.J. 80, § 95 c. In so far as we are advised, the order of discharge was unconditional. The statute provides no reservations in behalf of the receiver. The California Mining & Dredging Syndicate makes no claim to be subrogated but on the other hand it still remains outside of the jurisdiction of the courts of this state. The rights of the stockholders in the partition suit are not involved. That is so because "the court based its order of discharge on the ground that the exigencies of the case did not ap-

pear to require the appointment of a receiver for the conservation of the rights of the respective parties," and such order was affirmed on appeal. Richards v. California Mining & Dredging Syndicate, supra. As it has been adjudged that the rights of the parties have not been affected, it follows that the effect on the order appealed from has become solely academic and moot. State v. Imel, 243 Mo. 174, 147 S.W. 992.

The motion to dismiss is granted.

We concur: NOURSE, P. J.; SPENCE, J.

17 Cal.App.2d 328

BROCK, State Director of Agriculture, v. A. G. PRIESTER, Inc., et al.

Civ. 11122.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

Factors 🔑2½

Under bond conditioned on compliance by consignee with Wholesale Produce Dealers' Act, surety *held* not liable under allegations that consignee failed to remit proceeds of sale of produce by consignor, where bond expired after consignment but prior to sale, since violation of act did not occur during period for which bond was given (St.1927, p. 1812, as amended).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Anson A. Brock, as State Director of Agriculture, against A. G. Priester, Incorporated, and another. From a judgment adverse in part, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for appellant.

Eugene P. Fay, of Los Angeles, for respondents.

WOOD, Justice.

This action was commenced by the director of agriculture against A. G. Priester, Inc., as principal, and Angelus Indemnity Corporation, as surety, upon a commission merchant's bond filed in accordance with the provisions of the Wholesale Produce Dealers Act (Stats.1927, c. 860, p. 1812, as amended). During the farm produce season of 1934 and while the bond was in full force and effect the Priester company received on consignment from certain claimants farm products to be sold for the account of the claimants. The bond of Angelus Indemnity Corporation expired on July 17, 1934. Thereafter another bond was filed by a different surety company. Although all the produce was received by the Priester company before July 17, 1934, some of it was not sold until after that date. The trial court allowed the claims against the bonding company for produce sold prior to July 17, 1934, and disallowed the claims for produce sold after the date of the expiration of the bond. Plaintiff appeals from that part of the judgment denying claims for produce sold after July 17, 1934, and contends that the surety company which furnished the bond during the time the produce was received should be held liable for the entire amount.

In his complaint plaintiff alleges that "while the bond was in full force and effect the defendant, A. G. Priester, Inc., received farm produce to be sold on consignment and that said defendant sold the same for and on account of the growers thereof and refused and failed to remit for the same." It thus appears that plaintiff's cause of action is based upon the refusal and failure of the Priester company to remit after sale of the produce. A surety cannot be held liable until the happening of an event upon which the bond is conditioned. Mahana v. Alexander, 88 Cal.App. 111, 263 P. 260. Plaintiff cannot establish a cause of action against defendant surety company in the absence of allegations and proof that the Priester company failed to honestly and faithfully account for the produce received. The breach of the obligation must have occurred during the period for which the bond was given. At the time of the expiration of respondent's bond the principal was lawfully in charge of the produce and had done nothing which constituted a failure to comply with the terms of the Wholesale Produce Dealers Act. The obligation of the Priester company to remit for the produce had not accrued on July 17, 1934, the date on which the bond ceased to be effective.

In Coover v. Cox, 95 Cal.App. 1, 272 P. 343, the court had before it for consideration an issue very similar to the one presented by this appeal. In that case the suit was against a surety company upon a real estate broker's bond. The condition of the bond was that the broker "would comply with said law and would fully perform every undertaking entered into by him as a licensed real estate broker." The broker had received the sum of $1,000 on December 6, 1923, as deposit on the purchase of real estate which was to be returned if the seller could not furnish a clear title. On December 31, 1923, the broker's license expired and a new bond was filed for the year 1924. The defendant was the surety company which furnished the bond for the year 1924. In January, 1924, it developed that the seller could not furnish a clear title to the property and demand was made upon the broker for the return of the money deposited, but the money was not returned. The reviewing court held that the surety on the bond furnished in 1924 was liable.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

17 Cal.App.2d 257

PEOPLE, by DEPARTMENT OF PUBLIC WORKS OF CALIFORNIA, v. SOUTHERN PAC. R. CO. et al.

Civ. 10597.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

1. Dismissal and nonsuit 🔑57

Statute providing for dismissal of action on motion of court or any party interested, unless summons shall have been issued within one year, and summons, served and returned thereon, made within three years after commencement of action *held* mandatory (Code Civ.Proc. §§ 581a, 583).

2. Dismissal and nonsuit 🔑50

Consent on which action may proceed after lapse of three years without summons having been served or return made thereon, must be joint consent of parties (Code Civ. Proc. §§ 581a, 583).

3. Eminent domain 🔑197

Statute providing for dismissal of condemnation action based upon abandonment of action *held* not applicable where final judgment was procured as against some of defendants and dismissal of action was sought as to defendants who had not been served but answered voluntarily more than three years after commencement of action (Code Civ. Proc. §§ 581a, 1255a).

4. Dismissal and nonsuit 🔑63

Dismissal of action may be entered as to some defendants and not as to others (Code Civ.Proc. § 581a).

5. Eminent domain 🔑197

Abandonment is not sole ground on which condemnation suit may be dismissed, notwithstanding such ground is sole ground specified in provisions relating to eminent domain, since provisions relating to dismissals of civil actions are also applicable to eminent domain proceedings (Code Civ.Proc. §§ 581a and 1256).

6. Eminent domain 🔑197

Condemnation proceeding *held* required to be dismissed on motion of plaintiff, where action was filed in 1922 and defendants voluntarily appearing and answering on August 13, 1934, and May 27, 1935, had not appeared in case prior to that time, and plaintiff objected to cause being heard after answers were filed (Code Civ.Proc. §§ 581a, 583).

Proceeding by the People of the State of California, by the Department of Public Works of the State of California, against the Southern Pacific Railroad Company, a corporation, and others, and Hortensia M. Romero, and another, executrix of the last will and testament of Miguel Marquez, deceased, Bonafacio Marquez, Guillermo Marquez, and Leonard Slert, as administrator of the estate of Rosura Marquez de Slert, deceased. From an adverse judgment in favor of the named defendants, other than the Southern Pacific Company, the plaintiff appeals.

Remanded, with instructions.

Prior opinion, 57 P.(2d) 1004.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and C. C. Carleton and C. R. Montgomery, both of Sacramento, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

PER CURIAM.

Upon rehearing, granted to enable us to consider more fully the question of jurisdiction involved in this case, we have listened to oral arguments and have examined carefully the authorities cited in additional briefs that have been filed. But our conclusions are unchanged, and, accordingly, we adopt our original opinion (57 P.(2d) 1004), as written by Mr. Justice Pro Tempore Desmond, as part of this opinion, adding certain comments at the conclusion thereof. The original opinion is as follows:

"This is an appeal by the state of California, acting through its Department of Public Works, from a judgment rendered in favor of the heirs of Marquez, awarding damages for land or interests taken for highway purposes, at the point where Santa Monica Canyon comes down to the Pacific Ocean. Appellant also asks us, in considering this appeal, to review the action of the trial court in denying its motion to dismiss the case as to these heirs. This matter we shall discuss first.

"The motion to dismiss was grounded upon section 583, Code of Civil Procedure (which to us seems inapplicable to the facts of this case) and upon section 581a, Code of Civil Procedure, which, so far as is pertinent, reads as follows: 'No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must (shall) * be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have (been) * issued within one year, and all such actions must (shall) * be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided,' etc. (Note: Quotation where marked with asterisk (*) refers to alternative language used in earlier statutes.)

"This action was filed in 1922, joining as defendants various railroads and other corporations, together with R. C. Gillis, Maria Antonia Oliverez de Marquez, as executor of the estate of Bonifacio Marquez, deceased, John Doe, as executor of the estate of Pascual Marquez, deceased, and several fictitiously named individuals. So far as the record discloses, no return was made of any summons, nor was any summons ever issued. However, shortly after the suit was brought, an answer was filed in behalf of all the corporations, except Santa Monica Land & Water Company, and that corporation and R. C. Gillis joined in a stipulation entered into by the state and the answering defendants settling their interests. By this stipulation, the defendants, who answered, agreed that condemnation of the land desired for a highway might be made conditioned upon the state's meeting the cost of moving a railway, then located on the condemned strip, to land immediately adjoining; also, upon the establishment and recognition of certain excepted and reserved rights and easements for railroad purposes. It does not appear in the stipulation that any moneys were to be paid to any of these stipulating defendants for the condemnation, but we note in the brief of respondents the statement, unchallenged in appellant's reply brief, that a sum exceeding $13,000 was paid the Southern Pacific Company. The matters covered by the stipulation were embodied in an interlocutory judgment of condemnation entered in 1923, final judgment following in 1925.

"Although, as has been noted, certain members of the Marquez family were named as defendants in this proceeding, neither those named nor any other members of that family were parties to the stipulation, nor do we find any mention of their rights or interests there or in the judgments, except by way of description of land formerly belonging to their ancestor. It may be remarked, too, that no motion to dismiss the action as to any defendant was made when condemnation took place, the first motion of that character being directed against these respondents after they voluntarily appeared and filed their answer on August 13, 1934, except respondent Slert, who filed his answer May 27, 1935. These answers alleged that, although summons was issued in the action, it was never served on any of the respondents or their ancestors, and set up ownership in the various respondents of undivided interests in a 100-foot strip of land, of which 60 feet had been condemned and dedicated to use as a public highway by the decree and judgment of 1925. This 100-foot strip, we learn from an examination of the transcript, had been conveyed by deed dated October 27, 1892, to the Pacific Improvement Company (whose interests were later acquired by the early answering defendants) by Maria Antonia Oliverez de Marquez, administratrix of the estate of Bonifacio Marquez, deceased. It contains the following provision:

"'This deed is made upon the express condition that the land hereby conveyed shall be used by the party of the second part, its successors or assigns, for railroad purposes, and in the event that said party of the second part, its successors or assigns, shall fail so to use said land for railroad purposes then and thereupon said land shall revert to and become vested in the heirs of said Bonifacio Marquez, deceased.' A railroad was constructed on the land so conveyed at or about the time the deed issued, and trains or cars were operated continuously thereon from December 31, 1892, until November 22, 1933, when its use as a railway was discontinued under authority of the railroad commission. During the period following condemnation of the 60-foot strip for highway purposes, the railroad was operated on the remaining 40 feet of the land originally conveyed by the deed of Marquez's administratrix. The respondents claimed to be entitled to compensation in this case as part owners of the reversionary right created by that deed, a claim which was recognized by the judgment entered in their favor, from which this appeal has been taken.

[1, 2] "Were turn now to our inquiry as to whether error arose in the denial of the motion to dismiss under section 581a, Code of Civil Procedure. If so, the judgment thereafter entered must be vacated as being void for lack of jurisdiction, and the case dismissed.

"The groundwork of section 581a was subdivision 7 of section 581, added to the Code of Civil Procedure in 1889 (Stats.1889, p. 398). In 1897 subdivision 7 was amplified in its terms (see Stats.1897, p. 98) to read, so far as here pertinent, like the present section 581a, Code of Civil Procedure, except that, following the language of 1889, the word 'shall' appeared in the 1897 section, where now 'must' is written, indicated by our parenthetical entries in section 581a, above quoted. However, this change from 'shall' to 'must' appeared earlier than 1907, when the present section 581a was adopted. (Stats.1907, p. 712.) It was first made when section 582 was added to the Code of Civil Procedure by the legislature in 1901 (Stats.1901 [pp. 143], 144), that section 582 becoming section 581a six years later. Although prior to 1901 the important word in this section was 'shall' and not 'must,' the provisions even then were considered mandatory, for in 1896 we find Mr. Justice Temple saying in Vrooman v. Li Po Tai, 113 Cal. 302, at page 305 [45 P. 470]: 'This provision is very sweeping, and is expressly made applicable to pending suits. It is prohibitory, otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion where there had been culpable failure to prosecute. To hold this statute directory would, therefore, be to repeal it. Then the language could hardly indicate more plainly the intent that it shall be mandatory. Besides being absolute in form, it contains a prohibitory clause—"and no further proceedings shall be had therein." Such a negative cannot be, and never has been, considered as directory merely.'

"It is true that in a decision rendered three years later, Cooper v. Gordon (1899) 125 Cal. 296 [57 P. 1006], where, within the three-year period, a stipulation for judgment had been entered into, this same judge expressed the opinion that, notwithstanding the limitations imposed by the statute, it would be proper to proceed in a cause where voluntary appearance was made subsequent to a three-year period dating from the institution of the action, but it will be noted that to make such a course possible, the consent of all parties would be required, in the opinion of the learned justice. He says, page 300 [of 125 Cal., 57 P. 1006], 'Could the court then properly dismiss the action *against the protest of all parties?*' and again at page 301 [of 125 Cal., 57 P. 1006], 'But, if the *parties* consent that it is a case pending of which the court has jurisdiction, there is no excuse for not trying it.' (Italics ours.) So, also, we note in Harrington v. Superior Court, 194 Cal. 185, at page 188 [228 P. 15], the court relies upon the following rule: '"Where the jurisdiction of the court as to the *subject matter* has been limited by the constitution or the statute the consent of parties cannot confer jurisdiction. But when the limit regards *certain persons, they* may, if competent, waive their privilege, and this will give the court jurisdiction." Gray v. Hawes, 8 Cal. 562, 568. See Bates v. Gage, 40 Cal. 183.' But in the instant case, the parties did not consent that the cause should be heard; on the contrary, plaintiff objected and still objects. The consent upon which action may proceed, after the lapse of three years, necessarily must be joint consent of the parties, as stated in Cooper v. Gordon, supra, because of the language of the section, dictating, as it does, a dismissal 'on motion of any party interested therein.' We cannot escape the force and effect of this definite language, even though we realize that the court has said that its purpose is 'to relieve defendants from the assertion of stale demands' (Cooper v. Gordon, supra), and 'to insure proper diligence in the prosecution of asserted claims.' Pacific Paving Co. v. Vizelich, 141 Cal. 4, p. 9 [74 P. 352]. While those may have been the main purposes, it does not seem improbable, since the plaintiff, as well as the defendant, is given power to move for dismissal, that other purposes also have actuated the various legislatures which have kept this section in our Code in practically unchanged form for almost fifty years.

"Respondents here, prior to their appearance by answers filed in this case, and shortly after the discontinuance of railroad operation in 1933, filed a suit to quiet title against the successors in interest of the Pacific Improvement Company, and against the state of California, 'which action,' they say in their brief, 'is still pending although it is understood that, as to the state, the rights of the heirs of Bonifacio Marquez shall be adjudicated in this action where really they should be adjudicated.' The only understanding that could make such a course possible calls, in our opinion, for joint consent of the parties. Such consent was never given within the three-year period, nor since, so far as we know, and, if given, has been so definitely withdrawn by proceedings noted, that it is apparent now that any rights of these heirs against the state must be adjudicated in the other pending case.

"In this case, on the facts before us, we see no course open except to order the cause remanded to the lower court, with instructions to vacate the judgment heretofore entered, to quash any execution that may have issued thereon, and to dismiss the case.

"Accordingly, it is so ordered."

A few additional observations upon the questions involved may be pertinent.

[3, 4] Respondents have argued strongly that all procedural matters in this case should be governed primarily, not by any of the sections numbered 307 to 1062a, inclusive, which appear in part 2 of the Code of Civil Procedure and which apply to "Civil Actions," but by the rules of title 7 ("Eminent Domain") of part 3 of the Code, comprising sections 1237 to 1264, inclusive, under which this condemnation suit, "a special proceeding of a civil nature," was brought. It is contended that section 1255a governs the present situation, providing, as it does, for dismissal of a condemnation action. But it will be noted that such a dismissal is based, by the terms of that section, upon the abandonment of the condemnation suit. We do not think it has any application here (nor is the case of Silver Lake Power & Irr. Co. v. Los Angeles, 32 Cal. App. 123, 162 P. 432, in point), for in the case at bar the plaintiff, far from abandoning the proceedings, has secured a final judgment upon which it has rested since 1925, and now has asked, by its motion, merely for a dismissal of the action as to the defendants, who are respondents here. In Peck v. Agnew, 126 Cal. 607, 59 P. 125, the court held that under section 581 of the Code of Civil Procedure, subdivision 7 (practically identical with the present section 581a), providing for dismissal of an action, dismissal may be entered as to some defendants and need not be entered as to others; in other words, it need not be a dismissal of the entire action.

[5, 6] Section 1256 of the Code of Civil Procedure, one of the sections governing the exercise of eminent domain, reads as follows: "Rules of practice. Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." This language adequately supports the claim of respondents that primarily the provisions of title 7, part 3, Code of Civil Procedure, govern the conduct of condemnation suits; it is also a clear direction that when no provision is found there to meet a given situation reliance must be had upon such section or sections of the Code relating to civil actions as may be applicable. Under the title "Eminent Domain" in part 3, Code of Civil Procedure, we find no section providing for a dismissal in a condemnation suit except upon abandonment, but this does not mean that abandonment is in every case a prerequisite to dismissal. Where, for other reasons and upon other grounds, a dismissal is sought, sections of the Code outside the title "Eminent Domain" may be invoked. City of Bell v. American States W. S. Co., 10 Cal.App.(2d) 604, 52 P.(2d) 503, furnishes a recent instance. There section 583 of the Code of Civil Procedure was employed by defendant to secure a dismissal upon the ground that plaintiff had failed to bring the action to trial for more

than two years after answer filed, a situation not provided for under "Eminent Domain." Similarly, in our opinion, the plaintiff in the instant case, no section of the "Eminent Domain" title being applicable to the present situation, is entitled to terminate this action as to these respondents under section 581a of the Code of Civil Procedure.

Therefore, our earlier order to the superior court, embodied in our original opinion, is hereby confirmed: The action is to be dismissed as to these respondents.

* * *

17 Cal.App.2d 300

ARMSTRONG v. SENGO et al., and three other cases.

Civ. 5426–5429.

District Court of Appeal, Third District, California.

Nov. 2, 1936.

Hearing Denied by Supreme Court
Dec. 31, 1936.

1. Negligence 🔑122(1)

Defendants generally have burden to prove contributory negligence of plaintiffs.

2. Automobiles 🔑242(8)

In national guardsmen's actions for injuries sustained when struck by automobile while guardsmen were drilling, defendants had burden to prove contributory negligence of guardsmen by showing that guardsmen were walking "along and upon" highway in manner prohibited by statute (St.1929, p. 510, § 28½(a–c); p. 546, § 150½; St.1931, p. 2102, § 21; St.1933, p. 2501; pp. 2520, 2521, §§ 164, 167; 32 U.S.C.A. §§ 61, 62, 123).

3. Automobiles 🔑160(5)

Statute relating to use of highways by pedestrians *held* to apply only to pedestrians who are engaged in walking along and upon that portion of public highway upon which motor vehicles are accustomed to travel (St. 1929, p. 510, § 28½(a–c); p. 546, § 150½; St. 1931, p. 2102, § 21).

4. Automobiles 🔑245(72)

In national guardsmen's actions for injuries sustained when struck by automobile while guardsmen were drilling, whether guardsmen, as members of state militia, were walking along and upon paved portion of highway in violation of statutory provision at time of accident *held* for court as trier of facts (St.1929, p. 510, § 28½(a–c); p. 546, § 150½; St.1931, p. 2102, § 21; St.1933, p. 2501; pp. 2520, 2521, §§ 164, 167; 32 U.S.C.A. §§ 61, 62, 123).

5. Appeal and error 🔑1010(1)

Findings of fact made by trial court which were supported by substantial evidence would not be disturbed.

6. Appeal and error 🔑1010(1)
Negligence 🔑136(26)

Where it does not appear that militiaman, in obedience to command of his superior officer, has knowingly violated law, or that as reasonable person he should have known his act was contrary to law, question of his contributory negligence resulting in injury for which he seeks recovery becomes one of fact to be determined by court or jury, determination of which, in absence of evidence to contrary, will not be disturbed on appeal (St. 1933, p. 2501; pp. 2520, 2521, §§ 164, 167; 32 U.S.C.A. §§ 61, 62, 123; Const. art. 1, § 12).

7. Automobiles 🔑218

In national guardsmen's actions for injuries sustained when struck by automobile while guardsmen were drilling, obedience to command of superior officer to halt and stand at attention upon proper portion of concrete paving *held* not contributory negligence (St. 1929, p. 510, § 28½(a–c); p. 546, § 150½; St. 1931, p. 2102, § 21; St.1933, p. 2501; pp. 2520, 2521, §§ 164, 167; 32 U.S.C.A. §§ 61, 62, 123).

8. Automobiles 🔑195(6)

Automobile driven by party with express consent of minor son of owner who had signed application of son for operator's license and who, although unable to drive, had owned automobile for several years and regularly permitted son to use it without restrictions *held* operated with implied consent of owner who thereby became liable for damages resulting from negligence of driver (Civ. Code, § 1714¼; St.1929, p. 522, § 62(c).

◆

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Separate actions by Ralph Armstrong, William E. Locey, Wayne F. Grishaber, and Ralph W. Smith, a minor, by Marie Louise Reynolds, his guardian ad litem, and others against Tony Sengo and others, which were consolidated for trial.

From adverse judgments, the defendants appeal.

Affirmed.

Hamilton Wright, of Oakland, for appellants.

Hudson Ford, of Colusa, for respondents.

Mr. Justice THOMPSON, delivered the opinion of the court.

These four suits for damages growing out of the same automobile accident were consolidated for trial. From separate judgments which were rendered against the same defendants in each case they have appealed. The four appeals are presented to this court upon one transcript of proceedings. The judgments against Tony Sengo, the owner of the machine, in no instance exceeds the amount limited by the provisions of section 1714¼ of the Civil Code. The several amounts of damages awarded are not challenged as excessive. The causes were tried by the court sitting without a jury.

There is a conflict of evidence, but the following facts are sufficiently supported by the record: The defendant Tony Sengo, who lived near Maxwell, owned a Chevrolet touring automobile which he was unable to and had never personally driven. He signed the application of his minor son, William Sengo, for an operator's license, and thereby became liable for the negligence of his son under the provisions of section 62 (c) of the California Vehicle Act, St.1923, p. 532, § 62 (c), as amended by St.1929, p. 522 (now section 352 of the Vehicle Code). For several years the son drove this machine with the express consent of his father. The son always used this car at will for his father's benefit and for his own personal service. On the occasion of the accident which is involved in these suits the son was using the automobile for his own benefit with the implied consent of his father. At the time of the accident the machine was driven by Ralph Young at the request of William Sengo and under his control. He rode in the automobile. On the night of January 11, 1934, William Sengo drove to the high school building, which is situated on Oak street in the town of Maxwell. Oak street extends in an easterly and westerly direction through the town of Maxwell. The center of the street is paved with concrete 18 feet in width. Three blocks easterly of the high school building Pacific street crosses Oak street at a right angle. About 100 feet easterly from the corner of Oak and Pacific streets the Armory building is located on the northerly side of Oak street. That building fronts on Oak street and is 40 feet in width. Oak street is 80 feet in width at that point. Across Oak street, opposite the armory, is a large vacant lot, which was well lighted, where the local militia belonging to the 184th Infantry of the National Guard was accustomed to drill. In going to and coming from this lot the militia sometimes executed certain maneuvers across and upon Oak street in that immediate vicinity. It had been actively drilling for some time prior to the time of the accident in question. That fact was known to the citizens of that community. After dark, on the evening of January 11th a squad of fifteen regularly enlisted militiamen, consisting of three officers and twelve private soldiers had just completed their drilling under the direct control of Lieutenant Wells. Each of the plaintiffs was regularly enlisted in this local militia. They were engaged in drilling pursuant to the military laws of the state of California. The squad was marched in sets of fours to a point a few feet westerly of the armory, and prior to the accident it was brought to a halt on the northerly portion of the concrete pavement of Oak street. At the command of Lieutenant Wells they stood in that position at attention, facing the east. The company was not then marching along the highway. All of them stood northerly of the center line of the paved portion of the street on the proper side thereof. Immediately upon halting in that position the lieutenant placed them in charge of Sergeant Durfor preparatory to dismissing the squad. The street was then well lighted. There was a city light over the center of Pacific and Oak streets about 60 feet to their rear. There were also two lights in front of the armory a similar distance ahead of them.

Shortly prior to this time the defendant William Sengo, together with two boy friends and a school girl, got into his automobile at the schoolhouse about three blocks west of the auditorium and drove easterly along Oak street. Sengo asked his friend Ralph Young if he did not want to drive the machine. At this request Young did drive the automobile. The school girl friend sat by his side on the front seat. Sengo and his boy friend sat in the rear seat. Lieutenant Wells testified that he had brought his company of militiamen to a halt on the northerly side of the pavement where they stood at attention, when suddenly, without warning, the defendant's machine came "roaring down the street" from their rear, at the rate of 50 miles an hour on the "north side of the road", and "plowed through the company", striking all of the men in rank except the most northerly file. "It scattered men in all directions; they were thrown all over the road." Each of the plaintiffs was seriously injured as a result of the accident.

Separate suits for damages were brought by each of the plaintiffs. The causes were consolidated and tried by the court sitting without a jury. Judgments were rendered in each case against the defendants. From these judgments, the defendants have appealed.

It is conceded there is sufficient evidence to sustain the findings that the accident occurred through the negligence of the driver of the automobile. It is not contended the several amounts which were awarded to the respective plaintiffs are excessive.

It is contended, however, that the plaintiffs were guilty of contributory negligence in occupying positions at the time of the accident on the northerly side of the concrete portion of the highway, contrary to the provisions of section 150½ of the California Vehicle Act (St.1923, p. 517, § 150½, as added by St.1929, p. 546) and that Tony Sengo, the owner of the automobile is not liable for the negligent driving of the machine by Ralph Young for the reason that it was not then being operated with his consent.

There is ample evidence to support the findings that the plaintiffs were not guilty of contributory negligence in standing on the concrete portion of the highway contrary to the provisions of section 150½ of the California Vehicle Act, or otherwise. Section 150½ (now section 564 of the Vehicle Code) provides: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residential district otherwise than close to his left-hand edge of the highway."

[1] The evidence fails to show facts from which it may be determined whether the accident occurred "outside of a business or residence district," as that phrase is defined in section 28½ (a) and (b) of the California Vehicle Act (as added by St.1929, p. 510) now sections 89 and 90 of the Vehicle Code. According to the definition of a highway found in section 21 of the California Vehicle Act (St.1923, p. 519, as amended by St.1931, p. 2102), we must assume Oak street in Maxwell, where the accident occurred, is a public highway. The general rule in damage cases places the burden on the defendants to prove that the plaintiffs are guilty of contributory negligence. Under that rule these defendants would be required to affirmatively show that the accident occurred "outside of a business or residence district," to exempt them from liability. But the Legislature has seen fit to shift the burden of proof to the plaintiffs in that particular regard. Section 28½, subd. (c), of the California Vehicle Act (now section 758 of the Vehicle Code) provides: "Every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless signposted when and as required by this act."

[2] The burden still remains on the defendants to affirmatively prove that the plaintiffs were actually walking "along and upon" the highway, to exempt them from damages under the provisions of section 150½ of the California Vehicle Act. This they have failed to do. On the contrary, the evidence in this case affirmatively shows that the plaintiffs, at the time of the accident, were actually standing still on the northern and proper side of the concrete portion of the highway. What the members of the militia may have been doing in that regard some time prior to the accident is immaterial. Even if the company had been previously marching along the highway, that fact in no way contributed to the accident. But we are pointed to no evidence which indicates that it had previously been marching along and upon the concrete portion of the highway, or at all. Assuming that the company had been previously drilling "in the street," this does not prove it was maneuvering on, across, or upon the concrete. The street is 80 feet in width at the point where the accident occurred. The concrete portion of the street occupied but 18 feet along the center thereof. This left 31 feet of open space on either side of the concrete. If the militia had been

previously drilling on this graveled portion of the street outside of the paved portion, it may not be said that fact contributed in any manner to the accident which occurred on the northerly side of the paved portion of the street.

[3] The appellants' construction of section 150½ of the California Vehicle Act is a strained and unreasonable interpretation thereof. Clearly that section is intended to apply only to pedestrians who are engaged in walking along and upon that portion of a public highway upon which motor vehicles are accustomed to travel. Streets and highways are maintained for the use of pedestrians as well as for vehicles. If the appellants' construction of that section prevails, then it would constitute negligence per se for any pedestrian parade or military company to march along a street or highway under any circumstances. That construction is absurd. Under such circumstances a military company could comply with the terms of that section only by walking in single file, Indian fashion, along the extreme left-hand border of a street or highway.

[4, 5] The question as to whether the plaintiffs as members of the state militia were actually walking along and upon the paved portion of the highway at the time of the accident was a problem of fact to be determined by the court. The court decided that they were not walking along or upon the highway at that time. There is substantial evidence to support that finding, and it will, therefore, not be interfered with on appeal.

The plaintiffs were regularly enlisted members of the state militia actually engaged in military maneuvers pursuant to law under the direct command of their superior officer in accordance with the provisions of the Military Code of California. Stats.1933, p. 2501; Deering's Supp. of 1933, p. 1844, Act 4885. As members of the state militia the plaintiffs were bound to participate in company drills and maneuvers and to obey the lawful commands of their superior officers in accordance with the rules of discipline prescribed by the National Guard of the regular army of the United States. 32 U.S.C.A. §§ 61, 62. This Military Code requires these members of the state militia to "assemble for drill and instruction * * * not less than forty-eight times each year." See section 167 of the California Military Code, supra. The enlisted members of the state militia are bound to obey the lawful commands of their superior officers on penalty of being punished for insubordination, which is declared to be a misdemeanor. Section 164 of the California Military Code provides in that regard: "Any officer or enlisted man of the National Guard or Naval Militia who wilfully fails to attend any parade or encampment, or who neglects or refuses to obey the lawful command of his superior officer on any day of parade or encampment, or who fails to perform such military duty as may be lawfully required of him, or who uses disrespectful language toward his superior officer or commits any act of insubordination, is guilty of a misdemeanor."

These plaintiffs were under solemn oaths to obey the lawful orders of their superior officers, as provided by section 123 of the National Guard Act of the United States (32 U.S.C.A. § 123, supra). That section provides in part: "I do solemnly swear * * * that I will obey the orders * * * of the officers appointed over me according to law and the rules and Articles of War."

It is said that persons who are engaged in military service of the state or nation are not liable in a civil suit for damages for acts done in the course of their military duties in obedience to lawful orders of a superior officer. But if the orders are clearly or apparently illegal, or such as a person of common understanding, in the exercise of ordinary reason, should know are illegal and contrary to the express provisions of the civil law, the enlisted militiamen will not be exempt from liability for damages resulting from the execution of such illegal orders. 18 R.C.L., p. 1082, § 75; 40 C.J., p. 707, § 120.

[6] It is true that in time of peace, the military power is subordinate to civil law (article 1, § 12, Const. of Calif.), and that in time of peace it is no defense to a suit for damages resulting from a willful or negligent act that it was performed in obedience to the unlawful command of a superior officer of a company belonging to the National Guard, when that order is known to the militiaman, or, by the exercise of reasonable care, should have been known to him to be unlawful. Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278. The rule announced does not apply in time of war, or when the militia acts in conformity with the mandate of the Governor of the state for the purpose of executing the laws of the state or to suppress insurrections or repel invasions. Ar-

ticle 8, § 1, Const. of Calif.; Sterling v. Constantin, 287 U.S. 378, 395, 53 S.Ct. 190, 194, 77 L.Ed. 375; Herlihy v. Donohue, 52 Mont. 601, 161 P. 164, L.R.A.1917B, 702, Ann.Cas.1917C, 29. But when it does not appear that the militiaman, in obedience to the command of his superior officer, has knowingly violated the law, or that as a reasonable person he should have known his act was contrary to law, the question of his contributory negligence becomes one of fact to be determined by the court or jury, the determination of which, in the absence of evidence to the contrary, will not be disturbed on appeal. Bishop v. Vandercook, supra.

[7] In the present case it does not appear that the plaintiffs violated any statute in obeying the command of their superior officer, or in halting and standing in ranks, temporarily, on their proper northern portion of the paved street. The command of the presiding officer of the militia to halt and stand at attention upon the proper portion of the concrete pavement was not in conflict with the provisions of section 150½ of the California Vehicle Act, and it was not unlawful.

[8] The evidence adequately supports the finding that the automobile was being driven by Ralph Young at the time of the accident with the implied consent of the owner of the machine, and under his direction and control, which renders him liable for the negligent operation thereof. Civ. Code, § 1714¼; Haggard v. Frick, 6 Cal.App.(2d) 392, 44 P.(2d) 447; Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 357, 37 P.(2d) 99; Pohle v. Bolinas Beach Realty Co., 130 Cal.App. 704, 20 P.(2d) 730; Sutton v. Tanger, 115 Cal.App. 267, 1 P.(2d) 521. It appears without conflict that the car was in the control of William Sengo, the minor son of Tony Sengo, who had signed the application of his son for an operator's license; that the father, who was unable to drive an automobile, had owned the car for several years and that he regularly permitted and expected his son to use the machine for any and all ordinary purposes, at will, without restrictions; that at the time of the accident the machine was in the actual control of the son, William Sengo, who rode in the back seat thereof in company with his boy friend, and who had requested Ralph Young to drive the car. William Sengo testified in that regard: "Q. * * * You asked Ralph Young to drive down town, did you not? A. * * * Yes, I asked him if he wanted to drive it." This evidence furnishes proof that the car was being operated by Young with the implied consent of the owner thereof, and, under the authorities last cited, this renders him liable for damages under the provisions of section 1714¼ of the Civil Code.

The defendants failed to sustain the burden placed upon them to affirmatively prove that the plaintiffs were walking along or upon the highway at the time of the accident, or that they were then guilty of the violation of any law.

The judgments are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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17 Cal.App.2d 356

LOS ANGELES SCENIC STUDIOS, Inc. v. TELEVISION, Inc., et al.

Civ. 1974.

District Court of Appeal, Fourth District, California.

Nov. 5, 1936.

1. Appeal and error 🔑655(1)

Motion to strike out certain parts of clerk's transcript was denied where matters complained of were not material to disposition of case on appeal.

2. Licenses 🔑39

Statute requiring contractor to maintain action on contract to allege and prove that he was at time cause of action arose a duly licensed contractor *held* not applicable to contractors engaged in work upon structures or projects which were not part of realty upon which or in connection with which work is done (St.1933, pp. 1483, 1492, §§ 2, 12).

3. Appeal and error 🔑909(5)

In action on contract under which plaintiff built exposition exhibit for defendants, failure to allege and prove that plaintiff was duly licensed contractor at time cause of action arose *held* not to require reversal on appeal on judgment roll alone, since statutory requirement of such allegation did not apply to personalty and, in absence of any record as to facts, court would assume facts supported findings and judgment (St.1933, pp. 1483, 1492, §§ 2, 12).

4. Evidence ⚿5(2)

It is common knowledge that many exhibits in exposition buildings are not affixed to premises in such a way as to become a part of the realty.

5. Appeal and error ⚿907(3)

On appeal on judgment roll alone, all intendments must be taken in support of the judgment.

6. Trial ⚿397(3)

In action on contract under which plaintiff built exposition exhibit for defendants, wherein no issue was presented as to whether plaintiff had been paid, failure to specifically find that payment had not been made *held* not prejudicial where only possible conclusion from facts found was that amount was due and owing.

7. Appeal and error ⚿933(5)

Fact that new trial was granted one alleged partner in action on contract on ground of insufficient evidence would not require reversal on appeal of other copartners on judgment roll alone, since insufficiency of evidence might have been due to failure to prove that partner who was granted a new trial was member of partnership.

◆

Appeal from Superior Court, Los Angeles County; Arthur L. Mundo, Judge.

Action by the Los Angeles Scenic Studios, Inc., against Television, Inc., and others. From an adverse judgment, defendants C. Cusack and James F. Bolger appeal.

Affirmed.

E. H. Delorey and Frank L. Simons, both of Los Angeles, for appellants.

Samuel DeGroot, of Los Angeles, and Morey S. Levenson and Eli H. Levenson, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action upon a contract. Paragraph V of the complaint reads as follows:

"That on or about the 25th day of May, 1935, said plaintiff entered into an express agreement with defendants whereby said plaintiff was to erect, construct and build for the defendants that certain exhibit known as the Television Exhibit (building), located in the Electrical Products Building of the California Pacific International Exposition in the city of San Diego, county of San Diego, state of California; that pursuant to said agreement plaintiff did erect, construct and build the said exhibit (building) hereinbefore referred to; that the agreed price for said erection, construction and building of said exhibit (building) was the sum of two thousand eighty-four and 47/100 ($2,084.47) dollars, plus the California sales tax in the amount of twenty ($20.00) dollars."

The court found that the defendants Procunier, Cusack, and Bolger were copartners doing business under the name of Television Company; that on May 25, 1935, the plaintiff entered into an express agreement with these defendants "whereby said plaintiff was to erect, construct and build for the defendants that certain exhibit known as the Television Exhibit, located in the Electric Products Building of the California Pacific International Exposition in the city of San Diego, County of San Diego, State of California; that pursuant to said agreement plaintiff did erect, construct and build the said exhibit hereinbefore referred to; that the agreed price for said erection, construction and building of said exhibit was the sum of $2,000.00"; that payment had been demanded; and that these defendants had failed and refused to pay to the plaintiff the said sum or any part thereof. Judgment was entered on February 5, 1936, for $2,000 with interest and costs. In the clerk's transcript appears an order granting a motion for a new trial as to the defendant Procunier on the ground of insufficiency of the evidence, denying the motion as to the defendants Cusack and Bolger, and ordering the plaintiff to amend its complaint by interlining the word "building" in three places in paragraph V of the complaint. The interlineations thus ordered appear in parenthesis in the above copy of paragraph V, and the words so added did not appear in the complaint at the time judgment was entered.

The defendants Cusack and Bolger have appealed from the judgment against them upon the judgment roll alone. The respondent has moved to strike the word "building" from the clerk's transcript wherever this word was interlined in paragraph V of the complaint, and to strike from the clerk's transcript the order passing upon the motion for a new trial and ordering the amendment of the complaint.

[1] It is unnecessary to decide the questions presented by the motion to strike since the matters contained in the order and in the purported amendment of the

complaint are immaterial in so far as this appeal is concerned. For that reason and to clear the record the motion to strike is denied.

[2] The main point raised by the appellants is that the complaint did not state a cause of action since it failed to allege that the plaintiff was a duly licensed contractor. The appellants rely upon that part of section 12 of the Contractor's License Law (St.1929, p. 1595), as amended in 1933 (Stats.1933, p. 1492), which provides that a person acting in the capacity of a contractor, as defined by the act, may not maintain an action to recover compensation for services for which a license is required by the act without alleging and proving that he was a duly licensed contractor at the time the alleged cause of action arose.

Section 2 of this act, as amended in 1933 (St.1933, p. 1483), provides that the act shall not apply to a number of situations, including the following:

"(g) Any work or operation connected with the sale or installation of any finished product, material, or article of merchandise, which is not fabricated into and does not become a permanent fixed part of the structure.

"(h) Any construction, alteration, improvement or repair of personal property except as limited by subdivision (g) of this section."

It would appear from the act in general that it was intended to apply to contractors who engage in work upon structures or projects which are or are to become a part of the real property upon or in connection with which the work is done. The portions of section 2 above quoted specifically exempt from the provisions of the act any construction or repair work upon personal property which is not fabricated into and does not become a permanent fixed part of the structure.

[3-5] The court found that the agreement here in question was to erect, construct, and build a certain exhibit known as the "Television Exhibit," located in the Electric Products building of the exposition recently held in San Diego. Whether this exhibit took the form of a building or was an exhibit of another nature, we are not required to assume that it was fabricated into and became a permanent fixed part of the Electric Products building, in which it was located. It is common knowledge that many exhibits in such exposition buildings are not affixed to the premises in such a way as to become a part of the real property. Such an exhibit could well take the form of a small movable building, and the fact that it is called a "building" would not be conclusive in determining whether or not it was fabricated into and had become a permanent part of the structure within which it was located. This appeal being upon the judgment roll alone, all intendments must be taken in support of the judgment. Caruthers v. Hensley, 90 Cal. 559, 27 P. 411; Sacre v. Imperial Water Co., 206 Cal. 13, 272 P. 1044. If the exhibit in question was not of such a nature that it became a fixed part of the structure in which it was located, the complaint stated a cause of action and, in the absence of any record as to the facts, we must assume that the evidence supported the findings and judgment.

[6] It is argued that there was a failure to find on a material matter for the reason that the court failed to find that $2,000 or any other sum is due and owing to the respondent. The complaint alleged an express agreement to construct this exhibit at an agreed price, that the work was done as agreed, that demand for payment had been made, and that the defendants had failed and refused, and continued to fail and refuse, to pay the amount due or any part thereof. In the answer the defendants admitted that they had not paid the amount claimed or any part thereof. No issue was presented as to whether the amount had been paid. The only possible conclusion from the facts found is that the amount is due and owing, and the appellants are in no way prejudiced by the absence of a specific finding in this regard. Reed v. Johnson, 127 Cal. 538, 59 P. 986. The findings were sufficient to support the judgment.

[7] Some suggestion is made that the appealing copartners should not be held liable since a new trial was granted to the third partner. If the order in connection with the motion for a new trial were to be considered on this appeal, the fact would still remain that the insufficiency of the evidence referred to by the court may have been a failure to prove that the other defendant was a member of the partnership in question. The evidence is not before us.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

17 Cal.App.2d 238

HERMAN v. SAVAGE.

Civ. 9903.

District Court of Appeal, First District,
Division 1, California.
Oct. 30, 1936.

1. Exchange of property ⚷6

Party to agreement to exchange realty who complied with all conditions except to execute necessary deed, trust deeds, and releases, which were to be executed, delivered, and recorded through title company when other party paid agreed sum of money to company, *held* to have made sufficient tender of performance when other party refused to pay money and repudiated agreement.

2. Brokers ⚷60

Party who repudiated agreement to exchange realty after other party had performed conditions of agreement, solely because of fear of effect on business of probable outcome of forthcoming presidential election, did so without legal justification and became liable for payment of broker's commission, even though agreement provided that other party should pay commission.

3. New trial ⚷70

Granting new trial after verdict and judgment for defendant in action to recover broker's commission for services rendered toward consummating exchange of realty on ground that evidence was sufficient to sustain judgment for broker *held* not abuse of discretion in view of evidence that after other party to exchange agreement, who had agreed to pay commission, had performed conditions of agreement, defendant refused to perform and repudiated agreement solely because of fear of effect on business of probable outcome of forthcoming presidential election.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by M. Herman against M. J. Savage. Verdict and judgment for defendant, and from an order granting a new trial, defendant appeals.

Affirmed.

Travers, Landels, Weigel & Crocker, George N. Crocker, and Stanley A. Weigel, all of San Francisco, for appellant.

Julian D. Cohn, Leo B. Hone, and Jewel Alexander, all of San Francisco, for respondent.

KNIGHT, Justice.

The defendant, M. J. Savage, appeals from an order granting a new trial after verdict and judgment in his favor in an action brought by plaintiff as assignee of Alberton Realty, Inc., to recover a real estate broker's commission claimed to be due for services rendered by the realty company in connection with a written agreement made between defendant and Mrs. Ray Schwartz for the exchange of certain real property situate in San Francisco, and which exchange defendant subsequently refused to consummate. The order granting the new trial was made upon the ground that the verdict was not supported by the evidence.

The exchange agreement was executed by defendant on September 29, 1932, and by Mrs. Schwartz on October 7, 1932, following several weeks negotiations between all parties interested. According to the testimony introduced on behalf of plaintiff the only reason given by defendant for his refusal to go through with the exchange was his fear of the outcome of the presidential election which was then close at hand. At the trial, however, he placed his refusal upon the grounds that Mrs. Schwartz had failed to perform certain prerequisite conditions specified in the agreement of exchange and that the tender of exchange made by her was defective and without readiness or ability to perform.

The first ground of refusal so urged is based upon the following facts: The property belonging to Mrs. Schwartz, which defendant agreed to accept in the exchange, was located on the corner of Bush and Franklin streets. Erected thereon was a building consisting of one story and mezzanine, and the entire premises were under a fifteen-year lease to the Firestone Tire & Rubber Company of West Virginia. The term of the lease began in June, 1930, and was to expire in June, 1945. It called for a gradual increase of rentals ranging from $1,100 to $1,250 a month and gave the lessee an option to purchase the property. In connection with this lease the exchange agreement provided among other things as follows: The second party (Mrs. Schwartz) shall, as a condition precedent to the first party's obligations, furnish the following: "(1) The originals (or copies if the originals are not in the possession of or available to Second Party), or all correspondence between the Firestone Tire and Rubber Co. (both the Ohio and West

Virginia corporation), or the Firestone Realty Co., or any agent of any of said companies, and Second Party, between the date of said lease and the present time, concerning the said lease of the said Franklin Street property, with a statement in writing signed by Second Party affirming and warranting that such originals and copies include the whole of the said correspondence. If it appears from the said correspondence that the Firestone Tire and Rubber Co. (both the Ohio and West Virginia corporations, or either of them), or the Firestone Realty Co., or any agent of any of said companies, have in any manner questioned the validity of the said lease, or in any manner repudiated the same, then First Party may, at his option, declare this agreement to be null and void and may refuse to perform the covenants hereof. * * * (4) Second party shall furnish proof satisfactory to First Party that Second Party has offered to sell the Franklin Street property to the Firestone Tire and Rubber Co., a West Virginia corporation, for a price not exceeding the approximate value at which the said property is being transferred under this agreement of exchange, and that said offer was made in accordance with the terms of the said lease with the said Firestone Tire and Rubber Co., and that the said Firestone Tire and Rubber Co. has, on a date not earlier than September 28th, 1932, rejected the said offer and refused to exercise its option under said lease to purchase the said property."

There is ample evidence supporting the trial court's conclusion that Mrs. Schwartz complied with all of the foregoing conditions; also that the lessee had not in any manner questioned the validity of the lease or repudiated the same, and had expressly declined to exercise its option to buy the property. In a letter written on behalf of the lessee on May 16, 1932, and signed by W. B. Mullen of the Firestone Realty Company, and another dated May 25, 1932, and signed "Firestone Realty Co., D. H. Efferth," a demand was made for a substantial reduction in the rent on account of the depression; but neither letter can be fairly construed to mean that the lessee in any manner questioned the validity of or repudiated the lease. Furthermore, the evidence shows that these letters were in defendant's possession and the contents thereof known to him long before he executed the exchange agreement.

Defendant contends that Mrs. Schwartz failed to furnish proof satisfactory to him that the lessee had rejected its right to exercise its option to buy the property. The contention is wholly without merit. Its previous rejection was expressly confirmed in a telegram sent in direct response to two telegrams prepared and sent to it by defendant's attorney on behalf of Mrs. Schwartz, to which her name was signed. The first telegram so sent was dated September 30, 1932, and not having received an answer thereto by October 5, 1932, defendant's attorney sent a second telegram in the identical words of the first one. Both telegrams read as follows: "Property southwest corner Bush and Franklin Streets, San Francisco, California, about to be exchanged for property representing investment value two hundred thousand dollars. Stop. Again offering you this property under your option page eight in lease with Ray Schwartz, dated December twentieth nineteen hundred twenty nine. Stop. If you can meet this or pay one hundred seventy-five thousand dollars cash please wire me immediately to fifteen twenty Gough Street, San Francisco, Stop. You have heretofore rejected this but buyer desires confirmation. Delay may prejudice deal, so please wire me at once." To the second telegram was added: "Will you please favor me with immediate telegraphic reply." On the same day, the following reply was received: "Ray Schwartz 1520 Gought St. Management not interested in purchase of your property per wire (signed) Firestone Efferth." Defendant claims that the reply telegram was ineffective because it was signed "Firestone Efferth" instead of "Firestone Tire and Rubber Co. of West Virginia"; but as above stated, it was sent in reply to the two telegrams defendant's attorney himself had sent to the lessee; and, moreover, it is apparent that the name "Efferth" which was signed to the reply telegram was D. H. Efferth of the Firestone Realty Company, who sent and signed the letter of May 25, 1932, in behalf of the lessee demanding a reduction of rent, and which was one of the letters relied upon by defendant as indicating a repudiation of the lease. Furthermore, the evidence shows that at the time the telegram was received by defendant's attorney, no objection whatever was made by defendant or his attorney to the form, substance, or signature of the reply telegram. Therefore, as stated by the trial court, in the absence of any such objection the only inference to be drawn is that the reply was satisfactory.

Defendant claims also that Mrs. Schwartz did not furnish all of the correspondence which passed between her and the Firestone Company in that one telegram was withheld. It was dated June 1, 1932, and had been sent from Los Angeles to Mrs. Schwartz's son by R. J. Cope, a representative of the Firestone Company. But in this connection the evidence shows that Mrs. Schwartz's son delivered this telegram to defendant's attorney personally during the negotiations preceding the signing of the exchange agreement, and that said attorney retained the telegram in his possession and produced it at the trial from his own files.

With respect to defendant's point that Mrs. Schwartz tendered defective title, the evidence shows the following state of facts: Under the terms of the exchange agreement defendant agreed to convey to Mrs. Schwartz two separate pieces of property, one situate on Grant avenue and the other on Pacific avenue; and in addition he agreed to pay her $10,000 in cash. Mrs. Schwartz agreed to convey to defendant the Bush-Franklin street property subject to two encumbrances, the first securing a loan for $63,426.85 held by West Coast Life Insurance Company, and the second securing a loan of $7,000 to be held by Wilton Securities Corporation. Furthermore, she agreed to give defendant a note for $7,000 secured by a deed of trust on the Pacific avenue property which she was to receive from the defendant in exchange, and that said deed of trust should be second only to a first deed of trust for a sum not exceeding $20,000. It was stated in the exchange agreement that this said second deed of trust should "be given simultaneously with the consummation of this agreement." At the time the exchange agreement was executed the Bush-Franklin street property carried a second loan of $37,000 and it was necessary, therefore, for Mrs. Schwartz to reduce it to $7,000. She made all of the necessary arrangements so to do by negotiating a loan on the Pacific avenue property for $20,000, which sum she caused to be deposited with the California Pacific Title & Trust Company, which was selected by the parties to consummate the exchange. This $20,000, together with the $10,000 which the defendant agreed to pay, was to be applied by the title company on the second encumbrance on the Bush-Franklin street property so as to reduce it to the agreed amount of $7,000. Defendant, however, in the meantime repudiated the entire transaction. He refused to come forward with the $10,000 or to do anything else toward the consummation of the exchange, giving as his only reason therefor, so plaintiff's evidence shows, that he was fearful of the effect on business of the probable outcome of the presidential election which shortly was to follow. It will be seen, therefore, that Mrs. Schwartz proceeded as for as she could toward the consummation of the exchange, and was prevented from doing anything more to that end by defendant's repudiation of the agreement.

[1] Defendant argues that Mrs. Schwartz's tender of performance was defective because she did not deposit with the title company also her executed deed and deeds of trust, and the releases necessary to close the exchange transaction on her part. But as shown by the testimony of the title company's officer, in accordance with the customary practice of consummating an exchange of this kind, all of these documents were to be executed, delivered, and recorded through the office of the title company immediately upon the payment to the title company by the defendant of the $10,000 he agreed to pay in part consideration of the exchange; and that his refusal to pay the same, which was followed by his repudiation of the agreement, completely blocked the consummation of the exchange. As held by the trial court, after the defendant had so repudiated the transaction, Mrs. Schwartz was excused from doing anything further toward its consummation.

[2] Defendant calls attention to the fact that the exchange agreement provides that the broker's commission was to be paid by Mrs. Schwartz, and not by the defendant. It appears to be well settled, however, that where as here the party who is not obligated to pay the commission repudiates the transaction without legal justification, he becomes liable for the payment of the commission. Traxler v. Katz, 116 Cal.App. 226, 2 P.(2d) 553.

[3] It is our conclusion that the trial court was justified in holding that the evidence adduced at the trial would have been legally sufficient to sustain a judgment in favor of plaintiff; and such being the case,

there is no ground upon which it may be held on appeal that its action in granting a new trial constituted an abuse of its discretion. Its order made in that behalf is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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17 Cal.App.2d 288

COLLINS v. GRAVES et al.

Civ. 5613.

District Court of Appeal, Third District,
California.
Nov. 2, 1936.

1. **Automobiles 🔑245(13, 79)**
In action by motorist and occupant of automobile for injuries sustained in collision with defendant's truck on a narrow bridge which was rendered slippery by recent rains, and which both parties entered at excessive speeds, negligence of truck driver and contributory negligence of motorist and occupant *held* for jury.

2. **Negligence 🔑93(1)**
Where two persons are engaged in a joint enterprise in use of an automobile, contributory negligence of one will bar recovery by either, if it is in a matter within scope of the joint undertaking.

3. **Negligence 🔑93(1)**
To constitute a "joint undertaking" of motorist and occupant so that contributory negligence of one is imputable to the other, occupant and driver together must have such control over automobile as to be practically in joint or common possession of it, and fact occupant may indicate to driver route he wishes to travel is insufficient.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words & Phrases.]

4. **Negligence 🔑93(1)**
County police officers who were at time of automobile collision using county's automobile assigned to driver and were proceeding to a city on official police business *held* engaged in "joint enterprise" so that driver's contributory negligence was imputed to, and barred recovery by, accompanying officer.

5. **Appeal and error 🔑882(14)**
Where plaintiff tried automobile collision action on theory testimony relating to joint enterprise presented jury question, reviewing court would not, on appeal, hold that, as matter of law, no joint enterprise was shown.

6. **Appeal and error 🔑882(12)**
Where instruction given at plaintiff's request contained substance identical with substance of challenged instructions given at request of defendant, plaintiff *held* estopped from claiming error of trial court in giving defendant's requested instructions.

7. **Evidence 🔑150**
In action by motorist and occupant of automobile for injuries sustained in collision with defendant's truck on narrow bridge, testimony as to experiments tending to show how much automobile would lessen its speed on incline approaching the bridge after shutting off power *held* inadmissible where circumstances, climatic conditions, and wind pressure at time of experiments were not the same as they were at time of accident, and automobile used in experiments was not automobile involved in the collision.

8. **Evidence 🔑150**
Admission of testimony of experiments is largely within discretion of trial court, but for experimental evidence to be admissible, it must be shown first that circumstances are similar or so similar as to render result of experiments illustrative of questions under consideration.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by W. H. Collins against Archie Graves and another. From an adverse judgment, the plaintiff appeals.

Affirmed.

Rae B. Carter, of Fresno, for appellant.

Butler, Van Dyke & Harris, of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff to recover damages for and on account of injuries received in a collision which occurred on the 7th day of February, 1934, between an automobile in which the plaintiff was riding and a gasoline tank truck driven by the defendant, Archie Graves, and belonging to the Service Tank Lines, a corporation. The defendants had judgment, and from this judgment the plaintiff appeals.

The collision between the automobile, which was a Graham sedan and the tanker truck, occurred on a narrow bridge which crosses Dry creek about one mile south of Galt, in the county of Sacramento. This bridge is on United States highway No. 99; is approximately 730 feet in length, with a roadway 19 feet and 4 inches in width. The approach to this bridge, both from its northerly end and also from its southerly end, is by a left curve. These curves are approximately several hundred feet in length. The radius of these curves in such that the approach to the bridge can be perceived for a considerable distance. The highway approaching the bridge from the south has a gradual rise for a considerable distance. From the north the incline of the highway is practically negligible. At the time of the collision the automobile in which the appellant was riding was approaching from the south. The tanker truck was moving in a southerly direction, and had traversed over 500 feet of the bridge when the automobile came in contact with the left front of the truck. The truck had attached to it a trailer, and the length of the truck and trailer was approximately 51 feet. The width of the truck over all was 8 feet and 4 inches. The width of the automobile over all was 6 feet. The width of the two vehicles thus occupied 14 feet and 4 inches of the driveway. If the drivers of each vehicle allowed a clearance of one foot between what would be the trusses of the bridge on his right-hand side, there would remain just 3 feet of clearance between the two vehicles as they came to a meeting point on the bridge. It is thus apparent that a slight variation in the course of either vehicle would result in a collision. The driver of the automobile from the south testified that he had looked at his speedometer at about the time he reached the incline on the curve approaching the bridge from the south, and as nearly as he could make out, his speed at that point was approximately 42 miles per hour; that he shut off the power at that point and allowed his car to drift in free-wheeling until he reached the bridge, stating, however, that he did not know how fast he was moving when he entered the southerly approach of the bridge. He estimated his speed, however, at 25 miles an hour. The driver of the truck testified that he was driving 25 miles an hour just before he reached the northerly end of the bridge, applied his brakes gently, and reduced his speed to between 20 and 22 miles per hour. There is also some testimony in the record to the effect that the Graham car, when it entered the bridge, was traveling at a speed estimated at 40 miles an hour. Prior to the time when either vehicle had entered the bridge in question, it had been raining. The highway was wet; the bridge itself at that time had recently undergone repairs, and contained simply a board flooring with no cement or concrete or asphaltum covering. The testimony shows that the bridge was very slippery.

The plaintiff and C. A. Tarr, and a man by the name of Reif, were on their way from Fresno to the city of Sacramento, from which point the appellant was intending to proceed to the town of Folsom. The car in which they were riding belonged to the county of Fresno, of which county C. A. Tarr was at that time the undersheriff, and the appellant was the deputy sheriff. The mission of C. A. Tarr to Sacramento was to look up a witness wanted in a criminal case, supposed to be somewhere in the suburbs of Sacramento. The appellant's mission was to go on to Folsom and there interview an inmate of the state prison for the purpose of gaining information wanted in a criminal case pending or under investigation in the county of Fresno. Both Mr. Tarr and the appellant had had assigned to them for use, certain automobiles. The Graham sedan had been assigned to the undersheriff, C. A. Tarr. The appellant had assigned to him a Buick car. Just by whose orders this mission was undertaken does not very clearly appear, but it does appear that in order to save expenses it was agreed that the parties should ride in the Graham sedan, thus saving the wear and tear of one car.

The testimony of the witness Tarr, and the appellant, was to the effect that as they entered the bridge in question they saw a brown car ahead of them which either skidded or "shimmied" a little; that they noticed the tanker truck approaching from the north, and that the trailer attached to the truck skidded to the left, which would be over and partly across the path which would be used by the car in which they were riding, and that by reason of the skidding of the trailer, the collision was precipitated.

On the part of the defendants there is testimony by the driver of the tanker truck that no skidding took place. His testimony is corroborated by that of a witness named Phillips, who was driving an automobile somewhat to the rear of the tanker truck and trailer, and had slowed down as he came up to the tanker truck and trailer just before reaching the northerly approach of the bridge, and had not attempted to pass the truck and trailer on account of the narrowness of the bridge. This witness testified that the trailer did not skid until after the collision. The testimony of the driver of the truck is to the effect that just before the instant of the collision, the Graham sedan skidded slightly across the bridge and came in contact immediately with the left front of the truck; that as he saw the sedan ahead turn toward his truck, he turned slightly to the right, wedging the right front of the truck in the trusses of the bridge, causing sudden stopping, and the trailer thereafter buckled, described somewhat as a jack-knife operation. Whether the trailer did or did not skid prior to the collision, the facts as we glean them from the record show that the Graham sedan struck the left front of the truck, and not any portion of the trailer.

Upon the part of the appellant it is contended that he was riding as a guest in the car driven by C. A. Tarr. On the part of the respondents it is claimed that Tarr and the appellant were engaged in a joint enterprise; were using a car not belonging to either one of them; that the appellant was not riding as an invited guest with Tarr, but through an understanding that only one car should be used in making the trip in order to save expenses for the county.

[1] Upon this state of facts the jury returned a verdict favorable to the defendants. Appellant contends that the facts show defendants guilty of negligence as a matter of law, while the respondents answer that the verdict of the jury exculpates them from the charge of negligence. The verdict of the jury might well be as it was rendered without either of the foregoing contentions being true. The jury might very well have considered that under the climatic conditions, and also the condition of the highway prevailing at the time of the collision, all the parties engaged in the transaction might have been guilty of negligence. The jury might very well have reached the conclusion that the tanker truck, entering a bridge at a speed estimated at between 20 and 23 miles per hour, and the Graham sedan entering the same narrow bridge at a speed testified to by certain witnesses as proximating 40 miles per hour, in view of the prevailing climatic conditions and the condition of the surface of the bridge, were at speeds wholly unjustified. The fact that neither vehicle may have been exceeding the speed limit specified in figures contained in what is now section 511 of the California Vehicle Code (St.1935, p. 176) is not determinative of the question of negligence. What this court said in the case of Davis v. Brown, 92 Cal.App. 20, 267 P. 754, applies to the circumstances here presented. In that case we had to consider the facts concerning a collision which occurred on a slippery highway, and it was there held that subdivision (a) of the then section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1927, p. 1436) was applicable, specifying in effect that one driving a vehicle upon a public highway should propel the same at a careful and prudent speed (etc.), having due regard to the surface and width of the highway, as well as traffic conditions. Here, we have a highway which the parties admit was slippery by reason of its being a rainy day, the parties knowing they were entering a narrow bridge with a clearance, as we have shown, of only a distance proximating 3 feet. Under such circumstances and conditions the jury may very well have concluded that all the parties were negligent, and therefore no recovery could be had by any one of them. The driver of the Graham sedan also testified that just immediately preceding the collision he swung his car to the left, which corresponds with the testimony of the driver of the truck that the sedan turned toward his truck and collided with the left front corner thereof. Again, if the jury believed the testimony of the witness Phillips, that neither the truck nor trailer skidded to the left preceeding the collision, the defendants would not be liable, even though the truck driver entered upon the bridge at a negligent rate of speed, as the rate of speed under such circumstances would not be a proximate cause of the collision.

Appellant in his brief argues, in support of his contention that the speed of the Graham car was slowed down in approaching the bridge, the fact that the time elapsed between their leaving Fresno and reaching the bridge, in view of the distance travled, indicated an average speed of only 40 miles per hour. This overlooks the fact that sixteen different municipalities of various sizes had to be passed through on the journey, and if the speed law was at all complied with, would lead to the conclusion that on the open highway the speed of the Graham car more nearly approached a velocity of 60 miles per hour than 40 miles. The injuries received by the occupants of the Graham sedan indicate that the car was traveling at an excessive rate of speed at the instant of the collision.

Aside from any negligence on the part of the driver of the Graham car, the appellant argues that he was a guest, and therefore is entitled to recover from the defendants on the testimony introduced by him touching their negligence.

Was the appellant really a guest riding in the Graham car?

The record, as we have stated, shows that both Tarr and the plaintiff were peace officers of the county of Fresno. They were riding in a car belonging to the county of Fresno. Each had a common purpose in coming to the city of Sacramento, to wit, the accomplishment of some service in behalf of the county, one to interview a witness supposed to be located somewhere in the suburbs of Sacramento; the other to proceed to Folsom for a similar purpose. Each had previously been assigned a separate car. To save expenses it was agreed that they should both ride in the car that had been assigned to the undersheriff. The appellant was to drive the car from Sacramento to Folsom. They left Fresno together to complete the purposes of their assignments, and after making such investigations, as above referred to, they were to return by the same vehicle to Fresno. Neither of the men had any right to vary the purposes for which they had been assigned. It was their duty, and the duty of each one of them, to come directly to Sacramento, and one of them to proceed by the same conveyance to Folsom. There is nothing in the testimony indicating that Tarr had invited the appellant to ride with him as his guest or otherwise, to Sacramento. The record is absolutely silent as to an invitation of any kind. There is nothing in the record indicating that the appellant accepted any gratuitous offer to ride in the Graham car. The appellant was an occupant of the car belonging to the county of Fresno, driven by the witness Tarr. That is practically all that can be predicated upon the testimony in the record. Each officer was charged with the duty of proceeding to Sacramento, and one to go farther on to Folsom. Neither had a right to vary the course of the journey.

[2, 3] The law governing situations such as we are considering is tersely stated in the case of Bryant v. Pacific Elecric Ry. Co., 174 Cal. 737, 164 P. 385, 386, from which we quote the following: "'There seems to be no difference of opinion as to the rule that, when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking.' Volume 2 [R.C.L.] p. 1208, § 43. But in order that there be such a joint undertaking it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. 'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' (St. Louis, etc., Ry. Co. v. Bell [58 Okl. 84] 159 P. 336 [L.R.A.1917A, 543]; Atwood v. Utah Light, etc., Ry. Co., 44 Utah, 366, 140 P. 137; Cotton v. Willmar, etc., Ry. Co., 99 Minn. 366, 109 N.W. 835, 8 L.R.A.[N.S.] 643, 116 Am.St.Rep. 422, 9 Ann.Cas. 935)."

[4] It was not necessary in the instant case for either officer to indicate to the other the course they were to travel in coming to Sacramento. Each had received his specific instructions. The man who sat behind the wheel was instructed to journey to Sacramento. The appellant who sat beside him was instructed to do the same thing. They were to use a car belonging to the county of Fresno. The appellant certainly had a right to insist upon being driven directly from Fresno to the city of Sacramento. Tarr had a right, as he was driving the car, to drive from Fresno di-

rectly to Sacramento, but he had no right to drive anywhere else. Their community of interest consisted in reaching Sacramento to accomplish the purposes of their assignment. There is no evidence in the record that either officer had a superior right to be heard in relation to the purposes for which the trip was being made.

A somewhat similar case is that of Martin v. Puget Sound Electric Ry. Co., 136 Wash. 663, 241 P. 360, 362, where the Washington Supreme Court ruled that the parties were engaged in a joint enterprise. Employees of a corporation were engaged in transporting lumber on a company truck. The lights of the truck went out and the engine stalled. One of the men (not the driver) went ahead and cranked the motor and then stood in the road at the side of the truck, where he was struck by a passing bus. The language of the court is as follows: "The appellant was not the driver of the truck, but both he and the driver were the common employees of the same master and engaged in a joint enterprise. The negligence of the one is therefore necessarily imputed to the other."

The appellant has cited a number of cases where the parties were not held to be engaged in a joint enterprise, but those cases are all readily distinguishable from the conditions here presented for our consideration. The following elements were lacking in the cited cases: A common employer; a common purpose; an assignment to accomplish that purpose by some superior officer representing the common employer; a trip undertaken in the conveyance belonging to the common employer; the expenses borne by the common employer, and both having a right to insist that the vehicle belonging to the common employer be driven directly to the destination indicated by a superior officer of the county employer, and not a trip undertaken independently by either officer; and neither officer possessing any right to deviate from the purposes of his assignment. The respondents have cited a number of cases showing the existence of a joint enterprise, but the foregoing statement appears to us sufficient, without reviewing authorities pro and con.

[5] In the instant case the plaintiff had the question of joint enterprise submitted to the jury by requesting the court to give, and the court giving the following instruction: "Defendants have alleged that this plaintiff and the driver of the Graham sedan automobile in which plaintiff was riding, were engaged in a 'joint enterprise.' To constitute a joint enterprise such as would bar plaintiff's recovery for his damages, if any, if you find by a preponderance of the evidence that the driver with whom plaintiff was riding was negligent, there must be more than a common desire and common method of transportation. There must be a community of interest in the objects or the purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

Having tried the case on the theory that the testimony relating to the question of joint enterprise was such as to present a question of fact to the jury, it does not lie within the mouth of the appellant to now argue that the court erred in so doing, and that as a question of law it must be held that no joint enterprise is shown.

In Noble v. Miles, 129 Cal.App. 724, 19 P.(2d) 265, 266, speaking through Mr. Presiding Justice Pullen, this court, following the rule stated in 2 California Jurisprudence, page 846, said: "Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous."

A very similar case is that of Carter Oil Co. v. Kennedy, 137 Okl. 168, 278 P. 640, where the Oklahoma Supreme Court held: "Party is bound by instruction given at his request and cannot predicate error on theory different from that embodied therein."

To the same effect is the case of Hutchins v. Richardson, 100 Okl. 80, 227 P. 432; Martin v. Postal Union Life Ins. Co. (Cal. App.) 61 P.(2d) 333; United Bank & Trust Co. v. Hunt, 1 Cal.(2d) 340, 34 P.(2d) 1001.

Upon the question of instructions it is further argued that the court erred in giving respondents' instructions numbered 3 and 7. Challenged instruction No. 3 reads as follows: "Each of the parties to this action is entitled to a fair and impartial consideration of the evidence by you, and to equal and exact justice at your hands. In cases of this character it is grossly improper for the jurors to permit themselves to indulge in guesswork or to engage in speculation and conjecture as to the cause of the accident, or as to the extent of the injuries or damage sustained, if any. The jury must be guided entirely by the evidence that has been introduced, and by the instructions of this court, and you must keep in mind that before this plaintiff will be entitled to recover any verdict whatever, he must prove to you by a preponderance of the evidence that at the time and place of the accident in question the defendants were negligent; that such negligence on their part, if any, was the proximate cause of the accident, and that as a result thereof this plaintiff was injured or damaged. If plaintiff has failed to prove each of these issues to you by a preponderance of the evidence, it would then be your duty to return a verdict in favor of defendants and against plaintiff."

Challenged instruction No. 7 reads as follows: "In this action it is not necessary for these defendants to disprove liability on their part. On the contrary, in this action it is necessary for plaintiff to prove that defendant, Archie Graves, was guilty of negligence in the operation of the vehicle being driven by him, and that such negligence on his part was a proximate cause of this accident. In so far as this action is concerned the mere proof of the fact that an accident happened, or the mere proof of the fact that plaintiff sustained injuries, is immaterial unless plaintiff further proves to you that that accident and those injuries were proximately caused by the negligence of the defendant, Archie Graves. Therefore, even if you should find from the evidence that plaintiff did sustain injuries as a result of this accident, it will still be your duty to return a verdict in favor of the defendants and against plaintiff, unless you find from a preponderance of the evidence that the defendant, Archie Graves, was negligent, and that his negligence was the proximate cause of the accident."

[6] Again, the appellant is confronted with having requested of the court, and having had given to the jury an instruction in the following language: "You are further instructed, however, that the plaintiff must not only prove that the defendants were negligent by a preponderance of the evidence, but he must also prove by a like preponderance of evidence that such negligence of the defendants was the proximate cause of his injuries, if any. By proximate cause of an injury is meant that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred; it is the efficient cause, the one that necessarily sets the other cause in operation."

Under such circumstances the appellant is estopped from claiming error on the part of the trial court. The substance of the instruction given by the court to the jury at his request is identical with the substance of the challenged instructions. This removes all possibility of predicating error on the instructions challenged. See Noble v. Miles, supra, and other cases heretofore cited.

[7, 8] The court did not err in excluding testimony as to experiments tending to show how much an automobile would lessen its speed on the incline approaching the narrow bridge from the south, after shutting off the power. The circumstances were not shown to be the same; the climatic conditions were different; the wind pressure was not the same; the automobile was not the same. The admission of testimony of experiments is largely within the discretion of the trial court, but it must always be first shown whether circumstances are similar or so similar as to render result of experiments illustrative of the questions under consideration. It is not necessary to cite authorities to the effect that unless the circumstances are shown to be similar surrounding the experiments, the trial court does not commit error in excluding testimony in relation thereto.

It is further insisted that the court erred in limiting the cross-examination of one of the witnesses for the defense. Without setting forth the examination, it is sufficient to say that we find no merit in this contention.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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MANUEL v. CALISTOGA VINEYARD CO. et al.

Civ. 5464.

District Court of Appeal, Third District, California.

Nov. 6, 1936.

Rehearing Denied Dec. 10, 1936.

Hearing Denied by Supreme Court Jan. 4, 1937.

1. Appeal and error ⚷193(1)
Pleading ⚷207

Objections that count for promising to pay $30 per ton for grapes without any intention of performance did not allege that promise to pay was false, that defendant would not have paid for grapes if they had been sold to defendant or that in fact grapes were sold to defendant, that defendant's agent who made promise knew that his statements were untrue, that defendant had notice or knowledge of agent's representations, or that defendant would not on demand have carried out promise, could be reached only by special demurrer, and, in absence of such demurrer, would not be considered by reviewing court.

2. Pleading ⚷207

Objection that essential facts appear only inferentially must be raised by special demurrer.

3. Fraud ⚷41

Count for promising to pay $30 per ton for grapes without any intention of performance, which contained insufficient statement of facts and not insufficient facts, *held* sufficient as against general demurrer.

4. Principal and agent ⚷119(6)

Third party seeking to hold principal to guaranty made by agent must prove authority of agent to make contract.

5. Factors ⚷30

Vineyard company which had deciduous fruit dealer's license authorizing it to guarantee price of deciduous fruits purchased from producer on consignment was not "consignment shipper" within Deciduous Fruit Dealers Act, as respects right of vineyard company to guarantee price to producer for his deciduous fruit (Gen.Laws 1931, Act 6155).

6. Principal and agent ⚷103(2)

Under presumption that ordinary course of business has been followed, fruit producer dealing with vineyard company having deciduous fruit dealer's license authorizing company to guarantee price of deciduous fruits purchased from producers on consignment had right to believe that company was deciduous fruit dealer and acted as such, and did not act as consignment shipper as defined by Deciduous Fruit Dealers Act, as respects apparent authority of vineyard company's agent to guarantee price to fruit producer (Gen.Laws 1931, Act 6155).

7. Principal and agent ⚷99

"Ostensible authority" is such authority as a principal intentionally or by want of ordinary care allows a third party or his agent to possess.

[Ed. Note.—For other definitions of "Ostensible Authority," see Words & Phrases.]

8. Principal and agent ⚷123(7)

In action against vineyard company for breach of promise through agent to pay $30 per ton for grapes, evidence *held* to show that agent had authority to purchase grapes for vineyard company, that company had knowledge that agent purchased grapes, and that grapes were delivered to vineyard company as owners.

9. Appeal and error ⚷994(2)

Reviewing court would not consider objection that witnesses did not tell the truth and that their testimony was discredited, since jury were triers of facts.

10. Fraud ⚷49

Proof that agent of vineyard company "guaranteed" fruit producer $30 a ton for grapes sold company *held* not at variance with allegations that agent "promised" to pay producer $30 a ton for grapes sold to company, since use of word "guarantee" in such circumstances could be construed as synonymous with "promise."

11. Trial ⚷227

Sequence in which instructions are given rests in sound discretion of trial court.

12. Appeal and error ⚷969

Trial court's exercise of discretion as to sequence in which instructions are given will be disturbed only on strong showing of deliberate prejudice.

13. Appeal and error ⚷969

That instructions were not given in logical order did not indicate such deliberate prejudice as would warrant interference with trial court's discretion as to sequence in which instructions should be given.

14. Appeal and error 🔑1046(5)

Trial court's statement to jury that one designated group of instructions was proposed by plaintiff, that another group was proposed by defendant, and that another group was given by court, though not commended, was not reversible error.

15. Appeal and error 🔑882(12)

Defendants could not complain of giving of instructions submitted by them as applicable to issues which were subsequently removed from consideration of jury, where they had not sought to withdraw such instructions after removal from jury's consideration of issues to which they were applicable.

16. Trial 🔑334

$1,484.80 verdict in action for value of 55⅓ tons of grapes at $30 per ton, which would total $1,660, *held* proper, notwithstanding that cash advance of $500 was made, where interest from time lapsing between delivery of grapes and trial would amount to sum slightly in excess of verdict returned.

Appeal from Superior Court, Napa County; W. L. D. Held, Judge.

Action by Jessie Manuel against the Calistoga Vineyard Company and others. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Rutherford, Rutherford & Rutherford, of Napa, for appellants.

Clarence N. Riggins and Mervin C. Lernhart, both of Napa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment based upon a verdict of a jury awarding to plaintiff the sum of $1,484.80 for grapes delivered to defendants.

Originally the complaint was in three counts. To this complaint a general demurrer was interposed and overruled, whereupon defendant answered. Upon the trial a nonsuit was granted as to the first two causes of action in the complaint, of which ruling no complaint is made, so that we confine ourselves to the consideration of the third count in the complaint.

This count alleges the corporate capacity of the Calistoga Vineyard Company, Limited, and that this corporation had assumed the assets and liabilities of the Calistoga Vineyard Company, a pre-existing partnership. It then alleges that during the months of August, September, and October, 1930, Thomas A. Turner was the agent of defendant company, a partnership, for the purpose of purchasing, obtaining, and negotiating for the sale of grapes to and through the Calistoga Vineyard Company, a copartnership; that in the course of his employment as agent he represented and promised to plaintiff that, if plaintiff would sell his grape crop to Calistoga Vineyard Company, said company would pay him $30 a ton therefor. Plaintiff, it is alleged, believed and relied upon said representations and delivered to the company a specified number of tons, and, by an amendment permitted at the time of trial, plaintiff set forth he would not have so sold and delivered the grapes to defendant were it not for the fact he believed and relied upon such representations.

It is also alleged that at the time the representations were made they were made fraudulently by the agent of defendant for the purpose of deceiving plaintiff into delivering his grape crop to the Vineyard Company, and, in making said promise to plaintiff the agent did not believe the same and was made without intention of performance. This, briefly, is the gist of the cause of action upon which the case was tried.

[1-3] Appellants point out various deficiencies in the complaint, claiming there was no allegation that the statement the company would pay $30 per ton for the grapes was false; there was no allegation that the company would not have paid plaintiff for the grapes if they had been sold by him to the company or that he did in fact sell his grapes to the company, or that the agent knew the statements were untrue, or that the company had any notice or knowledge of the representations of Turner, or that the company would not, upon demand, have carried out the agreement. It will be observed that the action is not for the fraudulent representations of existing facts but in making promises without any intention of performance. These deficiencies in the complaint, if they were such, could have been reached by special demurrer, but, in the absence of such a demurrer, they cannot now be considered. A reference to the third count of the complaint will show that the facts demanded by appellant appear at least by inference, being at most an insufficient statement of

the facts, and not insufficient facts, and it has been frequently held the objection that essential facts appear only inferentially must be raised by special demurrer. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410; 21 Cal.Jur. 108. The third count was therefore sufficient against a general demurrer.

Upon the motion for a nonsuit appellants urged that the evidence was insufficient to sustain certain material allegations, and, among others, that the evidence failed to show that Turner had any authority to purchase grapes for the company or that the company had knowledge of any purchase of grapes from plaintiff by Turner, or that the company accepted or had any knowledge that the grapes were delivered by plaintiff to it as owner.

[4-8] Respondent recognizes the rule that, where a third party seeks to hold a principal to a guaranty made by an agent, the burden is upon such party to prove the authority of the agent to make the contract. Such was the holding in the case of Peterkin v. Randolph Marketing Company, 48 Cal.App. 300, 191 P. 947, for that judgment was reversed on the ground that there was no actual authority and no evidence tending to show any act on the part of the defendant from which a conclusion could be drawn that the agent had apparent authority to either purchase or guarantee a price at which it was to be sold. In that case, however, the court conceded it to be the law that, if the agent was clothed with ostensible authority, the principal was estopped from denying that the agent was authorized to make the agreement. In the case of Perkins v. Pacific Fruit Exchange, 132 Cal.App. 278, 22 P. (2d) 535, the court not only held there was no evidence that the agent was expressly or impliedly authorized to make the guaranty of a minimum return, but further held that the grower must be presumed to have knowledge that under the terms of the "Deciduous Fruit Dealers Act" of 1929 (Deering's Gen.Laws 1931, Act 6155) under which the fruit company therein was authorized to act, that neither the principal nor the agent could legally make the contract sued upon, in that the appellant was not a deciduous fruit dealer under the act, but came within the terms of a "consignment shipper" as defined therein.

In the case at bar defendants and appellants had a deciduous fruit dealer's license authorizing "the purchase of deciduous fruits from the producer on credit, or to verbally or in writing guarantee a price to the producer of deciduous fruits received from the producer on consignment, or to verbally solicit from the producer deciduous fruits to be used on an order at a named price," and did not come within the terms of a "consignment shipper" as defined by the act, and, under the presumption that the ordinary course of business had been followed, respondent had a right to believe that the defendants were deciduous fruit dealers and acted as such and did not act as a "consignment shipper."

In the instant case the plaintiff testified that Turner represented to him that he was acting for the Calistoga Vineyard Company, and that this company had contracts for the sale of a large quantity of grapes, but did not have enough grapes to fill the order, and that there was money in the bank on deposit on this contract, and promised him $30 per ton for his grapes, and agreed that he would receive $500 on account, and, believing and relying upon these representations, delivered his crop to the Calistoga Vineyard Company.

Upon the question of ostensible authority, that is, such authority as a principal, intentionally or by want of ordinary care, causes or allows a third party or the agent to possess, the evidence discloses that Charles Forni, one of the copartners in the Calistoga Vineyard Company, testified that Turner was employed to go among the growers for the purpose of soliciting grapes for consignment, and further testified that Turner acted for him at the receiving platform of the Southern Pacific depot, at Calistoga. The witness admitted that he purchased grapes during the year 1930. It also appeared that, about the time plaintiff claims to have had the agreement with Turner, Forni is alleged to have had a conversation with a brother of the plaintiff in the presence of Turner in which the brother informed Mr. Forni that Turner was offering $30 a ton for his grapes, and Mr. Forni is alleged to have said, "Yes, we are offering $30.00 a ton for them. I advise you to take it because it is a pretty good offer, and we have $30,000.00 in the bank, and you are sure of getting your money." The brother informed plaintiff of this conversation.

Plaintiff also claims that the authority of Turner was established by ratification, and in support of that the evidence discloses that when plaintiff had his grapes weighed he was given weight certificates showing delivery of his grapes to Calistoga Vineyard Company and the weight certificates were received by the weigh master of the Calistoga Vineyard Company. When the grapes were delivered at the shipping platform Turner directed plaintiff where they should be unloaded. Mr. Forni admitted that Turner was then acting for him at the depot. It also appears that the agent when making the agreement with plaintiff agreed to pay $500 on account at the time of delivery, and the company did pay the $500 upon delivery, all tending to indicate a ratification of the promise of the agent.

[9] Appellants claim that certain witnesses for respondent did not tell the truth and that their testimony was discredited. As to that we have nothing to say. The jury evidently believed the testimony and they are the triers of fact.

[10] Some point is made by appellants that the allegation in the complaint was that, if plaintiff would sell his crop to the Calistoga Vineyard Company, the company would pay to plaintiff $30 a ton, but at the trial plaintiff testified that the agent said "we will guarantee you $30.00 per ton." In view of the surrounding circumstances, the use of the word "guarantee" could be construed as synonymous with promise, and undoubtedly the jury so believed.

[11-14] Complaint is made of certain instructions and their order of presentation to the jury. The sequence in which instructions are given is a matter almost entirely in the sound discretion of the trial court, and it would require a very strong showing of deliberate prejudice before this court would consider such obligation. No such prejudice is even here intimated, the objection being the various instructions were not given in a logical order, thereby making it more difficult for the jury to follow. Complaint is made also that the judge grouped the instructions as those proposed by plaintiff and those proposed by defendants and those given by the court, and, before reading each group, announced to the jury by whom proposed. While this practice is frequently followed by trial judges, it is not to be commended. The instructions are the principles of law applicable to the facts of the particular case and are given by the court. Their applicability should not be affected by crediting them to either the one side or the other. We cannot, however, charge the practice as error.

We have examined the questioned findings together with all of the instructions given. It would serve no useful purpose to set forth the instructions complained of, for we are convinced that, even if the criticism were well founded, the giving of these instructions did not result in a miscarriage of justice. The case as a whole was fairly tried and fairly decided.

[15] Some of the criticism is directed at the giving of certain instructions submitted by appellants themselves as applicable to the first and second counts of the complaint as to which a nonsuit was granted. Before counsel can complain, they should have sought to withdraw such of their proposed instructions as they deemed applicable to the issues removed from the consideration of the jury by the granting of a nonsuit. It would be unfair to the trial court to permit counsel to submit instructions at large and later be heard to complain that such instructions had no application to the particular issues as finally submitted to the jury.

[16] The last objection urged by appellants is that the amount of the verdict was not supported by the evidence, the verdict of the jury being for $1,484.80. The action was for the value of 55 1/3 tons of grapes at $30 a ton, which would be $1,660; a cash advance of $500 was made which reduces the amount by that sum. However, should the jury have computed the interest from the time lapsing between the delivery of the grapes and the trial, it would amount to a sum slightly in excess of the judgment returned. We cannot say just what the process of reasoning, arithmetic, or dates by which the jury arrived at the amount of the verdict, but the amount as returned falls within the evidence in the case.

Finding no reversible error in the record, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

17 Cal.App.2d 284

PEOPLE v. HUNT.

Cr. 1528.

District Court of Appeal, Third District, California.

Nov. 2, 1936.

1. Infants ⚿20

Under information alleging that defendant committed certain lewd acts upon nine year old girl with intent of arousing, appealing to, and gratifying lust and passions and sexual desires of child "and" defendant, use of word "and" instead of "or," as in statute, *held* not to require proof that acts gratified desires both of child and defendant, since gist of crime is intent with which act is done and not its accomplishment (Pen.Code, § 288).

2. Infants ⚿20

Conviction under information charging violation of section of Penal Code relating to crimes against children would be sustained, notwithstanding evidence would have supported conviction under section relating to sex perversions had defendant been so charged, where there was ample testimony to establish commission of offense charged (Pen. Code, §§ 288, 288a).

3. Infants ⚿20

In prosecution for violation of section of Penal Code relating to crimes against children, testimony that at same time and place as commission of acts charged and in presence of each other, defendant committed same acts upon two of prosecutrix' playmates, *held* admissible, since such other acts were part of res gestæ (Pen.Code, § 288).

4. Criminal law ⚿365(1)

In prosecution for violation of section of Penal Code relating to crimes against children, refusal to give instruction that jury should disregard all evidence tending to prove commission of crime defined in section relating to sex perversions *held* not error, since such acts were admissible as part of res gestæ (Pen.Code, §§ 288, 288a).

5. Criminal law ⚿783½

Refusal to give instruction that one of several offenses could be proved under general charge, but that first evidence tending in any degree to prove one offense should be deemed selection of any number of other things involved, and when that precise offense should be proven to moral certainty, jury should disregard subsequent matters in evidence and render verdict of not guilty, *held* not error, since proposed instruction was ambiguous and did not express true rule as to election of offenses and instructed jury to disregard matters which were part of res gestæ.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

R. J. Hunt was convicted of the crime defined by Penal Code, § 288, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged with and found guilty of the crime defined by section 288 of the Penal Code, and from the order denying his motion for a new trial and from the judgment of conviction, he prosecutes this appeal.

[1] He first contends the evidence does not support the verdict. The information alleges that appellant committed certain lewd and lascivious acts upon prosecutrix, a nine year old girl, with the intent then and there of arousing, appealing to, and gratifying the lust and passions and sexual desires of the child *and* the defendant.

Appellant now claims that, having charged in the conjunctive rather than in the disjunctive, as is the language of the statute, it was necessary to prove that the acts gratified the desires both of the girl *and* the defendant. In this appellant is in error, the gist of the crime being the intent with which the act was done and not its accomplishment. People v. Bronson, 69 Cal.App. 83, 230 P. 213; People v. McCurdy, 60 Cal. App. 499, 213 P. 59. There was ample evidence in the record to support the implied finding of the jury on the question of intent.

[2] Appellant also contends the evidence was insufficient, in that it discloses that the appellant was guilty of certain sex perversions, as defined by section 288a of the Penal Code. While there is ample evidence in the record to have supported the conviction of appellant, had he been charged under section 288a of the Penal Code, nevertheless, there is also ample testimony to establish the com-

mission by him of the offense embraced within the provisions of section 288 of the Penal Code. A similar contention was made in the case of People v. Meyer, 94 Cal.App. 696, 271 P. 751, 752, and the court there said: "Continuing, the defendant quotes certain parts of the record which would tend to prove the commission of an assault to commit rape. In doing so he neglects to quote passages from the record which tend to prove the commission of a violation of section 288 of the Penal Code. Having given a one-sided view of the evidence, the defendant makes the claim that the defendant was guilty of an assault to commit rape, if anything, and therefore by the expressed language contained in section 288 of the Penal Code he was not properly charged under that section, that the evidence was insufficient, and that the verdict may not be sustained. However, as suggested above, there was evidence that the defendant violated the provisions of section 288 of the Penal Code and perhaps there was evidence that he committed an assault to commit rape. Under no logical reasoning was the latter offense a defense to the former."

[3] It was testified that at the same time and place as the commission of the acts charged in the information, appellant committed similar acts with two of the playmates of the prosecutrix. To the introduction of this testimony appellant objected, but, inasmuch as the evidence shows that the three little girls involved were all present at the same time, and that appellant then and there, in their presence, committed the same acts upon all of the children, such acts were part of the res gestæ and, under such conditions, the testimony was admissible. People v. Ciulla, 44 Cal.App. 719, 187 P. 46; People v. MacDonald, 53 Cal.App. 488, 491, 200 P. 491.

[4] Objection is made to certain instructions offered by appellant and refused by the court. Without setting these instructions forth, it is sufficient to say that the court committed no error. One referred to the use of the conjunctive in the information, which we have already referred to in this opinion. The second was to the effect that the jury should disregard all evidence tending to prove the commission of the crime defined by section 288a of the Penal Code, but such acts were admissible as a part of the res gestæ, and the jury had a right to consider them in that connection.

[5] The third instruction stated, in substance, that the people were at liberty to prove one of several offenses under a general charge, but the first evidence which would tend in any degree to prove one offense "shall be deemed a selection of any number of other things involved and when that precise offense is proven to a moral certainty and beyond all reasonable doubt," it was the duty of the jury to disregard the subsequent matters in evidence and render a verdict of not guilty. The proposed instruction is ambiguous and does not express the true rule as to the election of offenses. It also erred in instructing the jury to disregard subsequent matters in evidence, which clearly were part of the res gestæ.

The judgment and order from which the appeal is taken should therefore be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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17 Cal.App.2d 244

ANDERSON v. WESTERN PAC. R. CO. et al.

Civ. 9592.

District Court of Appeal, First District, Division 1, California.

Oct. 30, 1936.

Rehearing Denied Nov. 28, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

1. Negligence ⟹67

Plaintiff who in attempt to salvage scrap iron walked across public dumping ground to edge which was black, smoky, and smoldering and had no dirt covering *held* contributorily negligent, barring recovery for injuries sustained when bank caved off and plaintiff slid into smoldering fire in pit below dump.

2. Negligence ⟹122(1)

Law presumes person possessing normal faculties of sight and hearing must have seen and heard that which was within range of his sight and hearing.

3. Negligence ⟹66(2)

One who places himself in way of obvious and well-understood peril is guilty of contributory negligence which bars recovery of damages for injuries resulting therefrom.

4. Negligence ⟹134(1)

Evidence *held* to show that place where plaintiff, who fell into smoldering pit, was injured was public dumping ground, so that plaintiff's action for injuries sustained was governed by law of negligence relating to injuries sustained at public dumping grounds.

5. Negligence ⚷134(1)

In action for injuries sustained when edge of public dumping ground caved in while plaintiff was standing thereon attempting to salvage scrap iron, allowing plaintiff to slide into smoldering fire in pit below, evidence *held* to establish that there was no concealment or trap causing plaintiff's injuries.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Otto Anderson against the Western Pacific Railroad Company and others. Judgment was for the plaintiff against the defendant Pacific Gas & Electric Company and Meyer Rosenberg and L. Rosenberg, and defendant Pacific Gas & Electric Company appeals.

Reversed as to defendant Pacific Gas & Electric Company.

Prior opinion, 57 P.(2d) 542.

Thomas J. Straub, W. H. Spaulding, Clinton F. Stanley, and W. R. Dunn, all of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

PER CURIAM.

This is an action for damages for personal injuries consisting of severe burns which plaintiff sustained when he went on an open public dump to salvage some pieces of scrap iron. He walked across and to the edge of the dump to pick up the iron, and the bank caved off, precipitating him waist deep into a smoldering fire. The accident happened in the Islais creek reclamation district in San Francisco. All of the land in the immediate neighborhood had been used as a public dumping ground for many years. The particular block of land on which plaintiff was injured was divided into lots. They were separately owned, but the entire block was unfenced, and there were no markings on the land to identify the boundaries of the several lots. The complaint was filed some ten months after the accident happened, and the defendants named were several lot owners, among them being Western Pacific Railroad Company, Adelheid G. Schultze, C. L. Tilden, and Helen D. Umbsen; also Meyer Rosenberg and L. Rosenberg, and the Pacific Gas & Electric Company. The Rosenbergs held contracts with some of the lot owners to fill in their lots, and the Pacific Gas & Electric Company, with many others, had been dumping refuse on the land. Its refuse consisted of lampblack from one of its gas plants near by. Plaintiff subsequently dismissed the action as to all defendants except the Pacific Gas & Electric Company, the Rosenbergs, and Adelheid G. Schultze, and the jury trying the case rendered a verdict against the Pacific Gas & Electric Company and the Rosenbergs for $25,000, and to its verdict it added: "Exempting Adelheid Schultze defendant." From said judgment the Pacific Gas & Electric Company has taken this appeal.

Appellant contends: (a) That plaintiff was guilty of contributory negligence; (b) that one who dumps and abandons refuse to become a part of the realty at a public dump no longer has control of it and is not responsible for injuries to one who goes upon the dump to pick over the refuse; (c) that the plaintiff failed to prove facts showing a duty owed him by appellant to exercise care for his safety, in that he failed to prove that the accident happened at a place where appellant did not have the right by invitation to dump and was so clothed with rights as owner for that purpose as not to be obligated to exercise care for the safety of a trespasser or licensee; (d) that the court erred in the matter of instructions to the jury; and (e) that, in any event, the amount of the verdict is so excessive as to show passion and prejudice of the jury in the determination of the issues of fact submitted to it.

The northerly half of the block on which the accident happened contained four lots, and they were owned respectively by Adelheid G. Schultze, Helen D. Umbsen, C. L. Tilden, and Western Pacific Railroad Company. Respondent was admittedly a trespasser or at most a licensee on all portions of the lands within the block; but appellant's status was doubtless that of an invitee on all of said lots, with the exception of the Schultze lot, and as to that there is a serious dispute. The action was tried on the theory that the accident happened on the Schultze lot, but there is a great deal of uncertainty as to whether it happened there, or on the Western Pacific's property, or on the Umbsen lot, and the exact location of the accident becomes an important factor not only in determining what duty, if any, was imposed on appellant toward respondent, but also in passing upon appellant's assignments of error relating to the instructions. In other words, if the accident occurred on the Western Pacific or the Umbsen properties, respondent could recover from appellant only under the theory of a willful and wanton injury because appellant was an invitee thereon, and consequently was clothed with all the rights of the owner, so far as the question of negligence was concerned, Borgnis v. California-Oregon Power Co., 84 Cal. App. 465, 258 P. 394; Brust v. C. J. Kubach Co., 130 Cal.App. 152, 19 P.(2d) 845; Jacobson v. Northwestern Pacific R. R. Co., 175 Cal. 468, 166 P. 3; Leslie v. City of Monterey, 139 Cal.App. 715, 34 P.(2d) 837; Hamakawa v. Crescent Wharf, etc., Co., 4 Cal.(2d) 499, 50 P.(2d) 803; whereas, if it occurred on the Schultze property and appellant was not an invitee thereon, but was a trespasser, then respondent being also a trespasser or at most a mere licensee, the doctrine of ordinary negligence would seem to govern, Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353.

With respect to the question of the location of the accident, plaintiff did not know where it occurred, but in the complaint he alleged that it happened "623 feet west from Third Street and 355 feet north from Army Street," and counsel for plaintiff in his opening statement to the jury stated that his witnesses would establish the exact spot where it occurred. During the taking of the evidence, however, it developed that, if the measurements alleged in the complaint were correct, the accident happened on the Western Pacific's property or on the Umbsen property, and not on the Schultze lot. Thereupon respondent sought to prove the location by his brother, Ivar Anderson, who was with him at the time of the accident and who shortly afterwards took the measurements upon which the allegations of the complaint were based; but as will be seen from the following his testimony was most indefinite. Calling his attention to a large map of the block of land in question which defined the boundaries and specified the ownerships of the several lots, counsel proceeded with the examination as follows:

"Q. Can you point out the place on this exhibit No. 4, where it happened, as near as you can? A. Well, I couldn't—point out the exact spot?

"Q. Yes. A. That is kind of hard to say just the exact spot.

"Q. No, the approximate place as near as you can mark it with an 'X.' Mark it as near as you can remember. You marked it with a stake, did you? A. I did mark it with a stake.

"Q. You were back there a good many times afterwards? A. Yes, I was.

"Q. Mark it as near as you can remember, as closely as you can, as to the place where your brother caved in. A. Well, it isn't clear—

"Q. You understand this is Army Street (indicating), this is Indiana (indicating), and this is Minnesota (indicating), and this is Twenty-sixth (indicating). A. Well, I couldn't tell you just the exact spot—

"Q. Mark, please, as near as you can remember where it happened, within ten or fifteen feet; your very best knowledge and recollection of the place. A. As near as I can remember— * * *

"Q. Was it in this block? A. In this block.

"Q. Then mark the place.

"The Court: Just a second.

"Mr. Brown [counsel for plaintiff]: He says it was in the area on that block. A. In this area.

"Q. Mark it. A. I walked over it many times.

"Q. And point to the place as near as you can remember it, Mr. Anderson. A. As near as I can remember it, it would be somewheres in here. (The witness indicating.)

"Q. Mark it then with an 'X.' (The witness marks.) * * *

"Q. Is that 'X' in the place where it happened? A. Approximately."

The cross so placed on the map by the witness would fix the place of the accident at a point between 20 and 25 feet within the Schultze property line, northwesterly of the corner of the railroad's lot; and in explanation of the measurements set forth in the complaint he stated his measurements were correct but that they had been wrongly inserted in the complaint. Counsel for respondent then moved for, and was granted, permission to amend the complaint to conform to the proof; but in so amending no attempt was made to correct the measurements in the original complaint, nor even to fix the place of the accident on any particular lot. On the contrary, the effect of the amendment was that it happened somewhere within the north half of the block, which, of course, included not only the Schultze property, but also the lots owned by Umbsen, Tilden, and the Western Pacific Railroad Company.

[1] However, regardless of the question of the place of the accident and the merits of the other grounds urged for reversal, and even assuming that under the circumstances it may be reasonably inferred from all the evidence that appellant was guilty of some negligent act in dumping its refuse on said block, we are convinced that, as appellant contends, the evidence establishes as a matter of law that, in view of the dangers which were there clearly apparent, respondent was guilty of contributory negligence in deliberately walking over the black, smoky surface to the edge of the dump.

As stated, the land within the block had been used as an open dump for many years, and the débris was smoldering most of the time and emitting more or less smoke, especially around the edges. Respondent was not unfamiliar with the general condition in and around the dump because he formerly worked in that neighborhood and rode past the block two or three times a week. On the day in question he and his brother visited the dump shortly after the noon hour for the purpose of salvaging some pieces of scrap iron, and respondent, observing some iron near the edge of the dump, left the regular pathway followed by pedestrians in cutting across the block, and walked directly out across the dump to the edge to get the pieces of iron. There was a deep hole at the edge of the dump and the uncontradicted evidence proves that around the edge of the hole where respondent proceeded to walk there was a strip 8 or 10 feet wide and extending along the edge of the hole for a distance of 25 or 30 feet, which was black, smoky, and smoldering, and with no dirt covering. When respondent reached the edge, the bank caved off and he slid down the side into a smoldering fire below. His brother, who was just behind him, went to his assistance, but respondent was badly burned before he could be extricated.

[2, 3] In describing the dangerous appearance of the surface of this black strip near the hole, respondent's brother testified as follows:

"Q. What was the general character of the surface of the earth ten or twelve feet away from this hole? A. It was black and part white—grayish white.

"Q. Was it burning? A. Yes.

"Q. You could see that, could you? A. Yes, smoldering—smoke."

Furthermore, a witness for the respondent named Hovde, who was a short distance away when respondent slid into the hole and helped to remove him therefrom, in describing the same dangerous appearance of the ground near the hole, testified:

"Q. Let me ask you one question: Was there dirt piled over this stuff where the hole was and where you went down on the side? A. A little ways away from there it was rocks put on top.

"Q. Where he received his injuries, where he fell down on the side, there was no dirt on top of it? A. No, just black stuff. * * *

"Q. * * * While you were there did you see it smoking after the accident? A. Absolutely.

"Q. What color was the smoke? A. Well, there was plenty. * * *

"Q. How large a space was smoking there, where Anderson fell over the side? A. That is hard to judge.

"Q. What is that? A. Twenty or thirty feet, something like that, maybe less and maybe more. * * *

"Q. And that was along the edge of the dump which was smoking? A. Yes, sir."

And another of respondent's witnesses named Arsted, who arrived immediately after the accident, testified:

"Q. When was it that you walked across this material, this black material? A. The very same day that accident happened, because I went down to take a look at it.

"Q. It was at that time that you say you were afraid of falling down? A. Well, absolutely.

"Q. Why? A. I wouldn't go to the edge, because it was smoking that stuff; it was hot."

Moreover, respondent himself admitted that he saw the "black stuff" before he went upon it. The following is his testimony in this regard:

"Q. What was the color of the stuff on top, if you know? A. Black.

"Q. Black on top? A. Yes.

"Q. You are sure there was no dirt over it? A. No, no dirt over it. * * *

"Q. How far did you walk on the black stuff before the accident happened? A. Well, I cannot say exactly.

"Q. Well, approximately? A. Oh, maybe eight or ten feet.

"Q. And it was not until you got to the edge of the dump until it gave away with you? A. Yes, sir."

True, respondent on redirect examination testified to the effect that he did not see anything from which he could tell there was any fire below the ground, but nowhere did he deny that he did not see, as his witnesses stated they plainly saw, the smoke which was coming from this strip of "black stuff" over which he proceeded to walk to reach the edge of the hole. Respondent admitted that his eyesight was normal; and in this connection the law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992. Furthermore, it is a well-settled rule that one who places himself in the way of an obvious and well-understood peril is guilty of contributory negligence which bars recovery of damages for injuries resulting therefrom (Andrews v. Valley Ice Co., 167 Cal. 11, 138 P. 699); and it has been held in several other jurisdictions that, where one goes upon a public dump for purposes of his own, he assumes the risk of injury (Butz v. Cavanaugh, 137 Mo. 503, 38 S.W. 1104, 59 Am.St.Rep. 504, citing numerous cases). Therefore, since it appears that the evidence produced by respondent as well as his own testimony shows that he failed to exercise ordinary care for his own safety, and that his negligence in that regard constituted the proximate cause of his injuries, he is not entitled to recover damages therefor.

[4] There is some contention made by respondent to the effect that the place where he was injured was not an open public dumping ground; but the uncontradicted evidence proves that it was, and respondent so admitted at the trial. With respect thereto the record discloses the following:

"Q. [counsel for appellant in examining respondent]: Now, you knew this place where you were walking and where the accident took place was a public dumping ground, didn't you? A. Yes.

"Q. And you knew that how? How did you know that? A. Everything was dumped in there.

"Q. And you saw a dump sign there, didn't you? A. Well, that is some time back I have seen that, but not at the present time I did not see no dump sign.

"Q. You did not see any dump sign at the time? A. I cannot remember whether I did or not.

"Q. Well now, reading from the same statement [a deposition theretofore given by respondent]— * * * 'Q. But you knew it was a public dump ground? A. I assume it was, it said "Dump Open."'

"Mr. Brown [counsel for respondent]: We will admit that, we went all through that yesterday."

[5] The complaint alleges in substance and respondent contends that the situation there existing constituted a dangerous trap; but there was no evidence introduced from which any such conclusion may be drawn. On the contrary, the evidence without conflict proves that there was no concealment or trap whatever. The black substance over which respondent proceeded to walk was in plain sight, and he admits having seen it before he started across it. Farther back where the pathway ran across the block the refuse was more or less covered with dirt; but all of the witnesses, including plaintiff himself, testified that the strip of black substance over which he walked to reach the edge of the hole had no covering whatever over it. Moreover, there is no claim made that respondent fell through any crusted surface, respondent in this regard having admitted that he walked clear across the black substance to the edge of the hole, and that when he reached that point the bank caved in, causing him to slip down over the edge into the smoldering fire.

The judgment as to appellant is reversed.

ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO v. LELAND, Tax Collector, et al.*

Civ. 10324.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1936.

Hearing Granted by Supreme Court Dec. 31, 1936.

1. Constitutional law ⚷139

Generally, law in force at time of sale for nonpayment of taxes governs right of redemption, and redemption period may not be diminished or extended by subsequent legislation to prejudice of either landowner or purchaser at tax sale, but exception exists where state or one of its subdivisions is the purchaser.

2. Taxation ⚷696

Statute permitting property owners to pay delinquent taxes and assessments in installments thereby extending period of redemption *held* available to owner of land which had been sold to state for nonpayment of assessment for improvement work, notwithstanding expiration of period of redemption provided in improvement bond act (Gen. Laws 1931, Act 8209, § 12; Pol.Code, § 3817c4, as added in 1936).

◆

Original application for writ of mandate by the Anglo California National Bank of San Francisco, a national banking corporation, against Frances S. Leland, as Tax Collector of the County of San Luis Obispo, State of California, and others.

Writ of mandate granted.

Young, Hudson & Rabinowitz, of San Francisco, for petitioner.

M. R. Van Wormer, Dist. Atty., of San Luis Obispo, for respondents.

SPENCE, Justice.

This is an original application for a writ of mandate to compel the respondent officials of San Luis Obispo county to accept the tender of certain sums by way of payment upon delinquent taxes and assessments on real property of petitioner. The sufficiency of the tender made by petitioner is conceded in the event that petitioner was entitled to avail itself of the provisions of section 3817c4 of the Political Code, which was adopted by the Legislature at the special session of 1936.

Said section 3817c4 was adopted to grant relief to property owners by permitting them to pay delinquent taxes and assessments in installments and thereby to extend the period of redemption. It relates to "all taxes and assessments and annual instalments of assessments charged on the tax roll." It covers "all cases where real estate has been sold to the State on or before July 6, 1936 * * * and the State has not disposed of the same. * * *"

The refusal of respondents to accept the tender of petitioner is based upon the following facts: The property involved is located in what is known as assessment district No. 16. In 1930 and pursuant to the provisions of the County Improvement Act of 1921 (Stats. 1921, c. 872, p. 1658, as amended), which adopts and incorporates the Improvement Bond Act of 1915, as amended (Deering's Gen. Laws 1931, Act 8209), bonds were issued representing unpaid assessments for improvement work done within the district. Thereafter, the portion of the assessments which became due upon the property in question in the fiscal year 1932–1933 became delinquent and said property was sold on August 30, 1933, by operation of law and the declaration of the tax collector to the state of California. After the lapse of more than one year and in 1936, the respondent tax collector executed conveyances of said real property to the state of California, which conveyances were recorded on January 23, 1936. Respondents call attention to the fact that under the provisions of section 12 of said Improvement Bond Act of 1915, as amended, the property was subject to redemption within one year from date of sale only and that it is provided that the state holds the "title acquired at such sale" upon behalf of the county.

[1, 2] There are no headings in the briefs on file herein, but respondents' position is apparently summed up in the following paragraph: "We contend that the owners of the premises mentioned in the petition, not having redeemed within one year after the date of the sale, that year expiring August 30th, 1934, at that time the county acquired its title and had a vested interest in this property, which the State Legislature could not take away from it." We find no merit in this contention. It is manifestly an attempt by respondents to assert upon behalf of the county, which is merely a political subdivision of the state itself, the same rights

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*For subsequent opinion see 70 P.2d 937.

which a private person might acquire by purchasing upon a delinquent tax sale and awaiting the expiration of the period of redemption. It is generally held that the law in force at the time of a sale for nonpayment of taxes governs the right of redemption and that such period may not be diminished or extended by subsequent legislation to the prejudice of either the land owner or the purchaser at the tax sale. County of Los Angeles v. Rockhold, 3 Cal. (2d) 192, 44 P.(2d) 340, 100 A.L.R. 149. But this general rule may be said to have an exception where the state or one of its subdivisions is the purchaser. Board of Commissioners of Tippecanoe County v. Lucas, 93 U.S. 108, 23 L.Ed. 822; Essex Public Road Board v. Shinkle, 140 U.S. 334, 11 S.Ct. 790, 35 L.Ed. 446; Walker v. Ferguson, 176 Ark. 625, 3 S.W.(2d) 694, 695; McIver Abstract Co. v. Slaton, 178 Ark. 632, 11 S.W.(2d) 447; Grieb, County Clerk, v. National Bank, 252 Ky. 753, 68 S.W.(2d) 21; State v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Pace v. Wight, 25 N.M. 276, 181 P. 430; Warner v. Pile, 105 Kan. 724, 185 P. 1041, 1 A.L.R. 143. The distinction is clearly pointed out in Walker v. Ferguson, supra, 176 Ark. 625, 3 S.W.(2d) 694, at page 695, where the court said:

"Where lands are sold at a tax sale and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the state, or the instrumentality of the state, the obligation of which cannot be impaired by subsequent legislation extending the period of the right to redeem. Hence this court has held that the right to redeem in such cases from a tax sale is governed by the statute in existence at the time the sale is made, and no subsequent statute extending the period of time for the right to redeem is constitutional.

"The title acquired by the state, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. 37 Cyc. 1355, and Commissioners of Tippecanoe County v. Lucas, Treasurer, 93 U.S. 108, 23 L.Ed. 822. Hence the rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the state or one of its instrumental subdivisions was the purchaser."

We are therefore of the opinion that petitioner was entitled to avail itself of the provisions of section 3817c4 of the Political Code and that it was the duty of respondents to accept the tender made by petitioner. It is ordered that a peremptory writ of mandate issue directing respondents to accept payment for delinquent taxes and assessments upon the property described in the petition on file herein in the manner prescribed in section 3817c4 of the Political Code.

We concur: NOURSE, P. J.; STURTEVANT, J.

MERY v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al. *

Civ. 10325.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1936.

Rehearing Denied Dec. 4, 1936.

Hearing Granted by Supreme Court Dec. 31, 1936.

1. Contempt 🔑54(4)

Affidavit charging contempt must charge facts which show that a contempt has been committed.

2. Divorce 🔑269(10)

Rule that affidavit charging contempt for nonpayment of alimony need only allege making of order and refusal to comply therewith, when ability of the contemner to comply with order has already been determined, *held* not applicable, where affidavit was filed more than ten years after order.

3. Divorce 🔑269(10)

Affidavit charging divorced husband with contempt for nonpayment of alimony which stated only that divorced husband was able to pay amount due because he "is employed" *held* insufficient to show that contempt had been committed.

4. Contempt 🔑28(1)

Jurisdiction to punish for alleged contempt depends upon ability of delinquent party to comply with order when adjudication of contempt is made.

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*For subsequent opinion see 70 P.2d 932.

5. Divorce ⚷269(11)

In contempt proceeding charging divorced husband with failure to pay delinquent alimony, evidence *held* insufficient to establish ability to comply with order when adjudication of contempt was made, where husband's testimony as to his inability to pay full sum due was undisputed, since, if his testimony was not believed, there was no evidence before court on issue.

6. Prohibition ⚷5(2)

Prohibition will lie to restrain trial judge from punishing for contempt where delinquent party has no present ability to comply with order.

7. Divorce ⚷269(13)

Divorced husband *held* not subject to punishment for contempt for failure to make substantial payments upon delinquent alimony where he was cited for failure to pay entire sum due.

SPENCE, J., dissenting.

Original proceedings by Jacob L. Mery against the Superior Court in and for Alameda County, the Honorable James G. Quinn as Judge thereof, and another, for a writ of prohibition.

Writ issued.

Rehearing denied; SPENCE, J., **dissenting.**

Thomas D. Aitken, of San Francisco, for petitioner.

Myron Harris and R. J. Darter, both of Oakland, for respondents.

NOURSE, Presiding Justice.

This is an original proceeding in prohibition wherein the petitioner questions the jurisdiction of the respondent court to punish him for contempt for failure to meet payments of alimony.

The proceedings which the petitioner seeks to enjoin were based upon an affidavit made by his former wife. The vital question raised here is whether this affidavit states sufficient facts to give the court jurisdiction. It states that the original award was made on February 2, 1926, and modified (presumably) on February 14, 1930; that the sum of $10,860 had accrued under the order, of which $8,860 had been paid, leaving delinquent the sum of $2,000. In support of her charge that the petitioner was in contempt because of this delinquency the former wife alleged the petitioner had been able to comply with the order because he "is employed." No facts were stated showing upon what the affiant's conclusion was based, and no facts were shown at any of the hearings other than that petitioner had obtained United States bonds in payment of the veterans' bonus amounting to about $649, and that he was then employed at a salary of $100 a month.

[1-3] The settled rule is that an affidavit charging contempt is like a complaint in a criminal case and must charge facts which show that a contempt has been committed. 5 Cal.Jur., p. 938 et seq. Where the ability of the contemner to comply with the order has already been determined by the court, it has been held that it is only necessary that the affidavit allege the making of the order and the refusal to comply with it. In re McCarty, 154 Cal. 534, 98 P. 540; In re Rasmussen, 56 Cal.App. 368, 205 P. 72; 5 Cal.Jur. p. 941. The cases cited in support of the last statement both involved an affidavit filed soon after the order or judgment was entered. In such cases there is every reason for holding that the statement of the entry of the order or judgment is sufficient where the question of the ability to comply with the order was there determined. The unreasonableness of such a rule in a case such as is presented here, where the affidavit in question was filed more than ten years after the order, must be obvious, because an adjudication of the defendant's ability to pay in 1926 is no sound proof of that fact under the conditions existing in 1936. Here the petitioner was charged with contempt for failure to pay the accrued sum of $2,000 with no statement of facts showing his ability to pay other than that he "is employed." He was not cited to defend the claim that his veterans' bonus was subject to execution to pay this pre-existing debt, nor the claim that, because his second wife was employed, he should look to her alone for his support and use his own wages in payment of the alimony judgment, nor with the claim that an automobile used by him should be dispensed with. He was cited to show why he should not be punished for contempt for the failure to pay the accrued sum of $2,000 and not merely a part of that sum, and the only allegation upon which that citation was based was that he was able to pay that sum because he "is employed." This falls far short of a statement of facts showing that a contempt has been committed, particularly a contempt justifying the order of commitment which the respondent court threatens to make.

[4, 5] But, if the affidavit is sufficient to initiate the contempt proceedings, the jurisdiction to punish for the alleged contempt hinges upon proof that the defendant has the ability to comply with the order when the adjudication of contempt is made. Following several hearings from which it appeared that the petitioner was without employment and without funds for several years following the depression of 1930, the respondent court found that he was in contempt for failure to comply with the order "he having heretofore had the ability and having failed and neglected to do so." This finding was made upon evidence showing that the petitioner was then employed at a salary of $100 a month, but with no showing as to how long he had been employed, and that he had received over $600 in veterans' bonus bonds which he had partly used in the payment of other debts. The undisputed evidence is that, for several years after the entry of the original order, the petitioner paid the sum of $100 a month as awarded and that in 1930, by mutual agreement, he paid but $30 a month. This continued until the order to show cause was issued. All the testimony given by petitioner relating to his ability to pay was undisputed. If the trial court did not believe him, then there was no evidence before the court on that issue. Myers v. Superior Court, 46 Cal.App. 206, 189 P. 109; Merritt v. Superior Court, 93 Cal.App. 177, 181, 269 P. 547, 548. If his testimony is taken as true, he has no property with which to comply with the order except his salary of $100 a month, his veterans' bonus, and some stock of unknown value. Since he was cited for failure to pay the sum of $2,000, he cannot be held in contempt except upon evidence of ability to perform that which he is charged with a failure to do. The precise situation was presented in Merritt v. Superior Court, supra, where the court said: "It is quite true that he cannot live luxuriously and thus depreciate his ability to pay, and it is equally true that he must live in such a manner as to be able to earn and draw his salary. The courts have uniformly recognized necessary expenses as legitimate in order to arrive at the net income as a basis for determining one's ability to comply with the order. Snook v. Snook, 110 Wash. 310, 188 P. 502, 9 A.L.R. 262; Holcomb v. Holcomb, 53 Wash. 611, 102 P. 653. The testimony, being insufficient to support a finding that petitioner had the ability to comply with the order of the court, certainly cannot support a recital that such a finding was made, even if the recital were regarded as a finding." Hence, whether we call the entry pleaded in the return of the respondent court a finding or a recital, the same result follows because neither is supported by any competent evidence.

[6] That prohibition is the proper remedy is another question which was decided adversely to respondent in the Merritt Case, where, 93 Cal.App. 177, on page 182, 269 P. 547, other authorities are cited to the same effect.

[7] There is, therefore, no factual or legal support for the contempt order. The conceded facts are that petitioner is unable to pay the amount demanded. There is no denial of the allegations in the petition that, unless this sum is paid, the respondent court will order petitioner confined in the county jail because of the alleged contempt. It has been suggested that, notwithstanding this failure of proof, the showing was sufficient to support a commitment for failure to make "a substantial payment" on the amount due. The respondent court alleges in the return that on July 17, 1936, an order was entered reading in part: "Defendant is directed to make substantial payments and said matter is ordered continued to July 31st, 1936, at 2 p. m. for further hearing." If the contempt consists of the failure to make some payments on account of the amount due, the petitioner's answer is that he was not cited on that ground. In re McCarty, supra. The Supreme Court held in the latter case that a refusal to comply with an order made during the hearing requiring partial payments was a separate contempt and required a new affidavit and hearing. If it should appear in another proceeding that he is able to pay some part of that found to be due, the petitioner could then be heard on his defense of waiver and upon the question of the claim of exemption of the bonus bonds, but here we are only concerned with the one issue that, upon the conceded facts, the contempt order exceeded the jurisdiction of the lower court.

The peremptory writ will issue.

I concur: STURTEVANT, J.

SPENCE, Justice.

I dissent. The respondent court had general jurisdiction to punish for contempt for disobedience of its orders. Code Civ. Proc. § 1209, subd. 5. The conclusion that it was acting or threatening to act "without or in excess of the jurisdiction" in the present case (Code Civ.Proc. § 1102), is based upon alleged insufficiency of the affidavit and the alleged insufficiency of the evidence in support thereof. I find no insufficiency in either.

The affidavit showed that petitioner had disobeyed the order for the payment of $100 per month for the support of his minor children, which order was made in 1930 upon stipulation of the parties. Assuming, for the purpose of this discussion only, that it was necessary to allege that petitioner had been able to comply with the order (see In re McCarty, 154 Cal. 534, 98 P. 540; In re Rasmussen, 56 Cal.App. 368, 205 P. 72), the affidavit contained a direct allegation to that effect. This was the allegation of the ultimate fact and was sufficient. The mere fact that the probative fact, "Defendant is employed," was also alleged could not affect the jurisdiction of the trial court.

Turning to the evidence, it will also be assumed for the purpose of this discussion only that the burden of proving petitioner's ability to pay was upon his former wife. See In re McCarty, supra; In re Rasmussen, supra. The evidence produced was sufficient to show that petitioner had disobeyed the order over a long period of time when he had the ability to pay more than $30 per month, but paid only that amount. He did not claim to have been unemployed after 1932. Assuming, as testified by petitioner, who was a mechanical engineer, that his personal earnings were but $100 per month and that his present wife's earnings were $35 per week, all of said income was community property. This showed community income of approximately $250 per month. Petitioner's testimony regarding living expenses, including $20 per month for operating an automobile which did not appear to have been required in his business, showed that he could have paid much more than $30 per month in an effort to comply with the court's order. In addition, it appeared that he owned said automobile and also owned a one-fifth interest in the Chico Iron Works. While petitioner testified that this interest in the ironworks produced no income at the time, he did not testify that it was without substantial value. It is unnecessary to consider the disposition of the proceeds of the so-called bonus bonds, amounting to $649. It may be stated, however, that petitioner gave conflicting testimony on this subject at the various hearings, but finally admitted that he had turned the proceeds over to his present wife and could get it back. The foregoing evidence was sufficient to support an adjudication of contempt and to warrant punishment under the provisions of section 1218 of the Code of Civil Procedure. This is all that the respondent court was threatening to do as appears from its finding or recital in the minute order that "he (petitioner) having heretofore had the ability and having failed and neglected to do so." This is a finding or recital relating to what may be termed a past contempt rather than to a continuing contempt.

The majority opinion proceeds upon the theory that the trial court's jurisdiction "hinges upon proof that the defendant has the ability to comply with the order when the adjudication of contempt is made." It assumes that, unless the evidence shows a present ability to pay the entire sum of $2,000, then the respondent court has no jurisdiction to proceed to punish for contempt. This might be true if the respondent court was threatening to punish petitioner for a continuing contempt by imprisoning him under section 1219 of the Code of Civil Procedure until he had fully complied with the order. But no such threat is alleged herein and the record indicates that the respondent court has no such intention. In my opinion, the evidence is sufficient to show that petitioner had the ability over a long period of time to pay more than $30 per month for the support of his children and willfully disobeyed the order of the court by failing and neglecting to pay more than that amount. This is all that should be required to show a past contempt punishable under said section 1218, and the question of petitioner's present ability to pay $2,000 or any other amount is not of controlling importance in this proceeding.

It is apparent from petitioner's allegations herein, as well as his alleged defense in the trial court, that he is relying mainly upon an alleged waiver evidenced by a letter written to him by his former wife in 1934. He had apparently written her and claimed that he was unable to pay more than a certain amount per month at that time. She replied by suggesting that they get together, talk it over, and endeavor to straighten things out by themselves without the aid of counsel. She indicated that she would be willing to agree to "a new bases." In the meantime, the wife suggested that he send what he could, but not less than the amount mentioned in his letter. She further stated: "The old debt we will work out when I see you—I think it can be done painlessly." It does not appear that the parties met and agreed as suggested, and this letter itself certainly cannot be regarded as a waiver of the rights of the wife under the former order.

In my opinion the trial court was not acting, or threatening to act, without or in excess of its jurisdiction. On the contrary, it appears that, acting within its jurisdiction, it had dealt very fairly with petitioner and had given him every opportunity to show an inclination to obey the lawful order of said court based upon petitioner's own stipulation. The alternative writ should be discharged, and petition for a peremptory writ should be denied.

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17 Cal.App.2d 319

McLAUGHLIN v. HAMMOND HALL et al.

Civ. 11012.

District Court of Appeal, Second District, Division 1, California.

Nov. 4, 1936.

1. Schools and school districts ⇨7

Where headmaster of private school, who was employed for one year under written contract, resumed duties at beginning of succeeding school term and was discharged after one month and paid for month's services according to terms of contract, presumption applied that headmaster was employed for second year at rate of compensation received during first year, regardless of when first year's employment ended (Civ. Code, § 2012).

2. Schools and school districts ⇨7

Where headmaster of private school, who was employed for one year under written contract, resumed duties at beginning of succeeding school term, and was discharged after one month and paid for month's services according to terms of contract, trial court, in headmaster's action for damages, should have found that there was employment for second year, in absence of evidence to overcome presumption that headmaster was employed for second year at rate of compensation received during first year (Civ. Code, § 2012).

3. New trial ⇨61

Headmaster of private school under written employment contract for one year who did not recover in action for damages for breach of contract for dismissal in second year *held* entitled to retrial of action where evidence warranted finding that there was employment for second year, and no finding was made as to employers' claim that sufficient cause existed for dismissal.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by De Witt T. McLaughlin against Hammond Hall and others, doing business as Hammond Hall. From a judgment for defendants, plaintiff appeals.

Reversed.

Combs & Combs, and Combs, Fritz & Murphine, all of Los Angeles, for appellant.

Hazlett & Plummer, and Robert J. Sullivan, all of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiff brought this action to recover damages for the alleged breach of an agreement under which, as he claims, he was employed as headmaster of a private school operated by defendants, from which employment he was discharged. The case was submitted upon the sufficiency of plaintiff's proof to establish a contract of employment; judgment went for the defendants, from which plaintiff appeals.

The original complaint alleged that by a contract partly in writing and partly oral, plaintiff was employed for a period of two years at a salary of $1,800 per year, payable at the rate of $200 per month for nine months, with certain living accommodations during the school year and summer vacation period, meals for his family and a servant during the school year, and schooling for his daughter without charge. By an amended complaint filed at the close of the trial it was alleged that the employment was for one year and that at the expiration of that period the parties proceeded into the second year without any new arrangement and so continued until plaintiff was discharged without cause. In both the original and the amended complaints it was alleged that the contract was fully performed throughout the first year.

The court found: "That there was no mutual, valid or binding written agreement between the parties hereto relative to the employment of the plaintiff by defendants." If this finding related to the alleged contract of employment for a two-year period, it was correct. But, read literally, as it must be, it is a finding that there was no agreement whatever between the parties, and is entirely without support in the evidence. There was a written agreement evidenced by letters which passed between the parties which expressly stated that plaintiff was employed for a period of one year as headmaster of defendants' school at an annual salary of $1,800 payable at the rate of $200 per month for nine months; that plaintiff should also receive living quarters at the school for himself and family during the school year 1934–35 and also during the summer of 1935, together with free meals for himself, his wife and daughter. All of these terms were clearly stated in the writings. This agreement was fully performed and in addition to the compensation stipulated, plaintiff's maidservant received meals and his daughter received free schooling. Plaintiff and his family occupied living quarters on the school grounds during the summer of 1935, during which time plaintiff devoted himself to the preparation of school work for the coming year. He commenced the second year as headmaster and worked during the month of September, 1935, and until he was discharged on October 5th. He was paid at that time $200 salary for one month's services and $12.50 as an allowance upon meals. All of these facts appear without dispute.

The contention of defendants is that plaintiff was not employed for any definite time, but this position is untenable, as it clearly appears from the writings that the original employment was for one year. It is also contended that the agreement was one which was required to be in writing, and this would be true of the contract alleged in the original complaint, but by his amended complaint plaintiff claimed only employment for one year, and even this agreement, as we have seen, was reduced to writing. It is true that plaintiff received greater compensation than was stipulated in the written agreement, namely, meals for one maidservant and schooling for plaintiff's daughter. It matters not whether these terms were inadvertently omitted from the written agreement or whether the agreement was later modified, for, if there was an oral modification, the agreement as modified was fully executed by the parties. Any uncertainties that may have existed in the beginning as to the terms of plaintiff's employment were removed when plaintiff gave his services throughout the first year in return for the compensation which defendants voluntarily paid.

[1, 2] At the conclusion of the trial, plaintiff's position was that there was a valid contract for a single year and that without further agreement the relation of master and servant was continued after the expiration of the agreement. He relies upon section 2012 of the Civil Code, which reads as follows: "Renewal of hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." It would seem as though this section has direct application. There may be room for doubt as to when the first year's employment ended; whether it was when the school sessions ended in June or at the time they were resumed in the fall; but we think that this question is not important. Certainly the second year's employment began as early as the commencement of school in the fall and at that time at least plaintiff entered upon the second year of his services. The presumption, therefore, applies that plaintiff was employed for a second year at the rate of compensation he had received during the first year. Gabriel v. Bank of Suisun, 145 Cal. 266, 78 P. 736; Henkel v. J. J. Henkel Company, 212 Cal. 288, 298 P. 28; Williams v. Schalk Chemical Company, 11 Cal.App.(2d) 396, 53 P.(2d) 1015. No evidence was produced to overcome this presumption. Upon the evidence before the court, which consisted almost entirely of that presented by plaintiff, the finding should have been that there was an employment for a second year.

[3] No finding was made as to the claim of defendants that sufficient cause

existed for plaintiff's dismissal. The action therefore must be retried.

The judgment is reversed.

We concur: HOUSER, P. J., DORAN, J.

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17 Cal.App.2d 323

In re CLARK'S ESTATE.

Civ. 11191.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1936.

Rehearing Denied Nov. 27, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

1. Wills 🔑439, 450

Interpretation of clause of will must be made in light of rule that intention of testatrix must be followed, and in view of statutory provision that words of will are to receive interpretation which will give some effect to every expression, rather than one which will render any of expressions inoperative (Probate Code, § 102).

2. Wills 🔑661

Under will, whereby testatrix bequeathed to beneficiary $15,000, provided beneficiary "shall 'at' or prior to my decease fully pay and discharge all indebtedness owing by him to me," beneficiary *held* required to pay debt within reasonable time after decease of testatrix in order to receive legacy as against contention that indebtedness was required to have been discharged prior to decease of testatrix (Probate Code, § 102).

> Word "at" is word of great relativity and elasticity of meaning, being somewhat indefinite and shaping itself easily to varying contexts and circumstances, and taking its color from circumstances and situation under which it is necessary to apply it, the use of the word usually negativing idea that precision or exact coincidence is intended either of place or time; as used to fix time, the word does not necessarily mean eo instanti, or punctum temporis, or identical time named, or even fixed definite moment, but expresses relation of direction toward presence and nearness in either time or place, and does not demand exact coincidence as to either; the word primarily denoting simple occupancy of point in space, whence arise numerous allied and figurative meanings, including on, upon, after, near, upon the coming of, on the happening of, on occasion of.
>
> [Ed. Note.—For other definitions of "At," see Words & Phrases.]

3. Appeal and error 🔑1008(1)

Whether legatee's indebtedness to testatrix had been paid within reasonable time after death of testatrix so as to entitle legatee to legacy under provision of will was question primarily for trial court in which petition for ratable distribution and ratable payment of legacies was filed.

4. Wills 🔑661

Legatee's delay in paying debt owed testatrix after death *held* not unreasonable so as to preclude legatee's participation in distribution of estate under provision of will requiring payment within reasonable time, where testatrix died September 8, 1934, and legatee offered to pay debt in letter dated October 19, 1934, as result of correspondence commenced within one month from death of testatrix, and petition for ratable distribution and determination of persons entitled to specific legacies was filed July 20, 1935.

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of Sarah Louise Clark, deceased, wherein a petition was filed for ratable distribution and ratable payment of legacies upon which Harriett C. Eckett and others opposed the payment of a legacy to Webster C. Clark. From an adverse order and decree, Webster C. Clark appeals.

Reversed.

Prior opinion, 61 P.(2d) 73.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Robert F. Schwarz and Frederic H. Sturdy, both of Los Angeles, of counsel), for respondents.

WOOD, Justice.

This appeal presents for determination the interpretation to be given to a clause in the will of Sarah Louise Clark, deceased. The will was dated March 6, 1934, at which time Webster C. Clark was indebted to the testatrix for money loaned to him by her deceased husband in the sum of $57,000, and for which he gave his renewal note March 31, 1934. Certain interest payments were made upon the indebtedness and the principal was reduced by the sum of $3,000, so that at the date of the death of Sarah Louise Clark on September 8, 1934, Webster C. Clark was still indebted to her on account of the obligation in the sum of $54,000. Of the residue of her estate the testatrix gave to seven persons various sums in cash. Then follows the eighth clause as follows: "(8) To said Webster C. Clark the sum of Fifteen Thousand Dollars ($15,000), provided said Webster C. Clark shall at or prior to my decease fully pay and discharge all indebtedness owing by him to me as beneficiary under or distributee of my late husband's estate or otherwise. Should the said Webster C. Clark fail to fully pay and discharge such indebtedness at or prior to my decease, then said Webster C. Clark shall take nothing under Paragraph Fourth of this, my last will and testament, and I hereby give, devise and bequeath said sum of Fifteen Thousand Dollars ($15,000) to Mrs. Jennie Knapp, Mrs. Harriett Eckett, Mabel Elston, Esther Louise Elston, Mrs. Maude Dunne, Virginia Dunne, and Margaret Dunne, in the same proportions that the amounts I have hereinabove given and bequeathed to them respectively in clauses (1) to (7) inclusive of this paragraph Fourth bear to the aggregate of such amounts." Upon petition for ratable distribution and ratable payment of legacies the trial court held that the bequest to Webster C. Clark was conditioned upon his discharging his indebtedness to the testatrix within her lifetime, and that, not having done so, he was entitled to nothing. He appeals from the resultant order and decree which denied to him participation in the distribution of said estate.

[1, 2] The interpretation of the clause in dispute must be made in the light of the rule that the intention of the testatrix must be followed and in view of section 102 of the Probate Code: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." To sustain the contention of respondents we must hold that the words "Should the said Webster C. Clark fail to fully pay and discharge such indebtedness at or prior to my decease" should be interpreted to mean: "If the said Webster C. Clark shall have fully paid and discharged such indebtedness prior to my decease." The testatrix did not use such language, but provided that the debt could be paid "at or prior to her decease." The words "at or" cannot be disregarded. The interpretation requested by respondents fails to "give to every expression some effect." The testatrix could not have intended that the debt be paid at the instant life would be departing from her body. Payment at such a time would be utterly impossible. The only reasonable interpretation which gives "some effect" to the words "at or" is that Mr. Clark must pay the debt within a reasonable time after the decease of the testatrix in order to receive the legacy. An argument that the same result would be reached by operation of law and that the condition adds nothing to the testamentary provisions does not justify the court in disregarding any words contained in the will or in giving the will a meaning not intended by the testatrix. It is a matter of common knowledge that makers of wills very frequently include testamentary provisions which would be made effective by operation of law if they had been omitted.

Counsel have not cited cases in which the word "at" has been construed when used in testamentary dispositions, but many cases have been recorded in which the word has been construed when used in other situations. A general statement is found in Corpus Juris, vol. 5, p. 1422: "It is a word of great relativity and elasticity of meaning, and is somewhat indefinite, shaping itself easily to varying contexts and circumstances, and taking its color from the circumstances and situation under which it is necessary to apply it to surrounding objects. It is not a word of precise and accurate meaning, or of clean, clear-cut definition, and it has been said that the connection furnishes the best definition." And on page 1423: "The use of the word usually negatives the idea that precision or an exact coincidence is intended, either of place or time. As used to fix a time, it does not necessarily mean eo instanti, or 'punctum temporis,' or the identical time named, or even a fixed, definite moment. In short, the word expresses the relation of direction toward, presence, and nearness in either time or place, and does not demand an exact coincidence as to either." See Rogers v. Burr, 97 Ga. 10, 25 S.E. 339; Rice v. Kansas Pacific R. R., 63 Mo. 314. The following appears in the Standard Dictionary: "*At* primarily denotes simple occupancy of a point in space; whence arise numerous allied and figurative meanings, as of time, direction, etc., by which the word partakes of the meaning of numerous other prepositions and prepositional phrases." Thereafter in the different paragraphs the following definitions or synonyms appear: "On, upon, after, near, upon the coming of, on the happening of, on occasion of."

[3, 4] Respondent's contention that appellant's legacy has lapsed for failure to pay the indebtedness within a reasonable time cannot be sustained. This question is primarily for the determination of the trial court, and the record does not disclose that the trial court made a definite finding on the issue. Moreover, the circumstances before the court presented sufficient justification for the delay. Mr. King, one of the executors, is a lawyer. Within a month from Mrs. Clark's death appellant wrote to Mr. King concerning the clause in dispute and stated: "I would like very much to have an interpretation of this point from you." Under date of October 15, 1934, Mr. King wrote the appellant, giving an interpretation adverse to appellant's contention. On October 19, 1934, appellant sent a letter to Mr. King in which he stated: "Another consideration pointed out by my attorney is this: my indebtedness was large, was current, and was in process of gradual liquidation; the interest was always paid promptly. I was, therefore, proceeding in the matter in accordance with previously prevailing custom and in accordance with my legal position. There had been no disputes nor arguments about the indebtedness and there was nothing to lead me to suppose that the attitude of the parties toward it had experienced a change. Under these circumstances it is not reasonable to suppose that the testator intended to prepare a secret pitfall for my feet, leaving me in a position where all unknown to me valuable rights were to be lost to me, if I did not do certain things that I was under neither legal nor moral compulsion to do under the circumstances. Such being the construction placed by my counsel upon the will, will you please construe this letter as a tender of payment of my indebtedness to the estate made pursuant to section 1493 and following of the Civil Code of the State of California. I hereby offer to pay my entire indebtedness to the estate in due course of administration, conditioned, however, upon the construction of the will, and particularly the eighth subdivision of the fourth paragraph thereof to this effect: that upon payment of my indebtedness to the estate in due course of administration I am entitled to the legacy provided by that subdivision of that paragraph." This letter was answered by letter dated April 15, 1935, in which Mr. King expressed the belief that the legacy had failed and further stated: "It is clear to me that a possible dispute as to the validity of your contention is solely between you on the one hand and Mrs. Knapp, Mrs. Eckett, the Elstons and the Dunnes on the other hand, and is not primarily my affair. I have written Mrs. Knapp, Mrs. Eckett, the Elstons and the Dunnes, sending them copies of our correspondence on this matter and asking them what positions they will take. As soon as I have heard from them I shall write you again. We have proceeded and are proceeding with the routine of administration on the theory that your contention as to the legacy may or may not be well founded, and we do not propose at any time to take any steps which will unfairly prejudice your collection of any sum legally due you." The petition for ratable distribution and to determine the persons entitled to the specific legacies was filed on July 20, 1935. The delay in paying the indebtedness has not been unreasonable.

The order is reversed.

I concur: CRAIL, P. J.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing filed by the executors and others on November 25, 1936, is denied.

The order of this court of November 4, 1936, is modified to read:

"The portions of the order appealed from not affirmed by the Supreme Court by its order of July 20, 1936, are reversed.

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17 Cal.App.2d 338

YOUNG v. BRIGGS et al.

Civ. 1991.

District Court of Appeal, Fourth District, California.

Nov. 4, 1936.

1. Appeal and error 🔑337(2)

Where no findings of facts or conclusions of law were signed or filed, nor was a formal judgment rendered or entered, and findings of fact were not waived, order vacating prior orders and awarding plaintiff a trial by jury on specified issues presented by defendants *held* not appealable as an order granting a motion for new trial, since order was made before judgment and was reviewable on appeal from the judgment (Code Civ.Proc. § 656; § 963, as amended by St.1933, p. 2472).

2. New trial ⚷½

Motion for new trial is statutory remedy which is controlled by statutes and must be made under authority of statutes.

3. New trial ⚷116(1)

Motion for new trial cannot be made until findings of fact have been signed and filed as basis of final judgment (Code Civ.Proc. § 656).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Juel Young against Morton P. Briggs and William Campbell. On motion by plaintiff to dismiss an appeal from an order vacating a prior order and directing that all issues of the cause be tried before a jury.

Appeal dismissed.

Wright, Monroe, Thomas & Glenn, of San Diego, for appellants.

Kenneth J. Murphy, of Los Angeles, and Stickney & Stickney, of San Diego, for respondent.

MARKS, Justice.

This is a motion to dismiss an appeal from an order vacating a prior order and directing that all issues of the cause be tried before a jury.

Plaintiff maintains that the order from which the appeal is taken is not an appealable order. Defendants argue that the effect of the order was to grant a new trial upon one issue of the case and that it must be considered as an order granting a new trial in a case "where a trial by jury is a matter of right" (section 963, Code Civ.Proc., as amended by St.1933, p. 2472), and an order from which an appeal lies under the provisions of that section.

The situation presented by the record, on the motion to dismiss, is novel, and requires a detailed statement of facts to properly understand the question presented for decision.

The plaintiff instituted this action to recover damages for injuries received in an automobile accident which happened on July 6, 1935. Defendants Briggs and Campbell, to whom we will refer as the defendants, appeared, and, by way of special defense, alleged in paragraph five of their answer:

"That on the 9th day of July, 1935, and after said collision, for a valuable consideration paid on behalf of the defendant, Morton P. Briggs, this plaintiff released said defendant from any and all claims of every nature suffered by plaintiff on account of said collision and said accident."

Plaintiff regularly demanded a jury trial and paid the necessary jury fees and the cause was set down for trial before a jury.

On March 14, 1936, defendants filed a written notice of motion "for an order to separately try the issues raised by paragraph V of defendants' answer and the separate defense therein contained, to-wit, whether prior to the commencement of the above-entitled action plaintiff and defendants settled and compromised the claim of the plaintiff and whether plaintiff at that time executed a release, releasing the defendants from all liability herein. Said motion will be made upon the ground that the matters set forth and relied upon in said separate defense are matters not susceptible of any conflict of evidence but involve issues of law, and that any issues to be determined therein are not issues properly susceptible of trial by jury but are equitable matters proper to be determined only by the court, and that the separate trial of such issues will simplify and expedite said cause, will simplify the remaining issues involved in said action or will constitute a settlement and adjudication of the entire controversy."

Affidavits in support of and in opposition to the motion were filed by the parties.

The motion came on for hearing on March 23, 1936, in the department of the presiding judge and the minutes of the court show that "upon argument and submission said motion is granted as more fully appears in the order signed and filed herein." The written order contained the following:

"It Is Therefore Ordered, Adjudged and Decreed that the issues raised by paragraph V of Defendants' answer and the separate defense therein contained, to-wit, whether prior to the commencement of the above action plaintiff and defendants settled and compromised the claim of the plaintiff and whether the plaintiff at said time executed a release, releasing the defendants from all liability herein, and whether said release, if so executed, was binding and effective. be separately tried and determined by the Court alone, separate from a determination of the other issues involved in this action by the jury.

"It Is Further Ordered that the manner and time of the trial and determination of said issues shall be determined by the trial department of this court to which this cause be hereafter transferred for trial, and that said issues may be determined and adjudicated at such time and in such manner as may appear to such trial department to be most convenient and expedient."

Under date of March 25, 1936, the minutes of the trial department show that the parties appeared in person and with counsel. A jury was impaneled, was admonished, and was excused from the courtroom with instructions to return at the call of the court. Argument was had on the order of March 23, granting a separate trial of the issue of the release, and on the following day the court, without the attendance of the jury, proceeded to try the validity of the release over the strenuous objections of plaintiff. The minutes show that witnesses for both parties were sworn and testified and that "said special issue is argued by respective counsel, submitted for decision, and by the Court it is ordered that the defendants have judgment against the plaintiff. Defendants' counsel to prepare findings accordingly. At the hour of 5:23 p. m. the jury returns into court, and the cause having been disposed of by the Court, the jury is excused from further consideration of said cause."

Under date of May 16, 1936, the minutes of the trial department show the following:

"On this day comes counsel for the respective parties as appear of record, and on the Court's own motion the above entitled cause is reopened for further argument and consideration. Said cause is now further argued by counsel for the respective parties, submitted for consideration and decision and by the Court said cause is taken under advisement."

Under date of May 21, 1936, the trial judge signed and there was entered the following order:

"The above matter was regularly called for trial before a jury, Hon. Clarence Harden, Judge presiding in Department #1 of the above entitled Court, on the 25th day of March, 1936. A jury was duly and regularly impaneled and sworn; thereupon the defendants moved the Court to try the issue of the validity of the release pleaded in the answer before the Court and in the absence of the jury on the ground that said issue did not involve any questions that should be submitted to a jury. Said motion of the defendants was granted and the order theretofore entered on March 23, 1936, was reaffirmed and over the objection of the plaintiff the jury was excused from the court room, subject to call, and thereupon the Court, still over the objection of the plaintiff, received evidence in the absence of the jury on the issue of the validity of said release, and on March 26, 1936, said issue was submitted to the Court for decision and the Court on said date announced its oral decision and dismissed and discharged said jury from further attendance, all over the objections of plaintiff.

"The case having been re-opened for further argument and consideration, and the matter having been further argued on May 16, 1936, before the signing or filing of any written findings of fact or conclusions of law, and submitted on said date, the Court finds that the evidence received at the trial of the issue of the validity of said release discloses that on some of the questions involved the plaintiff is entitled to a jury trial as a matter of right, and that it is impracticable to try the issues separately and that the plaintiff has not waived her right to a jury trial on all the issues.

"Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That the order of March 23, 1936, and the subsequent order for a separate trial of the issues in this action be and the same are hereby vacated and set aside. It Is Further Ordered that the plaintiff have and she is hereby granted a trial by jury on all the issues involved in this action."

[1] Defendants maintain in effect that the minute order of March 25, 1936, has the effect of a final judgment in their favor and that the signed order of May 21, 1936, has the effect of granting plaintiff a new trial. No findings of fact or conclusions of law were ever signed or filed nor was a formal judgment ever rendered or entered. Findings of fact were not waived.

In 14 California Jurisprudence, 916, we find the following:

"A judgment prepared and signed by the judge is not effective until it is filed with the clerk. Until then it is but a purpose in the breast of the judge which can be changed as he may determine. Whether he deposits in the postoffice to be transmitted to the clerk or himself carries it in person to the office of the clerk is immaterial. Until it is filed it does not become a record in the case and consequently is not a judgment. It has been held that a decree signed by the judge and filed with the clerk is effective notwithstanding the latter's failure to enter it. This ruling, however, must be considered in connection with the discussion elsewhere herein, of the necessity for entry of judgment. And a formal decree signed by the judge, though found among the papers in the case, if it has not been entered, may be changed or a new judgment may be entered."

In DeCoe v. Johnson, 54 Cal.App. 592, 202 P. 362, 367, the court said:

"While counsel on both sides, in their briefs, refer to the judgment as having been entered, the record shows that it was merely filed and the trial court, in the order appealed from, also refers to the judgment as having been filed and not as entered. A judgment, although filed, is under the control of the court rendering it until it is entered, and, until entered, may by the court be altered or changed or another judgment substituted therefor. No citation of authorities is necessary to verify this proposition. If, therefore, the judgment here was merely filed and not entered at the time the order vacating it was made, no legal objection could be made to said order."

In the case of Easterly v. Cook, 140 Cal. App. 115, 35 P.(2d) 164, 168, purported findings of fact unsigned by the trial judge were filed and a judgment entered the same day. On motion of plaintiff this judgment was vacated, findings of fact and conclusions of law were signed and filed, and judgment entered upon them. Upon this state of facts the court said:

"That judgment was premature and void for the reason that the decision and findings had not been rendered in writing or signed by the judge as required by section 632 of the Code of Civil Procedure. In a case tried by the court without a jury the signing and filing of the findings of facts and conclusions of law constitute the decision of the court. Hoover v. Lester, 16 Cal.App. 151, 116 P. 382. Section 633 of the Code of Civil Procedure provides that, 'Judgment *upon the decision* must be entered accordingly.' The validity of the judgment depends upon the previous rendering of the decision by signing and filing the findings of facts and conclusions of law. The Code provision with regard to the necessity of rendering a decision by the adoption and signing of findings is mandatory. Williams v. Wren, 88 Cal. App. 607, 263 P. 1038. The judgment is deemed not to have been rendered until the findings have been adopted and filed. Brownell v. Superior Court, 157 Cal 703, 109 P. 91, 93; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; 14 Cal.Jur. 912, § 32. In the Brownell Case, supra, the court quotes approvingly from the Crim Case, supra, in that regard as follows:

" 'Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no "rendition of the judgment" until they are made and filed with the clerk.' "

The case of Aspegren & Company, Inc., v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400, 402, is decisive here. In that case, after a trial upon the merits, and on January 11, 1936, the trial judge announced that the relief sought by the plaintiff was denied. On January 21, 1926, plaintiff gave notice of appeal. Findings of fact and conclusions of law were signed and filed on February 8, 1926, and on the same day judgment was entered. Defendant moved to dismiss the appeal and the Supreme Court said:

"These several authorities indicate the rule to be that whenever findings are required the judgment is not rendered until they are signed and filed. But, whenever findings are waived or are not required the judgment is rendered when entered in the minutes of the court. With this rule we are in accord. * * *

"In the instant case findings were not only required but were expressly requested by counsel for appellant. If follows, therefore, that judgment herein was not 'rendered,' under the rule as above announced, until findings of fact were signed and filed. As the appeal was taken prior to the signing and filing of such findings, and therefore *before* the 'rendition of judgment,' said appeal was premature and does not come within that provision of section 939, Code of Civil Procedure, which declares that: 'No appeal, however, shall be dismissed on the ground that it was taken *after* the rendition of such judgment or order and before formal entry.' (Italics added.) * * *

"The present appeal being premature and no other appeal herein having been seasonably taken, the motion is granted, and the appeal is dismissed."

It follows from what has been said that, in the instant case, there was no judgment rendered.

[2, 3] A motion for new trial is a statutory remedy which is controlled by the

statutes and must be made under authority of the statutes. (20 Cal.Jur. 11, and cases cited.) In the case of Hughes v. De Mund, 70 Cal.App. 265, 233 P. 93, it is held that a motion for new trial cannot be made until findings of fact have been signed and filed as a basis of a final judgment. See, also, section 656, Code Civ.Proc. As the instant case had not progressed to that point when the trial judge vacated the prior orders and decided that plaintiff was entitled to a trial by jury on the issues presented by paragraph five of the answer, we cannot construe the order in question here as an order granting a motion for new trial. It is an order made before judgment that is reviewable on an appeal from the judgment and is not an appealable order. Section 963, Code Civ.Proc. as amended. It follows that the motion to dismiss the appeal must be granted.

The appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

LANDRETH v. DUCOMMUN.*

Civ. 10794.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1936.

As Amended Nov. 20, 1936.

Hearing Granted by Supreme Court Dec. 31, 1936.

1. Appeal and error ⚷878(1)

On appeal from judgment against maker on note, reviewing court would not at respondent's request pass on propriety of order, from which no appeal had been taken by respondent, vacating prior order terminating proceedings for preparation of transcript on appeal (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

2. Bills and notes ⚷537(4)

In action by transferee on note given in payment for rights in invention, question whether note was procured through fraud *held* for jury (Civ.Code, §§ 3133, 3136, 3139).

3. Bills and notes ⚷348

Holder who came into possession of note almost five months after date of maturity *held* prima facie not "holder in due course," as regards availability of fraud as defense in action by such holder on note (Civ.Code, §§ 3133, 3136, 3139).

◆

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by N. E. Landreth against E. F. Ducommun, also known as Edmond F. Ducommun. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Reay, Scharf & Reay and Oliver O. Clark, all of Los Angeles, for appellant.

Arthur F. Larrabee and C. E. McDowell, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Plaintiff, as sole indorsee, brought suit upon a $10,000 note signed by defendant on February 25, 1931, and made payable to the order of George A. Smith. After both sides had rested, the court upon plaintiff's motion directed the jury to render a verdict in her favor. From the judgment entered thereon, defendant appeals, claiming that there was sufficient valid evidence offered by way of defense to require submission of the case to the jury. Complaint is made also that the trial court abused its discretion in refusing to permit certain proposed amendments to defendant's answer; further, that the court erred in rejecting evidence tending to establish fraud and rescission. The additional point is made that, at a time prior to the trial of this case, error arose when a judge sitting in the law and motion department ordered stricken certain allegations of defendant's answer.

[1] We are asked by respondent to consider only the judgment roll in determining the questions here involved, and to ignore the reporter's transcript which has been prepared and which is now before us. It appears that respondent secured an order in the law and motion department terminating appellant's proceedings for preparation of a transcript on appeal. The order expressly provided, however, that the ruling was without prejudice to defendant's moving for relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851. Within a few weeks thereafter the order terminating the proceedings was set aside under the provisions of that section, and respondent requests us to review that vacating order, to set it aside, and thus render the reporter's tran-

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*For subsequent opinion see 68 P.2d 231.

script unavailable for reference on this appeal. Since no appeal was noticed from said vacating order, we do not pass upon the question raised, but in writing this opinion we have consulted the reporter's transcript.

We turn first to the pleadings and find that the defendant, answering the suit of plaintiff, urges the same defenses that were successfully relied upon in a similar suit brought against him by Smith personally, as payee of four other notes dated May 20, 1931, for $12,500 each. This deal for $50,000 represented by the four notes was an outgrowth of the transaction in which the $10,000 note, the subject of the present action, was given.

George A. Smith had applied on March 5, 1930, for letters patent on a vehicle turntable designed to operate in small yards or garages, where restricted area or hilly ground would prevent easy turning about or changing direction of an automobile. On July 15, 1930, Smith joined with one A. T. Lawrence in assigning to Ducommun, defendant here, at a price of $10,000, a one-third interest in a partnership having an exclusive license to deal in Los Angeles county, with such rights in the invention as might be secured from the United States Patent Office. In the following February, Smith sold to Ducommun his interest in this partnership and granted to him an option to buy, prior to August 1, 1931, for the sum of $50,000, the exclusive rights under the patent application within the state of California. The consideration for the partnership interest and the option was $5,000 cash and the promissory note for $10,000 that forms the basis of the present suit. On May 4th following, Lawrence sold his one-third interest in the partnership to Ducommun for $10,000, or thereabouts, and on May 29, 1931, instead of conveying merely the California territory to Ducommun for $50,000, as contemplated by the February 25th option, Smith sold him, for the four notes aggregating $50,000, the exclusive right "to make, use and vend * * * in the whole of the United States, except the State of Oregon and the County of Los Angeles." The agreement between the parties, however, bound Ducommun to organize a corporation which would pay Smith a royalty of $20 on each turntable manufactured, minimum fixed royalties to be paid monthly (otherwise the license to be forfeited) and Smith to receive 1,000 shares of stock at $100 each, of the new corporation, as well as a salary of $500 per month as consulting engineer over a five-year period.

The first of the $12,500 notes matured May 29, 1932, and, not being paid, suit was brought upon all four notes (possibly under a provision for acceleration), resulting in a verdict and judgment in favor of defendant, Ducommun. Meanwhile, Smith had died, and the administrator of his estate, his associate Lawrence, was substituted as plaintiff, and prosecuted an appeal which was unsuccessful, as appears by reference to Lawrence, Adm'r, v. Ducommun (Cal.App.) 58 P.(2d) 407, 408. That opinion, in abbreviated form, presents the conditions under which the various notes signed by this defendant were obtained from him, stating at page 408 of 58 P.(2d):

"It is sufficient to say that Smith and Lawrence, aided and abetted by Reverend A. B. Gardner, a psychic divine, known as 'Mother Gardner,' who conducted and operated 'The Church of the Open Door of Truth,' and who held herself out as being able to give business and financial advice obtained from 'divine' psychic sources, practiced with success a series of impositions upon defendant to their mutual profit, although the lion's share went to Smith. With the constant help of Lawrence and the continuous 'divine' assistance of 'Mother Gardner,' Smith managed to administer the final coup de grace to defendant in the form of the contract referred to. Before the blow was dealt, however, there were a variety of representations made, all of which the evidence in a superabundance reveals to have been without a basis in fact. Some of these representations were as follows:

"(1) That this turntable was perfected excepting for a few minor improvements.

"(2) That Smith had spent $40,000 in perfecting this device.

"(3) That Smith had five bona fide orders for this turntable.

"(4) That Lawrence had paid Smith $10,000 for a one-half interest in the Los Angeles county rights to this turntable device.

"(5) That this device could be manufactured and sold at a profit of $200 to $300 per table.

"(6) That there was a great demand for said product."

The opinion then goes on to say that "the defendant pleaded several defenses, including fraud, rescission and failure of consideration." We have the same defenses set up in the present case, particular emphasis being laid on fraud based upon the same representations as are listed in Lawrence, Adm'r, v. Ducommun, supra. We note that the answer states that the various untrue statements attributed to George A. Smith, A. T. Lawrence, and A. B. Gardner were made "to defraud the defendant and to induce him, the defendant, to execute the said note and pay said money and purchase said George A. Smith's interest in said copartnership and to take said option, hereinabove referred to; that the defendant did July 1, 1932, learn that said representations and each of them were false and untrue."

[2] Having read the transcript and examined the exhibits introduced upon this trial, we feel that, restricted as defendant was, by orders striking from his answer certain pertinent allegations, and also by rulings that prevented his amending his answer, he did succeed, nevertheless, in presenting substantial evidence upon which a jury might have found that he was the victim of fraud practiced upon him in pursuance of a common plan by Smith, Gardner, and Lawrence.

[3, 4] Fraud is available as a defense against the holder, not in due course, of a negotiable instrument (see sections 3133, 3136, 3139, Civ.Code), and in this case it appears that plaintiff came into possession of defendant's note almost five months after its date of maturity. Therefore, prima facie at least, she is not a holder in due course. It is true that she alleged in her complaint that a few days prior to her receiving the note, the time for its payment was extended, by a letter written to Ducommun and for a valuable consideration, to a date approximately six months in the future, namely, August 25, 1932, but this allegation was denied by defendant and no proof of it was made upon the trial; it is apparent, therefore, that it could not and did not have any bearing upon the court's decision to order a verdict for the plaintiff.

Judgment is reversed, and cause remanded for a new trial, with directions to the superior court to consider such applications as may be made for amendment of the pleadings.

We concur: YORK, Acting P. J.; DORAN, J.

17 Cal.App.2d 252

PEOPLE v. LITCHMAN.

Cr. 2895.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1936.

1. Criminal law ⚷211(1)

Failure of forgery complaint to contain allegation that defendant was absent from and not an inhabitant of state for length of time which was sufficient to save offense from operation of statute of limitations *held* not to deprive municipal court of jurisdiction to commit defendant.

2. Criminal law ⚷980(1)

On arraignment of defendant for judgment after plea of guilty to second of two counts in forgery information, statement of defendant's counsel that defendant had pleaded guilty to second count rather than to first count, in contradiction of statement of clerk, *held* a direct attack on clerk's minutes which court should have determined before judgment was pronounced under first count.

3. Criminal law ⚷1111(5)

Generally, in event of conflict between clerk's minutes and reporter's transcript, clerk's minutes should control on collateral attack against verity of clerk's minutes.

4. Criminal law ⚷1111(5)

Judgment of conviction for forgery based on offense alleged in first count of information would be reversed and cause remanded where it clearly appeared from reporter's transcript that defendant had pleaded guilty to second count of information, and clerk's minutes had been challenged directly by defendant's counsel at time of arraignment of defendant for judgment.

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Arthur Potter Litchman was convicted of forgery and he appeals.

Reversed and remanded.

John M. Hines, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant was charged in the information with two counts of forgery. Count I alleged the forgery of a check in the sum of $1,000, and count II alleged the forgery of a check in the sum of $47. In both counts the name signed on the check was alleged to be fictitious. The defendant appeals from the judgment which was pronounced on the assumption that defendant pleaded guilty to the offense alleged in count I, when in fact the plea was entered as to count II.

[1] The offenses are alleged to have been committed in April, 1932. The information further alleges that defendant was absent from and not an inhabitant of the state for a certain length of time, which was sufficient to save the offense from the operation of the statute of limitations. It is contended by appellant, however, that, because the complaint in the municipal court did not contain this last-mentioned allegation, the municipal court was without jurisdiction to commit the defendant. The point is without merit. People v. Lee Look, 143 Cal. 216, 76 P. 1028; People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Tibbitts, 71 Cal.App. 709, 236 P. 217.

The second contention of appellant, however, is by no means trivial. It is asserted by appellant that the facts are that, although defendant had pleaded "guilty" as to count II of the information, that count later was dismissed by order of the court; and that at the same time defendant was sentenced on count I of the information, as to which he had neither pleaded "guilty," nor been so found after trial as to said count. At the time the defendant was arraigned for judgment after his plea of guilty, the record reveals the following proceedings:

"The Court: Arthur J. Litschman, you have heretofore been charged with the crime of forgery in two counts and you have pled guilty to the crime of forgery in one count. You have applied for probation and this is the time fixed for passing on your application and imposition of judgment and sentence. * * * Is there any legal cause why judgment and sentence should not be pronounced at this time? * * * It is the judgment and sentence of this Court that for the offense of forgery, a felony, you, Arthur Potter Litschman, be confined in the State Prison at San Quentin. The Sheriff is directed to carry out this order.

"The Clerk: That is on count 1?

"The Court: Count 1 only.

"Mr. Hines: Count 2.

"The Clerk: He pled guilty to count 1.

"Mr. Hines: It is count 2.

"The Court: Let us have the information.

"The Clerk: He pled guilty to count 1, a thousand-dollar check on a San Francisco bank.

"Mr. Hines: It was the intent and it was my statement to the Court and it was my understanding with Mr. Richardson that he was entering a plea to count 2.

"The Court: Where are the minutes? The whole report is directed toward count 1, particularly from the defendant's standpoint, and as to count 2, has nothing to say.

"The Clerk: The defendant pled guilty to count 1.

"Mr. Hines: Did the Court deny probation?

"The Court: Yes, the Court denied probation.

"Mr. Wildey (Deputy Dist. Atty.): We move that count No. 2 be dismissed:

"The Court: In the interest of justice it is ordered dismissed."

It appears from the foregoing that the clerk dominated the situation then and there presented. When the defendant's counsel called the court's attention to the fact that defendant had pleaded guilty to count II, it will be seen that the clerk took issue with defendant's counsel, who, in reply, promptly disputed the clerk's contention. The court made no inquiry as to the question thus raised, but merely made the observation that the probation officer's report was directed toward count I. The clerk's minutes, in fact, show that defendant pleaded guilty to count I, and it is a reasonable inference that the probation officer obtained his information from the clerk's minutes.

At the time defendant entered his plea of guilty, the shorthand reporter's transcript of the proceedings shows the following to have taken place

"Tuesday, April 28, 1936.

"Mr. Hines: At this time, if your Honor please, we wish to withdraw our former plea and we will plead guilty to Count 2 of the information.

"The Court: Is this case regularly on the calendar?

"Mr. Hines: Yes, your Honor.

"The Court: Arthur P. Litchman, you wish permission at this time to withdraw your plea of not guilty heretofore entered to Count 2 of the information charging you with forgery?

"A. Yes, sir.

"The Court: You are granted permission so to do, re-arraign the defendant.

"Mr. Wildey: Arthur Potter Litchman, on motion of your counsel the Court has granted the authority to you to withdraw your plea of not guilty heretofore entered to the information in Count 2, charging you with the offense of forgery, how do you now plead to that charge, guilty or not guilty?

"The Defendant: Guilty.

"Mr. Hines: If the Court please, I ask permission to file an application for probation in order that the man's record may be presented to your Honor. There is considerable record here, but I think it would be well for the Court to have all the information before passing sentence.

"The Court: Very well, then, you may file your written application for probation and have it on file not later than five o'clock tomorrow night. It may be set down for disposition in this court on May 15th at 9:30. Judgment and sentence is continued until that time."

The attorney general makes no contention that the foregoing transcript of the proceedings is incorrect in any respect, but submits the proposition that, if the court follows the authority of the case of People v. Riccardi, 50 Cal.App. 427, 195 P. 448, 451, the judgment should be affirmed, but, if the court follows the case of People v. Williams, 64 Cal.App. 144, 220 P. 675, the judgment should be reversed.

It is pointed out by the attorney general that the Riccardi Case, supra, holds that "if there is a conflict between the Clerk's Transcript and the Reporter's Transcript, then the Clerk's Transcript controls." The Riccardi Case does not so hold. In that case the point was raised that the plea of the defendant was not stated to the jury and on this question there was a conflict between the clerk's minutes and the shorthand reporter's notes. The appellate court held: *"Under the circumstances,* in support of the verdict, we must hold that the clerk's version showing that the clerk's duty was properly performed is controlling." (Italics added.) The ruling of the court therefore was limited to the Riccardi Case.

In the Williams Case, supra, the court held as follows: "By referring to a recital of the proceedings made by the clerk of the court, the state has made it appear that the new trial was granted only upon the ground that the verdict was contrary to law; but the record is so clear in showing the grounds of the motion when made, and the terms of the order of the trial court in granting the motion, that we must conclude that the clerk's recital was error. In fact, the entire record shows that the parties at all times contemplated that the issue before the court was the insufficiency of the evidence and that questions of law were merely incidentally involved."

[2] While it is true that in the case at bar the defense counsel did not make a formal motion to correct the minutes, nevertheless what was done and said by him was a direct challenge to the verity of the clerk's minutes—a challenge which the trial judge ignored, and, notwithstanding, pronounced judgment. This was not a collateral attack on the clerk's minutes but, although informal, was a direct attack that raised an issue—and a vital one—which the court by inquiry should have determined directly and definitely before judgment was pronounced.

[3] It is the general rule that, in the event of a conflict, where the verity of the clerk's minutes is collaterally attacked, the clerk's minutes shall control. But no authority has been cited attaching such a degree of infallibility to the clerk's minutes that would make them conclusive under the circumstances presented herein. Indeed, it would seem that if such were the rule there would be no function, under such circumstances, for an appellate court to perform.

[4] It clearly appears that the defendant pleaded guilty to count II, and therefore the judgment, which is based on the offense alleged in count I, is reversed, and the cause remanded.

We concur: HOUSER, P. J.; YORK, J.

18 Cal.App.2d Supp. 775

CHELHAR v. ACME GARAGE et al.

No. 839.

Appellate Department, Superior Court, City and County of San Francisco, California.

Aug. 18, 1936.

1. Chattel mortgages 🔑197(2)

Creditor would not be affected by statute rendering mortgage valid as to one having actual notice thereof if creditors' debt existed before mortgage was executed (Civ. Code, § 2973).

2. Chattel mortgages 🔑182

Creditor at large cannot attack mortgage which is valid between parties, but in absence of recordation creditor who acquires lien by virtue of levy under writ of attachment or execution may attack mortgage (Civ. Code, § 2973).

3. Chattel mortgages 🔑138(1)

Possession taken by mortgagee under unrecorded chattel mortgage gives his asserted lien no priority over subsequent lien of execution creditor of mortgagor.

4. Chattel mortgages 🔑138(1)

Where chattel mortgage covering tow-car was recorded in recorder's office but copy thereof was not deposited in Department of Motor Vehicles and mortgagee was not registered as legal owner, and where mortgagee took possession on mortgagor's default, conducted sale, and became purchaser of tow-car, such a mortgage and foreclosure sale *held* invalid as against mortgagor's subsequent execution creditor who seized tow-car in mortgagee's possession (St.1931, p. 2517, § 45¼; Civ.Code, §§ 2957, 2973).

5. Automobiles 🔑19

Where mortgagee at no time took steps to cause himself to be registered as legal owner of tow-car, even after foreclosure sale at which mortgagee purchased tow-car, title under statute was deemed not to have passed to mortgagee and the intended transfer was deemed not to be valid (St.1929, p. 514, § 45).

Appeal from Municipal Court of City and County of San Francisco.

Action by Lorenz Chelhar against the Acme Garage, a copartnership composed of J. W. Eder and H. Beyer and others wherein Harry Beyer filed third party claim. From an order determining title to a tow-car to be in third party claimant, the plaintiff appeals.

Order reversed and cause remanded with direction.

Aaron Vinkler, of San Francisco, for appellant.

Vincent H. O'Donnell, of San Francisco, for third-party claimant and respondent.

JOHNSON, Presiding Judge.

This is an appeal by an execution creditor of the defendant J. W. Eder from an order determining title to a motor tow-car to be in Harry Beyer, who interposed a third-party claim.

It appears that Eder and Beyer had been partners in a garage business conducted under the name of Acme Garage. The partners having decided to dissolve their partnership, it was agreed between them that the interest of Beyer should be purchased by Eder, who should execute to Beyer a promissory note in the principal sum of $1,500 secured by a chattel mortgage of all the garage equipment, including the tow-car. Notice of such intended sale by Beyer and of such intended mortgage by Eder was duly given, and was recorded in the office of the recorder on April 26, 1935. On May 4th, at the time fixed in the notice, the transaction was consummated. Eder then executed in favor of Beyer a promissory note for $1,500, payable with interest in monthly installments; and as security for such payments he executed a chattel mortgage of the garage equipment including the tow-car. The mortgage was dated May 4, 1935, and was recorded that same day in the recorder's office. No copy of the mortgage was at any time deposited with the Department of Motor Vehicles, as then prescribed in section 45¼ of the Vehicle Act of 1923 (St.1923, p. 517, as added by St.1929, p. 517, as amended by St.1931, p. 2517), and now in section 195 of the Vehicle Code of 1935 (St.1935, p. 118); nor was any change made in registration of the car, which was in Eder's name.

Eder having made default in payments under his promissory note, Beyer took possession of the mortgaged property on November 18, 1935, as authorized by the chattel mortgage; and at a public sale, duly held at Beyer's instance on December 5th, he became the purchaser of the tow-car and the rest of the property listed in the mortgage.

On December 14th, Chelhar obtained judgment against Eder for $550 with interest and costs; and on December 16th he caused execution to issue and seizure thereunder to be made of the tow-car, then in Beyer's possession. By reason of such seizure Beyer on December 17th filed his third-party claim; and after a hearing, title was on January 20, 1936, determined to be in Beyer.

The question arising on the appeal from that order is whether failure of Beyer to comply with section 45¼ of the Vehicle Act of 1923, as amended (which was in effect at the time of the mortgage) rendered the chattel mortgage of the tow-car, and the subsequent foreclosure sale thereof to Beyer, invalid as against Eder's execution creditor.

As to chattel mortgages in general, section 2957 of the Civil Code declares that such a mortgage is void as against creditors of the mortgagor, and subsequent purchasers and encumbrancers in good faith and for value, unless the mortgage is recorded in like manner as grants of real property.

But under section 45¼ of the Vehicle Act of 1923, as amended, the provision of section 2957, C.C., in relation to recording did not apply to mortgages of motor vehicles; and it was provided instead that no such chattel mortgage was valid until the mortgagee was registered as the legal owner in the manner provided for registration of motor vehicles. It was further provided that when a copy of the mortgage duly certified by a notary had been deposited with the Department of Motor Vehicles, and the mortgagee had been registered as legal owner, subsequent purchasers and encumbrancers would be charged with constructive notice of the mortgage. Registration as legal owner was made complete on deposit of the copy of the mortgage with a request for registration. A filing fee of $10 was also required.

[1] With some modifications these provisions were embodied in section 195 to 198 of the Vehicle Code of 1935 (St.1935, pp. 118, 119), which became effective on September 15th. So far as the parties to the mortgage in question were concerned, however, it was valid as to them under section 2973, C.C., regardless of recordation; and according to the rule laid down in Old Settlers' Inv. Co. v. White, 158 Cal. 236, 240, 110 P. 922, and reiterated in Wolpert v. Gripton, 213 Cal. 474, 481, 2 P.(2d) 767, a mortgage, even though not recorded, is valid as against creditors of the mortgagor with actual knowledge of the mortgage. The record here does not show whether Chelhar became a creditor of Eder before or after the mortgage, but there is no evidence that he had actual knowledge of it; and as is said in the Old Settlers' Case, supra, 158 Cal. 236, at page 240, 110 P. 922, he would not be affected by section 2973 if his debt existed before the mortgage was executed.

[2] Though a creditor at large cannot attack a mortgage which is valid between the parties, nevertheless in the absence of recordation, the law operates in favor of a creditor who acquires a lien by virtue of a levy under a writ of attachment or execution. Ruggles v. Cannedy, 127 Cal. 290, 299–301, 53 P. 911, 59 P. 827, 46 L.R.A. 371; Wolpert v. Gripton, 213 Cal. 474, 480, 2 P.(2d) 767; Silverthorn v. Pacific Finance Corp., 133 Cal.App. 163, 165, 23 P.(2d) 798.

And in Eckhardt v. Morley, 220 Cal. 229, 30 P.(2d) 423, it was held that to give priority to a mortgage of an automobile, it was essential that there should be full compliance with section 45¼ of the Vehicle Act, even to actual payment of the registration fee.

There is conflict in the decisions as to the right of priority of a judgment creditor of the mortgagor, who levies execution after the mortgagee under an unrecorded mortgage has taken possession of the mortgaged property. In Jones on Chattel Mortgages (5th Ed.) § 178, it is laid down as the general rule that the delivery of possession to the mortgagee under the mortgage, before any specific lien has been acquired by others, secures priority to the mortgagee. Such was, undeed, the ruling made in Adlard v. Rodgers, 105 Cal. 327, 334, 38 P. 889; but upon that point the decision was overruled in effect in Loosemore v. Baker, 175 Cal. 420, 422, 166 P. 26. There a levy under a writ of attachment was made on personal property in the possession of a mortgagee whose chattel mortgage had never been recorded; and the court, refusing to follow Adlard v. Rodgers, supra, held that the attaching creditor had priority to the extent of his claim. The Loosemore Case is cited, and a like ruling made, in

Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N.W. 128.

Our Supreme Court in its holding is in accord with the rule prevailing in New York and some other states. The leading case in support of that view is Stephens v. Perrine, 143 N.Y. 476, 39 N.E. 11, which deals with a situation corresponding with that here. In that case, a chattel mortgage which had been made on February 25, 1892, was not filed until March 30, at which time possession was taken by the mortgagee; and after due advertisement, a sale was had at which the mortgagee became the purchaser. Thereafter executions were levied under judgments obtained in favor of creditors of the mortgagors.

In according priority to the execution creditors, notwithstanding the previous foreclosure sale, the court reached the conclusion that a mortgagee, in whose favor a lien invalid as to creditors had been created, could not validate his lien as against them by taking possession and purchasing at his own foreclosure sale. The reasoning of the court is as follows (143 N.Y. 476, at page 480, 39 N.E. 11, 12):

"The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under, and to sell the property by virtue of, such void instrument. As between these mortgagors and creditors, it was the same as if the mortgage did not exist, and the mortgagee could not, as against these creditors, obtain any rights under it. How could a mortgagee in a void mortgage, as against creditors, obtain any title to property by virtue of such mortgage? As against them, the mortgagee could not rightfully take the property by virtue of this void instrument, and, if she did take it in spite of the fact that the mortgage was void and no protection to her, how could she secure any further or greater right by the sale of the property and the receipt of its value? This action is against the mortgagee; and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which assert the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution, so as to enforce their rights which rest upon the invalidity of the mortgage. If void, what right has the mortgagee, as against creditors, to take possession in her character of mortgagee, and to sell or dispose of property described in it? Clearly, she has none, and she does not acquire any by the celerity of her movements in seizing and selling property under it.

"Although, in order to themselves take the property, it was necessary for the creditors to have some legal process, yet, when that condition was complied with, their right to take it, as between these parties, became perfect."

A similar case, with like result, is presented in Wilkinson, Gaddis & Co. v. Bohlen, 88 N.J.Law, 680, 97 A. 279. In that case a chattel mortgage, void as to creditors, was executed in favor of the defendant on November 13, 1913. On November 18 he proceeded to foreclose, and at a sale held on November 24 he became the purchaser. On the following day the plaintiff, a creditor of the mortgagor, reduced its claim to judgment, and caused execution levy to be made on the goods in defendant's possession. Then upon refusal of the defendant to surrender possession, plaintiff caused the goods to be replevied. The trial court gave judgment in the replevin suit for the defendant; but in reversing that judgment the New Jersey Court of Errors and Appeals said (88 N.J.Law, 680, at page 682, 97 A. 279, 280):

"In this finding and conclusion the learned trial judge erred. He gave to the sale under the foreclosure of a mortgage absolutely void as against the appellant the effect of a sale under a valid instrument.

"Undoubtedly the mortgagor was not in a position to successfully question the validity of the sale, because of defect in the mortgage, whereas an existing creditor, by virtue of his inchoate right under the statute, and who had reduced his claim to judgment, issued execution thereon and had a levy made upon the goods covered by the chattel mortgage, was.

"It needs no argument to establish that an instrument declared by law to be absolutely void as against existing creditors cannot legally be made the basis of a valid sale as against them. While it is true that an existing creditor is not in a legal position to question the validity of a chattel mortgage until he has obtained some lien on the goods covered by the void instrument, as above pointed out, it does not follow that because the goods were sold by virtue of the chattel mortgage before the existing creditor obtained his judgment and issued execution thereon against such goods that they thereby became immune to the lien created by the execution, but, on the contrary, the lien created by the execution gave the creditor a legal standing to test the validity, as to him, of the sale of the goods under the chattel mortgage."

[3] Since in Loosemore v. Baker, 175 Cal. 420, 166 P. 26, our Supreme Court placed itself in accord with the New York rule to the extent of holding that possession taken by the mortgagee under an unrecorded chattel mortgage gave his asserted lien no priority over the subsequent execution lien of a creditor of the mortgagor, it follows as a corollary that the ruling of the New York court in Stephens v. Perrine, supra, should be applied here.

[4] In other words, since Beyer's chattel mortgage of the tow-car was invalid as against Chelhar, and Beyer's possession before sale did not enlarge or perfect his asserted lien, he could not make that possession the basis of a valid claim, or add to his title as against an execution creditor, by his own act in causing a foreclosure sale at which he became the purchaser.

[5] In addition to the failure to deposit a copy of the chattel mortgage with the Department of Motor Vehicles, it must be borne in mind also that Beyer at no time took steps to cause himself to be registered as the legal owner of the tow-car, and that Eder at all times appeared on the records as the owner. Hence even after the foreclosure sale, title under the statute was deemed not to have passed to Beyer and the intended transfer not to be "valid or effective for any purpose." Section 45, Vehicle Act 1923, as amended by St.1929, p. 514, and section 186, Vehicle Code 1935.

For the reasons stated the order appealed from is reversed, and the cause remanded to the municipal court with directions to enter an order determining the plaintiff, Lorenz Chelhar, to have a valid lien, by virtue of the levy under his writ of execution, upon the tow-car in question in the amount of $550 with interest, costs, and other legal charges, which shall be declared to be superior to the claims of the third-party claimant and respondent, Harry Beyer. Appellant shall recover his costs of appeal.

GOODELL and CONLAN, JJ., concur.

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19 Cal.App.2d Supp. 749

SAN ANGELO WINE & SPIRITS CORPORATION v. SOUTH END WAREHOUSE CO.

No. 830.

Appellate Department, Superior Court, City and County of San Francisco, California.

Aug. 18, 1936.

1. Warehousemen ⚷15(2)

Assignee of nonnegotiable warehouse receipt acquires no stronger right than assignor had (Gen.Laws Supp.1933, Act 9059, § 27).

2. Internal revenue ⚷26

Warehouseman issuing nonnegotiable receipt stating that warehouseman claimed lien for all charges for storage and preservation of goods and also for lawful claims for money advanced against all goods of debtor whenever deposited *held* entitled, as against assignee of receipt, to assert lien against whisky for its advances for taxes payable under internal revenue laws and its charges and other outlays in relation to goods (Gen. Laws 1931, Act 9059, § 28; Gen.Laws Supp. 1933, Act 9059, § 27).

◆

Appeal from Municipal Court of City and County of San Francisco; Frank T. Deasy, Judge.

Action by the San Angelo Wine & Spirits Corporation against the South End Warehouse Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

E. Max Cohen, of Los Angeles, and Leonard S. Lurie, of San Francisco, for appellant.

Lovell & Richardson, of San Francisco, for respondent.

JOHNSON, Presiding Judge.

This case gives rise to the question whether a warehouseman may have a general lien, not only for charges for storage and ordinary services and expenditures incident to the business, but also for money advanced, in the case of liquors, for taxes, payable by the owner under the internal revenue laws. The determination of that question depends on the interpretation to be given to sections 27 and 28 of the Uniform Warehouse Receipts Act of this state. See St. 1909, p. 437, as amended, 3 Deering General Laws 1931 Ed. p. 4975, Act 9059, and amendments of 1933, St.1933, p. 2398, Gen. Laws Supp.1933, Act 9059.

There is no dispute concerning the facts of the case. Beginning in the year 1933 Western Distillers Corporation had at various times stored liquors in defendant's warehouses, and on January 18, 1935, there was issued to that corporation by defendant a nonnegotiable warehouse receipt for 20 barrels of rye whisky then in one of defendant's warehouses.

The receipt, among other things, stated that the warehouseman claimed, in the language of section 27 of the Uniform Act (see Gen.Laws Supp.1933, Act 9059, § 27), "a lien * * * for all lawful charges for storage and preservation of the goods, also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods." In the latter part of March the Western Distillers Corporation, being indebted to plaintiff, besides making payment of a sum of money transferred to plaintiff certain personal property, and also the 20 barrels of whisky in question by assignment and delivery of the warehouse receipt therefor. Thereafter on June 12, the plaintiff tendered to defendant the sum of $9, claimed by plaintiff to be the amount for which defendant had a lawful lien; and demanded delivery of the whisky described in the warehouse receipt. The tender was refused and delivery withheld upon the ground that, in the general account between defendant and Western Distillers Corporation, there was a balance owing to defendant in a large amount for money advanced for taxes, bottling, and other items.

Plaintiff's complaint, thereafter filed, is one in claim and delivery for the whisky in question.

The defendant in its answer pleads that at the time of plaintiff's demand there was owing to defendant by plaintiff's assignor not only the storage charges on the lot in question, but sums of money for advances made at the special instance and request of plaintiff's assignor. And defendant asserted a lien upon the lot in question for all unpaid charges and advances.

The court made written findings to the effect that the value of the whisky in suit was $1,600, and that plaintiff was entitled to delivery of the lot, or in lieu thereof to the sum of $1,600, upon payment to defendant of $16,181.88, representing the amount of the lien of defendant. From the judgment entered accordingly, the plaintiff prosecutes this appeal.

In plaintiff's memorandum it is urged, first, that under section 1856 of the Civil Code a warehouseman has no general lien for advances; and, secondly, that under the Uniform Act there is no lien for a general balance of account; and, moreover, that payment of taxes is not for preservation of the goods, but is in effect a loan.

In support of plaintiff's contention that a warehousemen's lien is special only, three California cases are cited. Stewart v. Naud, 125 Cal. 596, 58 P. 186, was decided in 1899, about ten years before the Uniform Act was adopted in this state. Boas v. De Pue Warehouse Co., 69 Cal.App. 246, 250, 230 P. 980, presented the question whether, after the withdrawal of a part of a single bailment, a lien was retained on the residue for the entire amount of charges on the original quantity. In holding that the lien for the entire amount was retained, the court adopted a passage from 27 R.C.L. 1007, in which incidentally it was said that a warehouseman's lien is specific and not general. So far as any issue before the court was concerned, that statement was merely dictum. The language drawn from the volume cited was a statement of the common-law rule; and on page 1008 attention is directed to the fact that under the Uniform Warehouse Acts the lien is extended to all such charges and claims as are enumerated in section 27 of our act, as amended in 1933. Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 18 P.(2d) 351, is concerned, not with the character of the lien acquired by force of the statute, but with the enforcement of the remedy. The conclusion announced was that, under section 35 of the Uniform Act (Gen.Laws 1931, Act 9059, § 35), a warehouseman may enforce his lien either by a public sale upon notice as provided in section 33 (Gen.Laws 1931, Act 9059, § 33), or by a judicial sale under a decree of foreclosure, as authorized in the case of pledged property by section 3011 of the Civil Code.

Section 28 of the Uniform Act, which is embodied in our statute (Gen.Laws 1931, Act 9059, § 28), provides that except when goods are represented by a negotiable receipt, a warehouseman's lien may be enforced "against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted."

In Knoxville Outfitting Co. v. Knoxville F. Storage Co., 160 Tenn. 203, 22 S.W.(2d) 354, 355, the court said that the section, in "prescribing the reach of the warehouseman's lien, is repugnant to the common-law rule. When there is a conflict between the common-law and a statute, the provision of the statute must prevail."

The Uniform Act is based on a statute adopted in New York in 1885; and the question whether the lien under that statute was general or special received consideration in Stallman v. Kimberly, 53 Hun, 531, 6 N.Y.S. 706, affirmed 121 N.Y. 393, 24 N.E. 939. It had long been established that wharfingers had a general lien at common law, and the purpose of the statute was to place warehousemen on the same basis, and put an end to any possible distinction between the two classes of bailees. Holding that the defendants, who were warehousemen, were justified in refusing to deliver articles stored until payment should be made of their charges and expenses of receiving and delivering other articles already withdrawn, Judge Barrett, at the close of his opinion for the General Term, said (53 Hun, 531, 6 N.Y.S. 706, 708): "The fact is, warehousing has become an immense industry in these days, and the act is nothing more than a fair recognition of the advance. Formerly the wharfinger was in the habit of keeping a warehouse on his wharf, and the warehousing business was a sort of subsidiary appendage thereto. Now warehousing, as an independent institution, completely dwarfs the wharfinger; and it would be the height of absurdity to retain the general lien in the one case and deny it in the other. Upon the whole, we are of the opinion that the defendants had a general lien upon the goods replevied, and that consequently, the learned judge erred in directing a verdict for the plaintiffs. Our judgment, therefore, is for the defendants, with costs."

Likewise in Re Taub (C.C.A.) 7 F.(2d) 447, 451, in a case arising under the New Jersey Uniform Act, the court said: "The common-law lien has been in many states extended by statute, so as to give a general rather than a specific lien. This was done in New York. Stallman v. Kimberly, 121 N.Y. 393, 24 N.E. 939. And it was done in New Jersey. There is no doubt that the New Jersey Uniform Warehouse Receipts Law gives a general rather than a specific lien." It was held in that case, however, that section 28 of the statute (4 Comp.St.N.J.1910, p. 5781, § 28) was not applicable, since the goods stored did not belong to the debtor, Taub, and he had not been so intrusted with possession as to create an estoppel against the owner.

The lien is likewise held to be general in Kaufman v. Leonard, 139 Mich. 104, 102 N.W. 632, and Roehl Storage Co. v. Wilson, 268 Mich. 691, 256 N.W. 598, 95 A.L.R. 1525.

The crucial question in the present case is whether the lien may be asserted for the amount of the taxes paid for account of the Western Distillers Corporation. The plaintiff contends that such advances are not within the purport of section 27 of the Uniform Act, but constitute independent loans made upon the personal responsibility of the debtor. In support of this contention plaintiff puts reliance on Schwab v. Oatman, 56 Misc. 393, 106 N.Y.S. 741. In that case the plaintiffs had purchased through a certain corporation, acting as the selling agent for a cotton mill, a number of bales of cotton cloth. According to custom, delivery was to be deferred pending shipping order from the purchasers. Meanwhile the goods were forwarded from the mill to the agent, and were placed by the agent in the warehouse of the defendants, who issued warehouse receipts therefor, and made loans thereon to the agent prior to plaintiffs' payment to the mill for the goods. Subsequently the agent became insolvent, and the defendants refused to deliver the goods to plaintiffs except on payment of the loans and advances thereon, together with the storage charges on those as well as other goods stored by the selling agent.

The trial court held that the plaintiffs had title to the goods, and then proceeded to consider whether the defendants had a lien for the advances made to the selling agent and the storage charges on other goods. The statute in force at the time in New York provided (Laws 1902, c. 608, § 2): "A warehouseman shall have a lien upon goods stored with him for his charges for storage, cartage, labor, freight, insurance, and other advances thereon, including weighing and coopering in relation to such goods or other goods belonging to the same owner and he may detain such goods until his lien is paid."

In comparing this clause with section 27 of our statute, which is in the language of section 27 of the Uniform Act, it is to be noted that there is a material difference both in the phrasing and collocation of the provision in respect of advances. The New York statute gave a lien for "charges for

CALIFORNIA REPORTER

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62 PACIFIC REPORTER

SECOND SERIES

7 Cal.2d 660

RHODES v. STATE BAR OF CALIFORNIA.

L. A. 15909.

Supreme Court of California.

Nov. 12, 1936.

Attorney and client ⚷10

Application of attorney, who was admitted to practice law in Oregon, to be admitted to practice law in California, *held* properly denied, where attorney failed to show that he had been engaged in actual practice of law for at least three years within period of seven years immediately preceding filing of his application under repealed statute, or that he was engaged in practice of law for four years out of six years immediately preceding filing of application under amended rule (Code Civ. Proc. § 279, as amended by St.1923, p. 233; Rules Regulating Admission to Practice Law, rule 6).

◆

In Bank.

Petition by Joseph B. Rhodes against the State Bar of California, to review an order of the Committee of the Bar Examiners of the State Bar denying petitioner's application to be admitted to practice law in California on motion and production of petitioner's Oregon license.

Orders denying petitioner's application for admission to practice affirmed.

Stanley A. Phipps, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

Petitioner, an attorney at law duly admitted to practice in the state of Oregon, was granted this writ of review of an order of the committee of bar examiners of the State Bar denying his application to be admitted to practice law in this state on motion and production of his Oregon license.

At the time the application to be admitted to practice in this state was made, April 25, 1928, section 279 of the Code of Civil Procedure (as amended by St.1923, p. 233), since repealed, relating to admissions to practice, provided, so far as material here, that: "Any citizen of the United States, or any resident of this state who has, bona fide, declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, and who, after such admission, has been engaged in actual practice of law in such state or foreign country *for a period of at least three years within the period of seven years immediately preceding the filing of his application* [italics added], may be admitted to practice in all the courts of this state," etc.

On examination of the petitioner's application and after oral examination of the applicant, the application was denied upon the ground "that said Joseph B. Rhodes had not had sufficient prior practice" to entitle him to admission here. A request for reconsideration of the order of denial was denied one and a half years later, "no further proof of applicant's actual practice prior to the date of his original application for admission having been offered or filed." A year later petitioner filed with the committee of bar examiners another petition for a rehearing. This petition was denied on the same grounds as stated in the order denying the first application for a rehearing. Still a year later, petitioner was examined by the committee at his request, and he was instructed to file a "detailed chronological statement" concerning his employment and activities during a material period of his practice.

On February 6, 1935, petitioner filed in this court an application (No. L.A.15171) for admission on motion, without examination, notwithstanding the refusal of the committee of bar examiners to recommend his admission. This application was denied March 18, 1935.

It appears from the records of the State Bar that the denials by the board of bar examiners of petitioner's application to be admitted to practice on motion and production of his Oregon license, and his subsequent petitions for reconsideration, were based on the sole ground that the committee concluded it was without jurisdiction to consider or reconsider such applications. This conclusion rested upon the fact that the petitioner was apparently unable to and did not produce evidence that he had "been engaged in actual practice of law" in Oregon "within a period of seven years immediately preceding the filing of his application." By the denial by this court on March 18, 1935, of petitioner's application to be admitted to practice law notwithstanding the adverse action of the bar examiners, all questions raised by the petition were adjudicated against petitioner.

The present application and the order of the committee of bar examiners now under review present a new situation. The rules governing admission to practice law in this state on motion and without examination apply only to those "who have been engaged in the practice of law" in the other jurisdiction "for a period of four (4) years out of the six (6) years immediately preceding the filing of their applications." Rule 6, 213 Cal. cxlviii. Petitioner has not, since March 18, 1935, when he was denied relief by this court, supra, made application to the committee of bar examiners for a recommendation for admission to practice law in this state. It does not appear that, should he make such application, he can meet the requirement of necessary practice to entitle him to be admitted to practice here.

The committee of bar examiners was acting within its jurisdiction during the entire period of petitioner's persistent efforts to be admitted to practice law in this state. Its orders denying petitioner's application for admission to practice are affirmed.

We concur: LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.; EDMONDS, Justice pro tem.

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16 Cal.App.2d 483

WATERMAN v. LIEDERMAN et al.

Civ. 9871.

Supreme Court of California.

Nov. 13, 1936.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Prior opinion, 60 P.(2d) 881.

Livingston & Livingston, of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent J. H. Liederman.

Haight, Trippet & Syvertson, of Los Angeles, for respondent Firestone Tire & Rubber Co. of California.

PER CURIAM.

The petition for hearing in this court, after decision by the District Court of Appeal, First Appellate District, Division 2 (60 P.(2d) 881), is denied. However, we withhold our approval of that portion of the opinion declaring that plaintiff failed to make out a cause of action against the manufacturer by reason of the intervening gross carelessness of the driver, not because it is an incorrect statement of the law, but because the driver was exonerated of such charges, hence it cannot operate as an intervening cause to relieve the manufacturer.

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7 Cal.2d 650

PEOPLE v. VALENZUELA.

Cr. 4027.

Supreme Court of California.

Nov. 10, 1936.

1. Criminal law 🔑48

Only test applicable to determination of legal responsibility for violation of criminal statutes is whether accused knew or understood nature and quality of act which he committed, and, if so, whether he knew act was wrong and punishable by law, and, if answer thereto is affirmative, defendant must suffer punishment prescribed by law, notwithstanding mental abnormalities not bearing on commission of act (Pen.Code, § 190).

2. Criminal law 🔑986

Consideration of mental state of accused in fixing punishment or degree of crime must be limited to facts relevant to and connected with commission of crime charged, and detached or disassociated acts culled from the life of defendant would not be admissible except on hearing as to insanity (Pen.Code, § 190).

3. Criminal law 🔑986

In murder prosecution, independent acts not part of res gestæ relating to occasions on which defendant in unreasonable bursts of anger made violent assaults on his brother and father *held* inadmissible on question whether defendant should suffer death penalty or imprisonment in penitentiary (Pen. Code, § 190).

4. Homicide ⚷282½

Proper punishment to be imposed in murder prosecution lies within discretion of jury after full consideration of all evidence (Pen.Code, § 190).

5. Homicide ⚷354

Discretion of jury in fixing punishment on conviction of murder should not be arbitrarily or captiously exercised (Pen.Code, § 190).

6. Homicide ⚷332(1)

Jury's exercise of discretion in mitigation of punishment for murder is not reviewable (Pen.Code, § 190).

7. Homicide ⚷253(1)

Evidence *held* to support conviction for murder without recommendation of life imprisonment (Pen.Code, § 190).

◆

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Natividad Valenzuela was convicted of murder, and he appeals.

Affirmed.

Harry C. Westover, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

The appellant, Natividad Valenzuela, was charged by an information filed against him in the county of Orange with having, on May 2, 1936, murdered Jovita Lopez Valenzuela, his wife. He entered the general plea of not guilty and also the plea of not guilty by reason of insanity. The jury returned a verdict of guilty of murder as charged in the information, without recommending life imprisonment, and the issue of insanity having been subsequently determined against him, the court pronounced the sentence of death upon the jury's said verdicts.

[1] His attorney in his opening brief says that he feels that the case was fairly tried and the evidence fairly presented to the jury. The sole question raised by him goes to the issue of intent, or rather to the capacity of the defendant to form a criminal intent. During the trial of the main case appellant's attorney made an offer to prove that the appellant had on several occasions, in bursts of anger and with little or no reason to do so, made violent assaults upon his brother, Narsario, and upon one occasion upon the father, who interfered in a difficulty between the brothers. These troubles, as related by the father and brother, grew out of disputes touching the control of or the right to an automobile which seemed to have been used by the brothers in accordance with some kind of an understanding between them, or were occasioned by the appellant's irritability as to the method in which the brother Narsario was performing the work in which both were engaged. The appellant was taken into custody by a peace officer, on one occasion, on complaint made by the father as the result of a difficulty in which several members of the family took part, but the complaint seems to have been withdrawn or dismissed. Proof of this class of independent acts, which were in no sense a part of the res gestae, were tendered in the main issue of not guilty to show, as appellant puts it, that he was subject to fits or spells during which he suffered a loss of mental poise and self-control. It was not claimed that said temperamental condition rendered him absolutely exempt from punishment, but that it was a proper matter for the jury to consider in determining the question as to whether the defendant should suffer the death penalty or imprisonment in the state penitentiary at the discretion of the jury. Section 190, Pen. Code. The above section absolutely delegates the fixing of the penalty for the commission of murder in the first degree to the discretion of the jury trying the case. The question appellant presents is whether mental weakness or infirmities which do not amount to the kind or degree of insanity or irresponsibility which exempts a person from legal responsibility are proper matters for the consideration of the jury in the exercise of its discretion as to whether the punishment should be death or confinement in a penal institution. Under the decisions of this state, the only test applicable to a determination of legal responsibility for the violation of statutes against crime is: "Did the accused know or understand the nature and

quality of the act which he committed, and if so, did he know it was wrong and punishable by law?" If the answer be that he did, he must suffer punishment as prescribed by law, notwithstanding mental abnormalities which do not bear upon the commission of the act. But granting that he is not exempt from punishment by reason of mental deficiencies, is, nevertheless, his mental weakness a proper matter to be weighed by the jury in the exercise of its discretion as to whether he shall or shall not suffer the death penalty?

[2, 3] If the mental state of the accused, as disclosed by the evidence upon trial as to guilty or not guilty, is a matter which the jury may consider in fixing the punishment or degree of the crime, it would seem, under our system, such considerations must be limited to those facts and circumstances relevant to and connected with the commission of the crime charged. Detached or disassociated acts culled from the life of the accused would not be admissible in evidence except on a hearing as to the insanity of the accused. All of the matters raised on the appeal, and a number of others not referred to, were placed before the jury on defendant's plea of not guilty by reason of insanity, and the jury found against said plea. He testified at considerable length as to both his mental condition at the time he committed the crime and as to the means by which it was committed. The court gave the jury very full instructions as to its right to exercise its discretion and relieve the defendant from the extreme penalty of the law if, in its judgment, the lesser punishment should seem proper in the circumstances of the case presented.

[4-6] It is not to be understood by what we have said herein that we have assumed to limit the power of the jury in the reasonable exercise of its discretion arising out of the facts and circumstances connected with the offense charged. The proper punishment to be imposed is to be determined by the jury after a full consideration of all the evidence adduced at the trial, including that of the defendant, and its discretion which, of course, should not be arbitrarily or captiously exercised, rests wholly within the province of the jury, and when exercised in mitigation of the punishment is not a matter which the court may review.

We will now turn briefly to the commission of the crime. The defendant at the time he committed the offense charged against him was twenty-four years of age and of Mexican ancestry. He was born in this country and spent approximately all of his life near the city of Santa Ana. He had attended American schools and had passed through the grammar grades. His English and his methods of expression are above the average. To the time of his marriage, he was living with his father's family, which consisted of father, mother, six sisters, himself, and a brother. All of the children, it seems, were born in the Delhi district near the city of Santa Ana, where they attended school. The father appears to have been a hard-working man, who in later years received some assistance from his sons in keeping the family together. The deceased, whose maiden name was Jovita Carrillo, was seventeen years of age, born in California, and was educated in the same community as the defendant. The two and their families had been acquainted for a number of years. The defendant and deceased intermarried approximately four months before he killed her. Jovita had not reached her majority and the wedding seems to have been clandestinely performed. After marriage the couple lived for a short time at his father's home, and then took up their domicile a few doors from the home of defendant's father. There is testimony in the record that the defendant on one or two occasions had used physical violence upon his wife and that she refused to return to his home some two or three weeks before her death by reason of mistreatment. She also made some reference to being under age at the time of marriage and suggested the institution of annulment proceedings.

It was claimed that on the occasion above mentioned the defendant made the threat that if his wife, who was then at the parents' home, did not return to his home, he would kill her. She did return on the day she told him she would not live longer with him, but the evidence is to the effect that they frequently quarreled and that on several occasions he used physical force on her. On the day she was killed they had spent the forenoon in Santa Ana. Mr. and Mrs. Guadalupe Lopez were their guests and rode with them into the city, occupying the back seat of the defendant's automobile. While in Santa Ana defendant and his wife visited two furniture stores. The wife was desirous of buying a bedroom set. A $10 deposit was required to make the purchase, and as the defendant had but little change the purchase was not made. He said to his wife that he was going to work the following week and they would make the purchase when he received his pay check. They returned to the Lopez home, stayed a few minutes, and returned to their home, having declined an invitation to take dinner with Mr. and Mrs. Lopez as Mrs. Valenzuela was not feeling well. It was understood that the party was to go to a picture show in the defendant's automobile, and the Valenzuelas were to return early in the evening. They did not return. As to what occurred from that time on, we have only the testimony of the defendant. He says that the wife wished to go to a Saturday night dance held at Capistrano. He demurred, as he did not enjoy dancing. She prevailed, and the couple started at about 7 o'clock for the dance. They quarreled on the way, and after traveling for some time along the banks of Peter's canal, a drainage ditch, he turned off this main road and drove down a dirt road, apparently seldom used, halted, and protested against going further. He said he had no money. He made contradictory statements as to what happened after he had determined not to go to the dance. In his testimony he said that his wife said she was going to walk home and started to get out of the car, and that he went around to the front door and after some struggling pulled her out. At another time he said that she jumped out; that he was struggling with her and that she scratched and kicked him; that the rear door of the car hung open and he reached in and took from the floor the auto jack and struck her three blows on the face and head. She never spoke while he was striking her. The blows crushed in the frontal bones of the face, and the cranial wounds were of such a depth that death was certain to ensue within a short time after they were inflicted. The car was stopped near the banks of said ditch, which was nine feet deep and contained a few inches of water. Its banks and sides were covered with a growth of weeds. He rolled her body to the brink of the precipitous side of the ditch and it went to the bottom of its own momentum. He threw the blood-stained jack into the ditch, where it sunk in the mud, covering all but a few inches of its length. The body was discovered one week afterwards by two boys, Vernon and Bobby Calvin, who happened to pass that way while enjoying a Saturday outing. After the murder the defendant drove to his father's home and later in the afternoon had his brother drive him to Riverside, where he intended to board a freight train. Not able to do so, he walked to Colton, and from this point made his way by freight train and automobile to Texas, where he remained a few days and then returned to Santa Ana by the same methods of transportation which he employed on leaving. He was arrested while walking into Santa Ana on the railroad track. At first he denied his identity and gave a false name. Soon after his arrest he disclosed his identity and made several statements, but did not in any of them relate any circumstances which would tend to justify or mitigate his shocking assault and ruthless treatment of his wife's body, except to say that he became so angry, in the circumstances of the situation, that he lost his self-control and was no longer master of his perverse passions.

On the trial of the issue of not guilty by reason of insanity it developed that an aunt on the paternal side and an aunt on the maternal side of defendant had been afflicted with insanity. It was also claimed that the defendant had impaired his mind by smoking marijuana cigarettes for a period of time prior to his marriage. In fact, in a belated statement as a witness, he testified that he smoked such a cigarette on the day he committed the crime. There is no substantial evidence in the record to the effect that either the use of intoxicating liquor or the effects of any drug used by him had impaired his mind to the extent that he was not conscious of the act which he committed. In fact, there is no evidence to justify the claim that he was, or ever had been, excessively addicted to the use of either. The two alienists appointed by the court to examine the defendant and investigate his sanity, Dr. Edwin Wayte, superintendent of the Norwalk State Hospital, and Dr. Aaron J. Rosanoff, a specialist in nervous and mental diseases, testified that in their opinion the defendant was responsible for his acts as tested by the rule heretofore announced, both at the time of trial and at the time he committed the crime charged against him. Dr. Rosanoff thought that the defendant exhibited a serious temperamental abnormality which may have been inherited. He was of the opinion, however, that he was able to distinguish right from wrong.

[7] We have examined the entire record, but do not find that any prejudicial errors were committed against the defendant. The evidence being sufficient to sustain the judgment and the orders, we are not at liberty to disturb it.

The judgment and orders appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; EDMONDS, Justice pro tem.

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7 Cal.2d 657

CROATIAN-SLAVONIAN BENEV. SOC., LODGE NO. 177 OF CROATIAN FRATERNAL UNION OF AMERICA v. MIOCH.

L. A. 15930.

Supreme Court of California.

Nov. 10, 1936.

Limitation of actions 🔑179(2)

Complaint, in fraud action by fraternal benevolent society against former secretary, showing discovery of fraud within three preceding years under such circumstances that society would not be presumed to have had knowledge of fraud when it occurred, *held* to state cause of action.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. L. Bogue, Judge.

Action by the Croatian-Slavonian Benevolent Society, Lodge No. 177 of the Croatian Fraternal Union of America, against Stephen A. Mioch, sometimes known as S. A. Mioch. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 56 P.(2d) 543.

Haas, Johnston, Maurseth & Kerrin, and Maurseth & Kerrin, Walter F. Haas, Stanley F. Maurseth, and Gerald E. Kerrin, all of Los Angeles, for appellant.

V. P. Lucas, of Los Angeles, for respondent.

WASTE, Chief Justice.

The plaintiff, a fraternal benevolent society, brought suit against the defendant, its former secretary, to recover the sum of $2,151.30, alleged to have been fraudulently misappropriated and by him converted to his own use. The defendant interposed a demurrer attacking the complaint on nearly a score of grounds. The demurrer was overruled, and the defendant was given ten days within which to answer. On his failure to answer, his default was duly entered, and, upon the taking of testimony, judgment was entered for plaintiff as prayed for.

The transcript shows that at the time he filed the demurrer to the complaint the defendant also filed a motion to strike from the complaint certain allegations particularly set out and described. No ruling was made by the trial court on the motion to strike at the time the demurrer was overruled, although both matters were argued and presented together, and both matters were called to the court's attention. Some time after judgment for plaintiff was entered, the court made an order, "nunc pro tunc" as of the date of the ruling on the demurrer "correcting Minutes to show 'The motion to strike is denied.'" Defendant appeals from the judgment and attacks the orders overruling the demurrer and denying the motion to strike.

Respondent admits that: "While the complaint is perhaps not a model for succeeding generations to pattern after, nevertheless", it contends, "it meets all of the statutory requirements, and when read in its entirety states a cause of action clearly and concisely and shows a right in the plaintiff, a duty on the part of defendant, a breach or a violation of that duty by the defendant to the resulting damage of plaintiff." With both this admission and contention we must agree. The defendant was the secretary of plaintiff, and was charged, among other matters, with collecting the dues from the members, receipting for and paying the same to the treasurer, keeping an accurate account of all receipts and disbursements, and submitting the report regularly to the lodge. By fraudulently entering upon the lodge books and records kept by him as secretary lesser sums than the amounts collected from the respective members, and depositing the funds of plaintiff coming into his possession as secretary in a bank account opened in his individual name as agent, he manipulated his lodge accounts, books and records as secretary in such manner that plaintiff was prevented from making an earlier discovery of the fraud than that alleged in its complaint. It was not until the trustees of the lodge audited and checked a report of the appellant, discovered the irregularities in the secretary's accounts, and caused an audit to be made, that the shortage sued for ($2,151.30, named in the complaint) was discovered.

The complaint shows: (1) That the fraud was not discovered until within three years prior to the time the action was commenced; (2) that the fraud was committed under such circumstances that the plaintiff would not be presumed to have had knowledge of it at the time; and (3) sets forth the times and circumstances under which the facts constituting the fraud came to plaintiff's knowledge sufficiently for the court to determine from the allegations of the complaint whether the discovery was within the three-year period. Such is the burden placed on the plaintiff in these cases, and, when it is fairly met, the complaint states a cause of action. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 701 et seq., 16 P.(2d) 268. The complaint met the test, the demurrer was properly overruled, and the motion to strike was properly denied.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; EDMONDS, Justice pro tem.

7 Cal.2d 636

TREAT v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15692.

Supreme Court of California.

Oct. 30, 1936.

1. Certiorari 🔑28(2)

Order purporting to grant motion to vacate and set aside findings of judgment may be annulled on certiorari if order was beyond power of trial court.

2. Trial 🔑393(1)

Statutory provision that copy of proposed findings shall be served on all parties to action at least five days before findings are signed by court, and that court shall not sign any findings prior to expiration of five days, is directory and not mandatory (Code Civ. Proc. §§ 634, 662).

3. Judgment 🔑340

Independent of statutory provision, court has power to correct mistakes in its proceedings and annul within reasonable time orders and judgment prematurely, inadvertently, or improvidently made by court.

4. Divorce 🔑165(6)

Grant of motion to vacate and set aside findings and judgments in action for divorce and to establish trust on realty and personalty *held* not sustainable as exercise of court's inherent power to correct mistakes and annul judgments prematurely, inadvertently, or improvidently entered, in absence of statement by trial court that order was based on such grounds.

5. New trial 🔑164

Power to alter, modify, or set aside findings and judgments is to be exercised only in conjunction with ruling on motion for new trial (Code Civ.Proc. § 662).

6. New trial 🔑164

Order vacating findings and judgment because no copy of fact findings and conclusions of law and judgment had been served on opposing party prior to time they were signed by trial court *held* not sustainable as exercise of court's statutory power to set aside findings and judgment, and reopen case for further proceedings in lieu of granting new trial, in absence of showing of any action taken on motion for new trial filed with motion to set aside findings and judgment (Code Civ Proc. §§ 634, 662).

SEAWELL, J., dissenting.

In Bank.

Proceeding on the petition of Evelyn Mariquita Treat for a writ of certiorari seeking to annul, vacate, and set aside an order made and entered in Superior Court of the City and County of San Francisco.

Order annulled.

Nat Schmulowitz, George B. Harris, P. J. Murphy, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for petitioner.

August L. Fourtner, of San Francisco, for respondent.

CURTIS, Justice.

This is an application by the petitioner, Evelyn Mariquita Treat, for a writ of certiorari seeking to annul, vacate, and set aside an order made and entered in the Superior Court of the city and county of San Francisco, granting a motion to vacate the findings and judgment in two separate actions which had been consolidated and tried by said court. These actions had been instituted by Valentine Treat, as plaintiff, against his wife, petitioner herein, one for divorce, and the other to establish a trust upon certain real and personal property held by her. On May 21, 1935, so the petition sets forth, the judge who heard the case, Honorable Thomas F. Graham, now deceased, made and entered his decision in favor of the defendant upon her cross-complaint, and an order to that effect was entered in the official records of the court. Thereafter on June 25, 1935, said judge signed the findings of fact and conclusions of law and judgment in the consolidated cases in favor of petitioner, granting to her an interlocutory decree of divorce, custody of the minor child of the parties, a certain amount for the minor's support to be paid monthly by the plaintiff, and quieting title to the real and personal property involved in the suits. Said judgment was recorded on June 27, 1935, in the official records of said superior court. Thereupon, on July 8, 1935, plaintiff served and filed notice of his intention to move for a new trial, and also a motion to vacate the judgment and findings of facts and conclusions of law upon the ground as set forth in said motion, that: "No copy of the said proposed Findings of Fact and Conclusions of Law, and Judgment were ever served upon, or exhibited to the plaintiff, or his counsel, prior to June 28th, 1935." On August 26th the motion to vacate the findings and judgment was heard by the late Thomas F. Graham, who granted the motion to vacate the findings and judgment. The following minute order or entry was then made and entered in the records of said court: "In this action, it is ordered by the court that the motion to vacate the findings and judgment be and the same is hereby granted." It is this order which petitioner here seeks to have annulled.

[1] Petitioner argues that the trial court in granting said motion to vacate and set aside the findings and judgment in said actions acted without and in excess of its jurisdiction and, therefore, the minute order just quoted is void and may be vacated and annulled on certiorari. There is no question that if the trial court had not the power to vacate and set aside its original findings and judgment, the order purporting to do so may be annulled on certiorari. Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, 1005; see, also, Lankton v. Superior Court, 5 Cal.(2d) 694, 55 P.(2d) 1170. In Stanton v. Superior Court, supra, the court said: "To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system."

[2] The sole question, therefore, presented is whether or not the minute order complained of, as made and entered, was beyond the power of the trial court to make. Section 634 of the Code of Civil Procedure, provides that: "In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days." However, this section has on numerous occasions been held to be merely directory and not mandatory. Amundson v. Shafer, 36 Cal. App. 389, 172 P. 173; Hammond Lumber Co. v. Henry, 87 Cal.App. 231, 261 P. 1027; Citizens' National Trust & Savings Bank v. Meserve, 139 Cal.App. 89, 33 P.(2d) 73, 34 P.(2d) 730; Manfre v. Sharp, 210 Cal. 479, 292 P. 465; Lorraine v. McComb, 220 Cal. 753, 32 P.(2d) 960. And nowhere in the statutes is the failure of a party to serve the opposite party with a copy of the proposed findings of fact and conclusions of law specified as a ground for setting aside or vacating a judgment.

[3] There are two possible sources of authority for making the order upon which the trial court could have relied. One such source is the express statutory authority conferred upon the court by the provisions of section 662 of the Code of Civil Procedure, which is to be exercised in conjunction with, and as a part of, the court's duty to rule upon a motion for a new trial. Said section reads as follows: "In ruling on such motion [motion for a new trial], in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial, on all or part of the issues, or, *in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings* and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered." (Italics ours.) The other source of authority, which might have been relied upon by the trial court as a basis for the order of annulment, is the inherent power of the court, independent of statutory provisions, to correct mistakes in its proceedings and to annul within a reasonable time orders and judgments prematurely, inadvertently, or improvidently made by the court. Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646; Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; Burbank v. Continental Life Ins. Co., 2 Cal.App.(2d) 664, 38 P.(2d) 451, and Watkins v. McCartney, 70 Cal.App. 137, 232 P. 982. See Freeman on Judgments, vol. 1, p. 432.

It follows that if the trial court had in fact proceeded under the power conferred by said section 662 of the Code of Civil Procedure in the making of the order complained of, the making of such order would have been within the power of the court, and such order could not be successfully attacked. Spier v. Lang, 4 Cal.(2d) 711, 53 P.(2d) 138; Ingram v. Wessendorf (Cal.App.) 57 P.(2d) 989; Barcroft & Sons Co. v. Cullen, 213 Cal. 208, 2 P.(2d) 353; Moore v. Levy, 128 Cal.App. 687, 18 P.(2d) 362; Heron v. Bray, 122 Cal.App. 79, 9 P.(2d) 513; Holland v. Superior Court, 121 Cal.App. 523, 9 P.(2d) 531. Or if the order granting the motion to set aside and vacate the original findings of fact and conclusions of law and judgment had been based upon the fact that said findings of fact and conclusions of law and judgment had been signed prematurely or improvidently, or under the mistaken belief of the trial judge that they had been served on the opposite party, said order would have been within the power of the trial court to make and would be sustained as a proper and valid order.

[4] Respondent advances no claim or contention that the original findings and judgment were prematurely or improvidently made. The motion to vacate and set aside said findings and judgment states that it is made upon the ground that no copy of said findings of fact and conclusions of law and judgment had ever been served on the opposite party or his counsel prior to the time they were signed by the trial court. The minute order, as made and entered, merely states that the motion was granted, and contains no language specifying that the motion was granted by reason of the fact that the original findings of fact and judgment were signed inadvertently or under the mistaken belief that they had been served upon the opposite party. We are of the opinion that if the trial court in fact based its order of annulment upon such ground, it should have so specified in the order granting the motion to vacate, and that in the absence of any such statement, the action of the trial court cannot be upheld on such a hypothesis.

[5, 6] Respondent relies solely for justification of the order complained of upon the ground that a motion for a new trial was served and filed at the same time the motion to vacate and set aside the findings and judgment, and claims, therefore, that the court in making said order was in fact acting in pursuance of the power conferred by section 662 of the Code of Civil Procedure. The power to alter, modify, or set aside findings and judgments is to be exercised only in conjunction with a ruling upon the motion for a new trial. The language of the statute and the authorities construing said section seem to indicate that some ruling upon said motion for a new trial is prerequisite to an exercise of the power conferred to change or vacate the findings or judgment. There is nothing before us to indicate that any action upon the motion for a new trial was

ever taken by the trial court. Petitioner states that the notation on motion for a new trial shows a line drawn through it in ink. If this be true, it would further indicate that no action was taken upon the motion for a new trial by the trial court. In any event, there is nothing before us to show that any action whatever was taken upon said motion for a new trial. The mere fact that a motion for a new trial was made in the consolidated actions is not sufficient to justify a conclusion that the order of annulment was made in conjunction with any ruling upon the motion for a new trial.

The order purporting to grant the motion to vacate and set aside the original findings of fact and judgment is annulled.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; LANGDON, J.

SEAWELL, Justice (dissenting).

I dissent. The majority opinion concedes that, independently of the provisions of section 662 of the Code of Civil Procedure, the trial court possesses the inherent power to set aside its findings, conclusions, and judgment in a case where it is shown that they were signed under the mistaken belief that they had been served on the opposite party. The motion in the present case was based on the sole ground that a copy of the findings, conclusions and judgment had not been served. The motion having been granted, that must have been the reason for its granting. It is the only reasonable and logical conclusion that can be reached. That conclusion is directly responsive to the grounds of the motion. It plainly indicates that the signing by the judge was obtained under a mistake of fact. The only element lacking is that the trial judge did not expressly find that he had signed the findings and conclusions and judgment in the mistaken belief that they had been served on the opposite party. The statute requires that they be so served. It is true that the statute is directory only, but that does not mean that in signing the findings the trial judge cannot assume that the provisions of the statute were followed. Keeping in mind the presumptions in favor of the trial court's actions, I think the burden is on petitioner to show irregularity and not on the respondent to justify the trial court's actions.

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17 Cal.App.2d 426

In re BAUER'S TRUST.

BAUER v. AMERICAN TRUST CO.

Civ. 10321.

District Court of Appeal, First District, Division 2, California.

Nov. 12, 1936.

Rehearing Denied Dec. 12, 1936.

Hearing Denied by Supreme Court Jan. 11, 1937.

1. Trusts 🔑162

Courts may order discharge of trustee of private trust, although trustee may not discharge himself.

2. Trusts 🔑162

In absence of formal release by beneficiary, trustee is entitled to judgment of discharge on termination of trust (Civ.Code, § 2230).

3. Trusts 🔑303

Trustee of private trust *held* entitled to maintain proceeding to obtain decree that trust was terminated and incidentally to tender account, have account approved, and surrender to beneficiary remaining properties held in trust (Code Civ.Proc. § 1060).

4. Trusts 🔑283(2)

Trustee may be permitted to deal in trust property with himself or acquire interest therein where beneficiary has capacity to contract and deals with trustee with full knowledge of trustee's motives and of all other facts concerning transaction which might affect his own decision and without use of any influence on part of trustee (Civ. Code, § 2230).

5. Appeal and error 🔑901

Reviewing court will not search record to gather material on which to reverse trial court.

6. Trusts 🔑315(3)

Rules applicable to fixing compensation of executor or administrator do not control in fixing compensation of trustee.

7. Trusts 🔑315(3)

Fixing of compensation of trustee is committed to sound legal discretion of trial court.

8. Trusts 🔑315(3), 325

In proceeding to terminate private trust and settle account of trustee, approving item of account involving charges by trustee for commission for leasing realty belonging to trust and for cost of preparing and filing fiduciary income tax return *held* not abuse of discretion under evidence (Code Civ.Proc. § 1060; Civ.Code, § 2230).

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding in the matter of the trust created by deed of Mary Bauer to Charles A. Hellwig. From a decree adjudging that the trust had been terminated and settling the account of the American Trust Company, as trustee, Mary Bauer, as beneficiary, appeals.

Affirmed.

Charles A. Christin and Thomas J. Keegan, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

STURTEVANT, Justice.

From a decree adjudging that a trust had been terminated and settling the account of the trustee, Mary Bauer, as the beneficiary under the trust, has appealed.

Heretofore Mary Bauer was the owner of a certain lot and improvements thereon located near the corner of Eighth and Mission streets in San Francisco. On the 19th day of June, 1918, she conveyed said property to Charles A. Hellwig to hold the same in trust for her according to the terms designated in the deed. Later Charles A. Hellwig resigned as trustee and Mercantile Trust Company was appointed trustee in his place. Thereafter the Mercantile Trust Company was merged with the American Bank, another corporation, and the two became the American Trust Company.

Mary Bauer was also the owner of certain properties located in Marin county. At San Anselmo in said county the American Trust Company maintains a branch bank. At some time prior to the commencement of this action Mary Bauer executed a deed of trust in favor of the San Anselmo branch of the American Trust Company to secure a promissory note evidencing an indebtedness.

From the date on which it was appointed trustee down to December 6, 1933, the American Trust Company discharged its duties as trustee under the Hellwig trust. On the date last mentioned it filed a petition, report, and account in the above-entitled matter in the superior court in San Francisco. In that document the American Trust Company set forth the following facts: It pleaded the execution of the trust deed to Charles A. Hellwig and set it forth in hæc verba. Among other things, that deed contained the following: "To Have and to Hold unto said party of the second part in trust, however, for the following uses and purposes, towit: To manage and control said real property and receive the rents, incomes and profits thereof for the period of fifteen (15) years from date hereof, if said party of the first part shall live during that period; otherwise during the said life of the party of the first part, and to pay the same to the said party of the first part"; the date, and book, and page of the recordation of said deed; the resignation of Charles A. Hellwig and the appointment of American Trust Company as a substitute; the qualification of the petitioner and the performance of its acts from the date of its appointment, March 12, 1925, to November 6, 1933; that petitioner received $30,301.52, disbursed $29,431.24, and had on hand a balance of $870.28; that every item of receipt and of disbursement was correctly set forth in the formal account attached to the petition; that the trustee had diligently managed the trust property, had acted fairly toward the beneficiary, and had fully carried out the duties of trustee; that the deed was dated June 19, 1918, and the period of fifteen years mentioned therein expired June 19, 1933; that the trustor was still living, and therefore the trust had expired and terminated; the name and address of the beneficiary; that the trustee had received 5 per cent. of the gross income as its compensation, but that its attorneys had received no compensation and that they were entitled to reasonable compensation for services rendered. Notice was given of the hearing to Mary Bauer and she appeared by counsel and filed "Objections to Final Account and Petition of American Trust Company." Her pleading set forth the following: She alleged that the Hellwig trust had not expired nor terminated and that it was still in full force and effect; she pleaded specifically certain passages contained in said deed; that since the petitioner commenced to administer said trust she had not received all of the income from the property after deductions for maintenance and repairs as specified in said trust; that the trustee had applied some of the proceeds to pay interest and repay capital of certain loans contrary to the terms of said trust; she specified other disbursements which she claimed had been illegally paid; she alleged that the trustee had borrowed $3,000 from the Humboldt Bank to make certain alleged repairs and that she was compelled to sign the application therefor; she objected to the payment of $1,228 as interest on said loan from the Humboldt Bank; and finally she alleged that $14,937.30 was not paid to her personally but was paid to the branch bank of the American Trust Company at San Anselmo. In due time a hearing was had in the above-entitled matter on the issues so made by the parties. The trustee and the beneficiary each produced both oral and documentary evidence. Thereafter the trial court caused a decree to be entered in favor of the trustee and against the beneficiary. That decree contained specific findings on every issue that was presented to the trial court.

[1-3] Asserting that in the instant case the trial court was called upon to hear and settle the account of a trustee of a private trust, Mary Bauer contends the trial court was without jurisdiction. She cites and relies on Gillette v. Gillette, 122 Cal. App. 640, 10 P.(2d) 760; Oil Well Supply Co. v. Superior Court, 9 Cal.App.(2d) 624, 51 P.(2d) 908. Neither of those decisions is applicable to the facts in the instant case. As will be noted from what has been said above, the pleadings put in issue the question as to whether the trust had been terminated and also many items of disbursements made by the trustee and in particular the application by the trustee of $14,937.30 which it paid to its branch office at San Anselmo. The issues so presented authorized the petitioner to commence a proceeding under section 1060 of the Code of Civil Procedure. Moreover, at an early date it was decided that the courts may order the trustee of a private trust discharged but that the trustee may not discharge himself. In the absence of a formal release by the beneficiary, the trustee is entitled to a judgment of discharge. See sections 2279–2289, Civil Code (1872), and notes of commissioners. In other words, the petitioner had the clear right to maintain this proceeding to obtain a decree that its trust was terminated and incidentally to tender an account, have it approved, and surrender to the beneficiary the remaining properties held in trust.

[4] Pointing to the payments made to the San Anselmo branch, Mary Bauer contends the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself or acquire any interest therein. The rule contended for is statutory. Civ.Code, § 2230. But that statute creating the rule creates exceptions thereto. The first exception is that, when the beneficiary, having capacity to contract, with the full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. Miller v. Security-First National Bank of Los Angeles, 219 Cal. 120, 131, 25 P.(2d) 420. During the trial both parties introduced evidence as to whether the trustee acted within the scope of said exception. The trial court held that it did. Appellant has not shown us wherein the finding made in that behalf was not supported by the evidence.

[5-8] Finally, it is contended that the account rendered by the trustee reveals some improper charges. As we stated above, such subjects were presented by the pleadings, and specific findings were made thereon. In her brief Mary Bauer contends that the said expenditures were in violation of the rule stated in Perry on Trusts, p. 720. She quotes: "A trustee has been refused compensation for services rendered by himself for himself as trustee on the ground that no man can make a contract with himself." But she has not quoted any portion of the record showing that in the instant case the trustee violated the rule which she quotes, and it is settled law that a court of review will not search a record for the purpose of gathering material on which to reverse a trial court. In presenting her point the appellant attacks three different disbursements. On January 6, 1927, the trustee entered a charge of $285 for commission for leasing the real estate. Of that sum $142.50 was paid to Buckbee, Thorne & Co. The rest was paid to the trustee. It is not claimed that the charge was unreasonable. It is not claimed that a trust company accepting such a trust as was involved in the instant case undertakes to act as broker in obtaining lessees or vendees. In fixing the compensation of a trustee, the rules applicable to fixing the compensa-

tion of an executor or administrator do no control. In re Estate of Willard, 107 Cal.App. 672, 290 P. 897. But the fixing of the compensation of a trustee is committed to the sound legal discretion of the trial court. No fact is called to our attention showing that the trial court in any respect abused that discretion. In April, 1932, the trustee entered a charge, "Paid cost of preparing and filing fiduciary income tax return for year 1931—$5.00." A similar entry was made for the year 1932. There was evidence that the amounts were paid. There was no evidence that they were not paid. Neither was there any evidence that either sum was an improper charge in any respect.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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17 Cal.App.2d 411

BOGARDUS v. SNYDER et ux.

Civ. 11040.

District Court of Appeal, Second District, Division 1, California.

Nov. 9, 1936.

1. Negligence 🔑83

Last clear chance rule does not apply where one of its essential elements is lacking, but in such case plaintiff's negligence remains a proximate cause.

2. Automobiles 🔑244(59)

Where, under evidence, defendant motorist either had no opportunity to avoid collision at intersection by exercising ordinary care or else did not know that plaintiff motorist was unaware of his danger and could not have so discovered by exercise of ordinary care, last clear chance rule could not be applied to remove effect of plaintiff's negligence as bar to his recovery, since one of essential elements was lacking.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Park E. Bogardus against W. R. Snyder and wife. From a judgment for defendants and an order denying a new trial, plaintiff appeals.

Judgment affirmed, and the appeal from the order denying a new trial dismissed.

W. Cloyd Snyder, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondents.

BISHOP, Justice pro tem,

Plaintiff seeks to recover damages resulting from a collision between his automobile and that of defendants, on the theory that the defendant Mrs. Snyder failed to avail herself of the last clear chance to avoid the accident. We approve of the action of the trial judge in directing the jury to bring in a verdict for the defendants.

Taking the evidence most favorable to plaintiff, we are told that both he and the defendant Mrs. Snyder entered an intersection at a rate of speed greater than that prescribed by the statute, their cars coming together about the middle of the intersection. Plaintiff did not look at all toward the right, the direction from which the defendant was coming; his eyes were fixed ahead; and he did not see defendants' car until just before it ran into his car. The speed of plaintiff's car, as he entered the intersection, was "about 20 to 25 miles" per hour; the speed estimated for defendants' car was between 30 and 35 or 40 miles per hour. When she was about fifty feet back of the paved portion of the street upon which plaintiff was driving, defendant became conscious of his approach, thanks to the alarm of her small son, and not her own vigilance. Her reaction was to step on the gas and drive straight ahead. She was so busy with herself, she testified, that she did not notice the plaintiff; she did not know where he was looking nor whether he swerved his car one way or the other.

[1] From this evidence, reasonable minds could reach but one conclusion: Plaintiff was driving negligently, and his negligence was a contributing cause of the accident, warranting the trial court in instructing the jury to bring in a verdict for the defendants unless the facts give possible foundation for the application of the doctrine of the last clear chance. While it might seem that, factually, plaintiff's negligence would be one of the factors contributing to the accident,

whether or not the situation was one where the last clear chance rule should be applied, legally, we are told, it ceases to be a proximate cause in those cases where the rule is applied. Girdner v. Union Oil Co. (1932) 216 Cal. 197, 13 P.(2d) 915; Center v. Yellow Cab Co. (1932) 216 Cal. 205, 13 P.(2d) 918. However, if one of the elements essential to invoking the last clear chance rule is lacking, the rule does not apply, but plaintiff's negligence remains a proximate cause not alone of the accident, but therefore of his failure to recover judgment. Palmer v. Tschudy (1923) 191 Cal. 696, 700, 218 P. 36; Girdner v. Union Oil Co., supra, 216 Cal. 197, at page 202, 13 P.(2d) 915.

[2] At least one of the essential elements of the doctrine is lacking in this case. If we take the horn of the dilemma that plaintiff was in a position of danger from which he could not escape by the exercise of ordinary care, because it was physically impossible, then it is plain that the defendant herself did not have a chance to avoid the accident by exercising ordinary care, for, under the facts we have, she had a poorer chance of avoiding the accident than he had, as he was driving more slowly. Note: New York, etc., Co. v. United Railroads (1923) 191 Cal. 96, at page 102, 215 P. 72. But if we take the stand that plaintiff was in a position of danger from which he could not extricate himself, because he was unaware of his danger, and hence could not bring ordinary care into play, then it appears that defendant did not know that he was so situated, because she did not know that plaintiff was unaware of his danger, nor, if this be important, could she have discovered that fact by the exercise of ordinary care. In both Girdner v. Union Oil Co., supra, and Center v. Yellow Cab Co., supra, the court notes that the defendant realized that the plaintiff was unaware of his predicament.

Moreover, if, as was done in Poncino v. Reid-Murdock & Co. (1934) 136 Cal.App. 223, 28 P.(2d) 932, full significance is given to the adjective "clear" in the statement of the further essential that the defendant shall have a clear chance to avoid the accident, then it appears that the defendant here did not have such a chance.

We are of the opinion that this is not a case where the last clear chance rule should have been applied; the trial court was not in error in disregarding it.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: HOUSER, P. J.; DORAN, J.

17 Cal.App.2d 420

MATHEWSON v. NAYLOR.

Civ. 11099.

District Court of Appeal, Second District, Division 2, California.

Nov. 10, 1936.

1. Appeal and error 🔑460(2)

Appeal from judgment for costs *held* to stay execution on judgment, since it was not "a judgment for the payment of money" for which an undertaking on appeal was required to stay execution (Code Civ.Proc. § 942).

2. Appeal and error 🔑479(1)

Where respondent had taken steps under statute authorizing execution on salary of public officers to collect judgment for costs against appellant, appellant *held* entitled to writ of supersedeas to restrain collection of such costs until remittitur was issued on appeal (Code Civ.Proc. § 710, as amended by St. 1933, p. 907).

◆

Action by Ruth Mathewson against Edward Harrison Naylor, also known as Ed Naylor and E. H. Naylor. Judgment for defendant, and plaintiff appealed and filed a petition for a writ of supersedeas.

Writ of supersedeas issued.

John A. Jorgenson, of Los Angeles, for petitioner.

Wallace & Crandall, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] The plaintiff sought to recover a money judgment against defendant upon certain promissory notes. The trial court entered judgment in favor of the defendant (respondent) and against the plaintiff for costs. The plaintiff appealed, and the case is now pending, having been submitted for decision upon briefs of counsel on October 18, 1936, and being now under

submission. A judgment for costs is not "a judgment for the payment of money" requiring an undertaking on appeal to stay execution under the provisions of section 942 of the Code of Civil Procedure (California, etc., Corporation v. Cornelius Cole, Ltd., 132 Cal.App. 105, 22 P.(2d) 520), and the appeal stayed the execution on the judgment for costs.

[2] However, the plaintiff is employed as a teacher by the board of education of the city of Los Angeles, and on October 26, 1936, the respondent Naylor obtained an abstract of said judgment for costs and made his affidavit in connection therewith under the provisions of section 710 of the Code of Civil Procedure, as amended by St.1933, p. 907, and has taken such action thereunder that unless a supersedeas is issued the judgment for costs will be collected from the plaintiff's salary before the judgment becomes final. For the reason given a writ of supersedeas should issue to restrain any further proceedings to collect said costs until the remittitur is issued on the appeal. Petitioner to pay costs of this proceeding.

Let the writ of supersedeas issue.

We concur: WOOD, J.; McCOMB, Justice pro tem.

17 Cal.App.2d 422

BODIN v. WEBB et al.

Civ. 10315.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1936.

As Corrected Dec. 7, 1936.

Hearing Denied by Supreme Court Jan. 1, 1937.

1. Judgment 🔑135

Statute authorizing setting aside of judgments *held* applicable to judgment entered after trial for failure to appear, as against contention that proper remedy was to move for a new trial on ground of accident or surprise which ordinary prudence could not have guarded against (Code Civ.Proc § 473, as amended by St.1933, p. 1851).

2. Judgment 🔑138(2), 162(2)

Applications for setting aside of judgment should be disposed of as substantial justice may require, and neither party should be deprived of hearing except when guilty of inexcusable neglect, all doubts being resolved in favor of application (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

3. Judgment 🔑159

Affidavit in support of motion to set aside judgment entered after trial for failure to appear, showing that defendant's counsel had another trial on that date, that matter had been discussed between opposing counsel, and that secretary of court had informed defendants' counsel case could not be tried on date set, *held* sufficient (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

4. Appeal and error 🔑957(1)
Judgment 🔑139

Motion to set aside default judgment is addressed to sound discretion of trial court, and, in absence of a clear showing of abuse in exercise thereof, appellate court will not disturb order (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

5. Constitutional law 🔑315

Order setting aside default judgment which did not expressly order new trial *held* not to deprive plaintiff of his judgment, and hence did not deprive him of property without due process of law, since order placed case in statu quo, and default and judgment had been obtained subject to right of court to set them aside (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Frank Bodin against A. R. Webb and another, doing business under the firm name and style of Webb & Schell, and others, wherein default of the defendants was entered and judgment rendered in favor of the plaintiff. From an order setting aside the default and the judgment, the plaintiff appeals.

Affirmed.

Philip O. Solon, of Oakland, for appellant.

Bronson, Bronson & Slaven, of San Francisco, for respondents.

TYLER, Presiding Justice.

Appeal from an order granting a motion for relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, upon failure of defendants to appear at the trial. Three grounds are urged for a reversal. They will be discussed in the order made. The action is one for personal injuries. It was set for trial for March 6, 1936, in the superior court of Alameda county. On February 3, 1936, defendants received notice of the setting of the cause. Neither defendants nor their counsel having appeared on the trial day, plaintiff presented his evidence, and judgment was rendered in his favor for the sum of $10,000. On March 16, 1936, defendants moved to set the default and judgment aside upon the grounds of mistake, inadvertence, surprise, and excusable neglect. The motion was heard upon the supporting affidavit of one of the attorneys for the defendants and upon an affidavit of merits and upon the counter-affidavit of the attorney for the plaintiff. On May 1, 1936, the trial court granted the motion and set aside the default and judgment. By its order the court required defendants to pay to plaintiff $100 to cover costs incurred at the trial. This sum was tendered to plaintiff's counsel on May 4, 1936, but was rejected. The reason for the failure of defendants to appear at the trial appears from the affidavit of defendants' counsel and its sufficiency will be hereafter discussed.

[1, 2] Appellant's argument in support of his first ground of appeal is that while a motion under section 473 of the Code of Civil Procedure is the proper remedy to vacate a default entered for failing to plead to a complaint, the only remedy to vacate a judgment for failure to appear at the trial is a motion for a new trial on the ground of accident or surprise which ordinary prudence could not have guarded against. We cannot subscribe to this contention. The very language of the section (473 of the Code of Civil Procedure) negatives it. The pertinent portion of the section reads as follows: "The court may, upon such terms as may be just, relieve a party or his legal representative from a *judgment, order, or other proceeding taken against him* through his mistake, inadvertence, surprise or excusable neglect." It has repeatedly been held that the section is applicable to judgments entered after trial for failure to appear. Pearson v. Drobaz Fishing Co., 99 Cal. 425, 34 P. 76; Melde v. Reynolds, 129 Cal. 308, 61 P. 932; Nicol v. Davis, 90 Cal. App. 337, 265 P. 867. Appellant does not dispute the holding in these cases but he argues that they are not well considered.

We are of a contrary opinion. The language of the section itself compels this conclusion. Applications for the setting aside of judgments are addressed to the sound legal discretion of the court and should be disposed of by it as substantial justice may require, and neither party should be deprived of a hearing except when guilty of inexcusable neglect and doubts should be resolved in favor of the application. Pearson v. Drobaz Fishing Co., supra.

[3, 4] It is next claimed that the showing in support of the motion was insufficient. It appeared from the affidavit in support of the motion that the case was set for trial for a particular day on the nonjury calendar. Opposing counsel had discussed the impossibility of defendants' attorneys being able to be present on that day on account of another trial. It also appeared that the secretary of the court, who had charge of arranging the status of cases for trial and notifying attorneys concerning the probable dates upon which causes would go to trial, had assured counsel for defendants that owing to the congested state of the calendar their case would not go to trial on the day set and that he would arrange the calendar so counsel would not be called upon to try two cases the same day. It further appeared that practicing attorneys relied upon the information conveyed to them by the secretary. The next day defendants' attorneys telephoned to the secretary to ascertain the day the case had been set for trial and were informed by him that through some inadvertence the case had not been continued but that a default judgment had been entered in plaintiff's favor and against the defendants. This is the precise situation that appeared in the cases of Lynch v. De Boom, 26 Cal.App. 311, 146 P. 908, and Anaconda Mining Co. v. Saile, 16 Mont. 8, 39 P. 909, 50 Am.St.Rep. 472, where the orders setting aside the judgments were affirmed. It has been uniformly held that the power vested in the trial courts by section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that cases may be disposed of upon their substantial merits, and to give a party claiming in good faith to have a substantial defense to an action an opportunity to present it. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63. The policy of the law is to have every litigated case tried upon its merits. A motion to set aside a default judgment is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below. Way-

bright v. Anderson, 200 Cal. 374, 253 P. 148; Kalson v. Percival, 217 Cal. 568, 20 P.(2d) 330.

[5] Appellant makes the final point that since the lower court did not expressly order a new trial in its order vacating the judgment, he has been deprived of his judgment, which constitutes a taking of property without due process of law in violation of constitutional inhibitions. The order complained of did not constitute a final judgment but, as we have seen, it was procured subject to the right of the court to set it aside. The case was placed in statu quo. There is no merit in the contention.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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17 Cal.App.2d 413

PEOPLE v. GREEN.

Cr. 1531.

District Court of Appeal, Third District, California.

Nov. 9, 1936.

Criminal law ⇨1182

Conviction of accused for passing fictitious check was affirmed where transcript on appeal was filed August 24, cause was placed on calendar for oral argument on following November 9, and no appearance was made for accused at time case was called for hearing (Pen.Code, § 1253).

Appeal from Superior Court, Sacramento County.

C. R. Green was convicted of passing a fictitious check, and he appeals.

Affirmed.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of passing fictitious check, a felony.

The transcript on appeal was filed in this court August 24, 1936. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on November 9, 1936. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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17 Cal.App.2d 384

FURUTA v. RANDALL et al.

Civ. 1627.

District Court of Appeal, Fourth District, California.

Nov. 6, 1936.

1. Automobiles ⇨149

Motorist who was hauling trailer without light of any kind on it as required by statute was guilty of negligence per se (St.1923, p. 551, § 106).

2. Automobiles ⇨244(38)

In action for death of motorist when automobile ran into trailer loaded with motorboat on highway at night, judgment for plaintiff *held* sustained by evidence that failure to have lights on trailer or boat was proximate cause of accident (St.1923, p. 551, § 106).

3. Appeal and error ⇨842(4)

In action for death of motorist when automobile ran into unlighted trailer loaded with motorboat on highway at night, whether motorist with whom deceased was riding was contributorily negligent in driving 35 miles per hour despite fact that there were patches of fog *held* fact question for trial judge, and not question of law for reviewing court (St. 1923, p. 551, § 106).

4. Appeal and error ⚷1046(5)

Where evidence supported findings, and findings supported judgment, reviewing court could not reverse judgment because of remarks made by trial judge in summing up evidence, where those remarks were neither reflected in findings nor judgment.

5. Witnesses ⚷379(9)

In action for death of guest of motorist, refusing to permit defendants to read into record excerpts from evidence of motorist in whose automobile deceased had been riding, given at coroner's inquest, for purpose of impeaching testimony of motorist given at trial, *held* not error, where evidence at inquest did not tend to impeach evidence at trial.

6. Appeal and error ⚷110

Order denying motion for new trial is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Charles M. Furuta against Carl William Randall and others. From an order denying motion for new trial, and from a judgment in favor of the plaintiff, Carl William Randall, William H. Randall, and Mrs. William H. Randall appeal.

Affirmed.

Frank L. Simons, of Los Angeles, for appellants.

West & West, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion for new trial, and from a judgment awarding plaintiff damages resulting from the death of Nobuko Furuta, his minor daughter, which occurred in a collision between an automobile in which she was riding and a motorboat on a four-wheel trailer being drawn by an automobile driven by Carl William Randall on Huntington Beach boulevard, a public highway in Orange county, shortly after 12:30 o'clock on the morning of March 28, 1934.

William H. Randall and Mrs. William H. Randall are the parents of Carl and signed his application for an operator's license. Their sole liability in this case is under the provisions of section 62 of the California Vehicle Act (St.1923, p. 532, § 62, as amended by St.1929, p. 522) as it existed at the time of the accident.

William Knight, Robert Young, and Donald Matthews were companions of Carl on his trip and were joined as defendants in the action. No judgment was rendered against them. When in this opinion we refer to the defendants we do not include these three minors. William H. Randall was regularly appointed guardian ad litem of Carl William Randall, William Knight, Robert Young, and Donald Matthews, all of whom were minors.

On March 28, 1934, Carl was the owner of a Ford coupé and a cabin cruiser motor boat 20½ feet in length. At the time of the accident he was engaged in transporting the motorboat over the Huntington Beach boulevard. The motorboat was mounted on a four-wheel trailer which was being towed behind his automobile. The bow of the motorboat projected about 4½ feet over the front of the trailer and the stern 3 or more feet over its rear. The trailer was not equipped with lights, but Carl had hung a lighted lantern with a red chimney on the propeller at the stern of the boat. One of the tires of the trailer became deflated and the car was stopped with the left wheels of the car and trailer on the pavement and the right wheels on the oiled shoulder of the highway. The evidence offered by defendants is to the effect that when the car was stopped the boys went to the rear of the motorboat and one of them detached the lantern from the propeller and handed it to another who stood several feet to the rear of the motorboat. Carl decided that the place was not suitable for the repair of the tire because of the proximity of a ditch which paralleled the pavement and prevented him from driving the automobile and trailer completely off the pavement. He re-entered his automobile and started driving along the highway at a speed of about 5 miles an hour while one of his companions followed about 10 feet in the rear of the motorboat with the lighted lantern in his hand. Robert Young testified that when the automobile and trailer had proceeded about 35 feet he saw the headlights of the automobile in which Nobuko Furuta was riding approaching from the rear at a distance of about 100 feet. He testified that he waved the red light until the approaching automobile was so close that he had to jump out of its path. The right side of the automobile struck the left rear of the motorboat, injuring Nobuko so seriously that she died.

Massaji Neishi was the driver of the automobile in which Nobuko was riding. Two of her sisters were sitting on the seat beside him. Nobuko was on the right of the rumble seat with another sister sitting on her left. Neishi testified that, while he was driving south on his right side of Huntington Beach boulevard at a speed of about 35 miles an hour, he saw the motorboat mounted on the trailer loom up about 35 feet in front of him; that he applied his brakes and turned to his left; that the right side of his automobile came into contact with the left rear of the motorboat; that there was no light of any kind on the trailer or motorboat nor to the rear of it, and no person with or without a light on the road to the rear of the boat. This testimony was corroborated in detail by Toshiko Furuta. Neishi further testified that after the accident he saw a boy carrying a red lantern walk around from the west side of the boat.

[1, 2] It is admitted that there was no light of any kind on the trailer or motorboat at the time of the accident as required by section 106 of the California Vehicle Act (St.1923, p. 551). The violation of this statute constituted negligence per se on the part of Carl William Randall, the driver. The trial judge found that this negligence was the proximate cause of the injury and death of Nobuko. The evidence on the question of Robert Young displaying the red light to the rear of the boat was in sharp conflict. This evidence bore on the proximate cause of the accident. As the trial court found that the failure to have any lights on the trailer and motorboat was the proximate cause of the accident, we cannot disturb the judgment on appeal, even though we should conclude that a contrary finding might have evidentiary support.

[3] Defendants urge that Neishi was guilty of contributory negligence as a matter of law, as there were patches of fog across the road over which he approached the scene of the accident. They maintain that because of the fog he should have driven at a less speed than 35 miles an hour. Under the facts of this case the question of contributory negligence was one of fact for the trial judge and not one of law for this court. In making this statement we have assumed, without holding, that the negligence of Neishi, if any, could have been imputed to Nobuko, whom the trial court found was a passenger in the Neishi car.

[4] Defendants further urge that the trial court misconstrued the law requiring disabled motor vehicles to park off from the paved portions of the highways, and misapplied that law to the facts of the instant case. There is no mention of this matter in the findings of facts. Where, as here, the evidence supports the findings and the findings support the judgment, we cannot reverse the judgment because of remarks made by the trial judge in summing up the evidence, where those remarks are neither reflected in the findings nor the judgment.

[5] Defendants contend that the trial court committed prejudicial error in refusing to permit their counsel to read into the record an excerpt from the evidence of Neishi given at the coroner's inquest held over the body of Nobuko Furuta. It was offered for the purpose of impeaching the testimony of Neishi given at the trial. The purported impeaching evidence is not contained in the record, at least not within a reasonable distance from the page reference to it in defendants' brief, and in the absence of a proper record we cannot consider the question. However, the testimony is set forth in the briefs of both parties, and we agree with the trial judge that it did not tend to impeach the evidence of Neishi given at the trial and that it was properly excluded.

[6] An order denying a motion for new trial is not appealable. Section 963, Code Civ.Proc. (as amended by St.1933, p. 2472).

The appeal from the order denying the motion for new trial is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

17 Cal.App.2d 508

PEOPLE v. BANKS.

Cr. 2912.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1936.

Automobiles 🔑357

Where defendant was charged with negligent homicide by automobile and was not charged with having caused injuries in commission of unlawful act not amounting to a felony, instruction that jury need not find that injuries were caused in negligent manner, but that it was sufficient if they were caused in commission of unlawful act not amounting to a felony, *held* reversible error (St.1935, p. 2141, § 500).

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Louis Banks was convicted of negligent homicide, and he appeals.

Reversed.

David Blonder and Carl Katleman, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was charged with the crime of negligent homicide in violation of section 500 of the Vehicle Code (St. 1935, p. 2141), a felony, in that the defendant did operate an automobile "in a negligent and unlawful manner," resulting in injuries causing the death within one year of Lem Fong. At a former trial the jurors were unable to agree upon a verdict and a mistrial was declared. At a second trial the jury found the defendant guilty, and this appeal is from a judgment of conviction and an order denying a new trial.

The defendant was not charged with having caused the injuries "in the commission of an unlawful act not amounting to a felony." Nevertheless, the trial court gave an instruction to the effect that it was not necessary to find that the injuries were caused by the driving of the automobile in a negligent manner, but that it was sufficient if the jurors found the injuries were caused in the commission of an unlawful act not amounting to a felony. The same instruction was condemned in the case of People v. Okada, 58 P.(2d) 967, decided by this court on June 18, 1936. During its deliberation on the case, the jury asked the court for additional instructions on this very point, and the court emphasized and reiterated its instruction to the effect that it was sufficient if the jurors found the injuries were caused in the commission of an unlawful act not amounting to a felony.

The instruction was erroneous and prejudicial to defendant's rights, and a reversal of the judgment is inescapable under the authority of People v. Okada, supra. There are other contentions with regard to the instructions which it is not necessary for us to consider. They will not arise upon a retrial of the case.

Judgment and order reversed.

I concur: WOOD, J.

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17 Cal.App.2d 414

STERMAN v. ZIEM et al.

Civ. 5641.

District Court of Appeal, Third District, California.

Nov. 9, 1936.

Hearing Denied by Supreme Court Jan. 4, 1937.

1. Partnership 🔑20

Partnership may be created by agreement or conduct of parties, either expressed or implied (Civ.Code, § 2400).

2. Chattel mortgages 🔑34

Fact that successive assignments of business and assets of partnership were absolute upon their face *held* not to prevent operation of rule that where relation is that of debtor and creditor, and property is regarded as security, there is no transfer of title.

3. Chattel mortgages 🔑39

In action by partner for dismissal from company by assignee of partnership business after liquidation under an assignment for benefit of creditors, where partners had continued in apparent control and management of business, evidence *held* to support finding that partnership property was in assignee's name for security only, and hence assignee had no right to discharge partner from business (Civ.Code, § 2400).

4. Conspiracy 🔑15

Partner who was dismissed from business by assignee of partnership property for security only *held* entitled to maintain action against assignee for alleged conspiracy to defraud him of his interest in partnership, notwithstanding money advanced had not been tendered in repayment by him, since action was not based upon any breach of contract.

5. Partnership 🔑70

Fiduciary relationship exists between members of partnership.

6. Partnership 🔑79

Partners have equal rights in conduct of business unless limited by contract.

7. Conspiracy 🔑14

Partner deprived of possession of business through conspiracy between copartner and a third person may sue both partner and third person for damages for the conspiracy, or third person alone.

8. Appeal and error 🔑931(1)

Reviewing court must accept as true all evidence tending to establish correctness of finding of trial court, together with all inferences which might reasonably follow, and resolve every substantial conflict in evidence in favor of finding.

Appeal from Superior Court, Los Angeles County; Walter Steele, Judge.

Action by Jack Sterman against Roy H. Ziem and another. From an adverse judgment, the defendants appeal.

Affirmed.

W. I. Gilbert, Jr., and Jean Wunderlich, both of Los Angeles, for appellants.

Bicksler, Parke & Catlin and William E. Woodroof, all of Los Angeles, for respondent.

PULLEN, Presiding Justice.

This is an action for damages for an alleged conspiracy to defraud respondent, Sterman, of his interests in a certain partnership.

In 1930, Jack Sterman and Roy H. Ziem formed a partnership known as Ziem-Sterman Upholstering Company, and continued as such copartners until September, 1933. At that time the partners made a voluntary assignment of their business and assets to M. J. Flavin, for the benefit of their creditors, which assignment was in the usual form and provided that, after the payment of their partnership debts and liabilities, the surplus, if any, should be paid to the partners. The assignment also contained a memorandum that either party had the option of purchasing, within a specified time, the interest of the other for $2,500.

After the assignment to Flavin he paid the current bills, but permitted the former partners to carry on the business as a going concern. During this period Carrie J. Duffy loaned to Flavin the sum of $2,600 to be used as the working capital in the business and received from Flavin his promissory note therefor. Of this $2,600 so loaned, $2,000 belonged to Mrs. Duffy and $600 to a Mrs. Hushman, a relative of appellant Ziem. During the receivership Flavin repaid to Mrs. Duffy $1,000 on her loan and to Mrs. Hushman $300 on her loan. In December, 1933, the creditors decided to liquidate the business, and the same was sold to one J. H. Ready. None of the consideration for this sale, however, was paid by Ready. The cash required, some $1,400, was advanced by Mrs. Duffy, and the balance of the consideration was a cancellation of certain notes and a waiver of certain salary claims of Mrs. Ziem and Mrs. Sterman for services rendered to the Ziem-Sterman Upholstering Company, and, while the bill of sale was from Flavin to Ready, it was agreed between Ziem, Duffy, and Sterman that Ready was to hold title to the assets so sold for the benefit of Ziem, Sterman, and Duffy, and for their security.

It further appears in the evidence that, although the business and assets were transferred to Ready, Ziem and Sterman had the physical possession and continued to carry on the business as they had previously done, without consulting either Mrs. Duffy or Ready in regard to any of the details thereof. Shortly after the bill of sale to Ready had been given, Ziem stated to Ready that Sterman, Duffy, and himself were not satisfied with the business standing in the name of Ready, and after a conference between them, Ready, by agreement transferred the business to Mrs. Duffy, receiving $3,300 therefor from Mrs. Duffy, of which she contributed $3,000 and Mrs. Hushman $300. At the time of the transfer from Ready to Mrs. Duffy she gave to Ziem and Sterman an option to repurchase the business from her for $3,-

500, with interest thereon from date of agreement until $3,500 was paid to her, and they agreeing to allow her $25 a month from the business. It appeared in the evidence that the difference between the $3,300 paid to Ready and the option for $3,500 represented a bonus which Mrs. Duffy was to receive for advancing the money, and that the $25 per month was in lieu of interest on her investment. This arrangement became effective, and Ziem and Sterman continued to operate the business, Ziem in charge of the selling and Sterman in charge of production for about three or four months, when Mrs. Duffy gave to Sterman a letter dismissing him from the company, which letter brought about the present action.

During all of the times it is now claimed by appellant that Mrs. Duffy was operating the business, Ziem and Sterman carried on the business, doing the buying, selling, and manufacturing of the commodities engaged in and extending credits to their customers and at no time discussed such affairs with Mrs. Duffy. The business at the time of the transfer to Mrs. Duffy had assets of approximately $14,000 and liabilities of about $1,200 exclusive of the $3,300 owed Mrs. Duffy. Upon such evidence the court found that Ziem and Sterman were partners.

The foregoing constitutes a summary of the evidence touching the relationship of the parties to the business, and while some of the statements are disputed by appellants we believe the foregoing is in accord with the findings of the court and the evidence in the record which tends to support the judgment and findings.

It is the contention of respondent that the transfers from Flavin, the assignee for the creditors, to Ready, and from Ready to Duffy, were each for security only and that each of the transferees held the title for the benefit of Ziem and Sterman, and the law and the facts appear to support this contention. It is true that an assignment for the benefit of creditors has the legal effect of dissolving the partnership (Wells v. Ellis, 68 Cal. 243, 9 P. 80; Garn v. Thorwaldson, 40 Cal.App. 62, 180 P. 9), and this is not denied by respondent, but he claims that after the transfer to Ready a new partnership came into existence and continued thereafter as was evidenced by the acts and conduct of the parties.

[1, 2] A partnership is defined in section 2400 of the Civil Code as an association of two or more persons to carry on as copartners a business for profit. That a partnership may be created by the agreement or conduct of the parties, either expressed or implied, has often been recognized. Stenian v. Tashjian, 178 Cal. 623. 174 P. 883; Niroad v. Farnell, 11 Cal.App. 767, 106 P. 252; 20 Cal.Jur. 681.

In Niroad v. Farnell, supra, the rule is stated in the syllabus which is borne out by the text, "the voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners, and acted as such."

In the case at bar the former partners continued in apparent control and management of the business, and, as the court found, the title vesting in Ready and Duffy was for security only. The fact that the conveyances to Ready and to Duffy were absolute upon the face is not material. The rule is stated in 5 California Jurisprudence, 41: "The rule is well settled under the code that a chattel mortgage does not transfer title to the mortgaged property, and that the mortgagee has only a lien thereon as security for the payment of this debt. Even though the parties agree to the contrary, yet where the relation of the parties is that of debtor and creditor and the property is regarded as security for the payment of the debt, there is no transfer of title. Nor is the operation of the rule changed by delivery of possession of the mortgaged property to the mortgagee."

[3] Appellants point out that with the bill of sale from Ready to Duffy was an option from Duffy to Ziem and Sterman, granting them the privilege of purchasing the business. Apparently, however, the trial court considered this entire transaction as a subterfuge to protect Ziem and Sterman from their creditors, and denominated the option as a "working agreement" given as security to the parties thereto, and that Mrs. Duffy held the property in trust for the partners. This seems to find sufficient support in the evidence, the relationship of the parties, the advancement of the money, and the conduct of the business, all of which indicate that the parties were in accord as to the joint interest in the business of Ziem and Sterman.

There is here ample support in the findings and justification in the law for the conclusion of the court that neither possession, title, nor ownership of the partnership property was vested in appellant Duffy, and that she held the same for security only, and did not have the ownership or control of the business, but held at most the bare legal title for security, with the ownership and control in Ziem and respondent, and therefore she had no right or authority to discharge respondent from the business.

[4] Appellants claim that respondent has no cause of action against appellant Duffy until he has tendered repayment to her of the money advanced; inasmuch, however, as this action is for conversion and is not based upon any breach of contract, and is for a declaration of the rights of respondent and damages for their infringement, no tender need be made. Furthermore, under the contract between the parties the period within which such a tender could be made had not terminated.

[5-7] Appellants claim that, no overt act having been shown, the evidence is insufficient to support the finding of conspiracy to do a willful and unlawful act. It requires the citation of no authority, however, that a fiduciary relationship exists between members of a partnership and that, in the conduct of the business, the partners have equal rights unless limited by contract, and, where one partner is deprived of possession of the business through a conspiracy between a copartner and a third person, he may sue the partner and the third party for damages on the conspiracy or may sue the third person alone. 20 Cal. Jur. 802; Moropoulos v. Fuller Co., 186 Cal. 679, 200 P. 601.

[8] The argument of appellants is based largely upon the conflict in the evidence between the respective parties and the contention the evidence adduced upon behalf of plaintiff is insufficient to support the findings and judgment of the trial court. It is a well-recognized principle, however, that, in examining the sufficiency of the evidence to support a questioned finding, we must accept as true all evidence tending to establish the correctness of such finding as made, together with all inferences which might reasonably follow, and every substantial conflict in the evidence must be resolved in favor of the finding. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157.

We find, therefore, that there is ample evidence to support the findings of the trial court, and the judgment should be affirmed. It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

17 Cal.App.2d 372

PEOPLE v. WALKER.

Cr. 2904.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1936.

1. Criminal law 🔑59(1)

The law, in absence of conflicting testimony, as matter of common knowledge, recognizes that two or more persons who have engaged in commission of criminal act ordinarily have had secret antecedent agreement to commit such act.

2. Criminal law 🔑59(1)

Evidence that crime has been committed by two or more persons acting in concert indicates that crime was result of conspiracy among such persons.

3. False pretenses 🔑49(1)

Evidence that defendant, by purporting to be man of means interested in purchasing grocery, and his alleged agent arranging for consummation of sale, lured defendant into position where grocer was "fleeced" out of $250 by another man, *held* to sustain conviction of defendant as member of conspiracy committing offense of grand theft.

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Jack W. Walker was convicted of the crime of grand theft, and he appeals.

Affirmed.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Defendant appeals, not only from a judgment of his conviction of the crime of grand theft, but also from an order by which his motion for a new trial was denied.

It would seem necessary that in substance a history of the crime in which it was asserted that defendant willingly and knowingly participated be herein related: On each of several occasions that occurred during a period of about ten days which preceded the 25th or the 26th day of April, 1935, a man by the reputed name of Wilson, who represented himself as the confidential agent of another man, whom Wilson named as Landrew, but who in reality was the defendant in this action, was negotiating, or at least was pretending to negotiate, the purchase of a grocery from one Penland, who was the owner thereof. On the said 25th or 26th day of April, Wilson and defendant together appeared at Penland's place of business, and then and there defendant was introduced to Penland. It also appears that on another occasion defendant had been at Penland's store, but that at that time defendant was unable to see him. However, in the course of the conversation that ensued among the several persons then present, the record discloses that Wilson said: "We about concluded to take your store, Mr. Penland. We have been looking at several and this looks the best, doesn't it?" Whereupon defendant remarked: "You have got another one you want to look at." Wilson said: "Yes. We have about decided to take this store. * * * We will see you later." Previously thereto, Wilson had told Penland that defendant "was a man of means, owned properties and dealt in oil stocks and so forth; * * * was buying this store for his nephew." Several days later, in a conversation that occurred over the telephone between defendant and Penland, the former inquired whether Wilson had been at the latter's place of business. On being told by Penland that Wilson had not been there, defendant stated that Wilson "would be there within fifteen minutes." On Wilson's subsequent arrival thereat, which was "in a short time," Penland told him that "Mr. Landrew (defendant) had phoned from Santa Monica * * * and wanted to talk to him." Whereupon Wilson "went right in to the phone; * * * he wasn't in there but just two or three minutes." When he returned to Penland after speaking to defendant, Wilson said to Penland: "He (defendant) says he wants to talk to you; * * * that is Landrew (defendant) * * *. Mr. Landrew (defendant) wants to talk to you again." Penland then had a telephonic conversation with defendant, in which defendant said: "I am very busy; could you come to Santa Monica, and we will close the deal?" To which query Penland, in effect, responded that he could do so. Wilson and Penland then went to Santa Monica, where they met defendant, at which time and place defendant said: "I am awfully sorry, Mr. Penland, but I have got an engagement right now I have got to attend that will take me a couple of hours. Do you mind waiting?" In effect, Penland responded that he would not "mind waiting." Defendant then left Wilson and Penland together, and they "went right across to the ocean front * * * and sat down on a bench a minute."

With reference to subsequent occurrences, Penland in part testified as follows: "Well, we sat there a little bit and then got up and started to move away along the ocean, and Wilson saw a large envelope on the grass. He stooped over and picked it up and says, 'Somebody has dropped an envelope here,' and he picked it up and went and sat down on the bench again and opened it up. There was a $100,000.00 bond in it to start with. This man was under a $100,000.00 bond apparently, that dropped it. There was $40.00 in cash, eight $5.00 bills in there. And he read the contents of the envelope, a letter, rather, and so he says, 'That is very valuable to somebody.' I said, 'It sure is.' So about that time—* * * a fellow came along * * *. Well, he was kind of looking along, and I said, 'I expect that is the fellow who lost the envelope,' to Mr. Wilson, and, of course, I just said, 'Have you lost something?' And he said: 'I certainly have. I lost an envelope that means a good deal to me.' So I says, 'What is the name?' He said, 'Holcomb.' I said, 'I guess this must belong to you, then.' I took the leading part in it. So Wilson turned it over to him. Wilson had the envelope all the time. * * * And so Holcomb took these bills and handed them to Wilson and Wilson said, 'No, I don't want anything like that when I know it is yours.' So, we stood there just a moment, and Wilson says, 'Well, we see by the contents of that envelope that you are pretty well informed on the stock market. I should think you would put us on to something.' And he said, 'Well, you have read that. You see what I am getting from headquarters now. I couldn't very well do anything along that line. But,' he says, 'I will tell you what I will do. You take this $40.00 and go put it on American Can,' * * *."

Thereupon, following a somewhat familiar course which is of no particular importance here, Penland was "fleeced" out of $250 by Wilson, Holcomb, and another man. At no time thereafter did either Wilson or defendant ever approach Penland with reference to the purchase or proposed purchase by the former of the latter's store.

On the trial of the action it was neither asserted nor attempted to be proved by the prosecution that defendant, either directly participated in the actual commission of the offense for the commission of which he was being prosecuted, or even that he was personally present at the time when and the place where the crime was actually committed. To the contrary, defendant's conviction depended upon legal proof of his membership in the conspiracy, or of his having been a party to an agreement to commit the crime

Appellant concedes the fact that on the occasion in question the crime of grand theft was committed.

[1, 2] Apparently without conflicting authority with reference thereto, as a matter of common knowledge, the law recognizes the fact that where two or more persons have engaged in the commission of some criminal act, their antecedent agreement or common understanding, one with the other or the others, so to do, ordinarily has been entered into in secret; but manifestly, where the crime is shown to have been committed by two or more individuals who in its commission have acted in concert, one with the other or the others, it is an inevitable conclusion that the crime was the result of an agreement or conspiracy between or among the participants therein that the crime should be committed.

[3] In the instant matter, since it is conceded that the crime of grand theft was committed, in which each of several persons took a willful and deliberate part in its commission, it follows that each of such persons was a member of a conspiracy to commit the crime. Undeniably, the man Wilson, who first approached Penland, and who thereafter and even in the final stages of the commission of the offense took a very prominent part in its execution, was one of such members. He not only was present at the inception of the execution of the scheme to defraud Penland, but actually took the leading part in all subsequent steps up to the moment when the money of which Penland was defrauded was received from him by the conspirators. Evidently the pretended purchase of Penland's store was simply a part of the scheme in which defendant herein assumed the role of purchaser. He was "a man of means," solely for the purpose of impressing Penland with his financial standing and importance. He could not take the time to personally negotiate the proposed purchase. He must have a confidential agent to attend to and arrange for the consummation of such small affairs. He was so busy that he even requested Penland to leave his place of business and go to Santa Monica for the purpose of "closing the deal"; and when in pursuance of the keeping of the engagement so made, Penland arrived at the appointed place of meeting, defendant's time was so occupied that he requested Penland to postpone the consummation of the proposed transaction for "a couple of hours"; and immediately thereafter, under the skillful guidance of Wilson, Penland was led into the trap which theretofore had been set for him. Those facts alone ought to be sufficient to establish defendant's connection with the commission of the crime; but should any doubt remain as to the correctness of such a conclusion, would it be possible for either defendant or Wilson to satisfactorily explain why, after Penland had parted with his money, neither Wilson nor defendant ever thereafter appeared on the scene at Santa Monica? Why did defendant use the assumed name of "Landrew" throughout the entire transaction? More than that, why so abruptly and without any attempt at explanation of their conduct did Wilson and defendant utterly and completely abandon the proposed purchase? Viewing the entire situation—far from entertaining the existence of a reasonable doubt regarding the question of the guilt of defendant—to the "mind" of this court the guilt of defendant was established to a degree that closely approached the certainty attained by a mathematical demonstration.

The judgment, and the order by which defendant's motion for a new trial was denied, are affirmed.

We concur: YORK, J.; DORAN, J.

17 Cal.App.2d 505

MALONE v. CAREY et al.

Civ. 9953.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1936.

1. **Arrest** 🔑65

Officer has duty without delay to carry out commands of warrant which is valid in form and issued by court of competent jurisdiction.

2. **False imprisonment** 🔑7(3)

Police officer is not liable for proper execution of warrant which is valid in form and issued by court of competent jurisdiction.

3. **False imprisonment** 🔑20(1)

In action for false imprisonment, complaint alleging that plaintiff was arrested under warrant charging offense for which he had previously served sentence on plea of guilty *held* insufficient to state cause of action against police officers executing warrant, in absence of allegation that warrant was not valid on its face, notwithstanding allegation that imprisonment was unlawful and void.

4. **False imprisonment** 🔑7(2)

City judge *held* not liable for false imprisonment on warrant issued by judge on complaint charging violation of municipal traffic ordinance, because plaintiff had previously served sentence imposed on plea of guilty to same offense.

5. **Justices of the peace** 🔑25

Acts of justice of peace after he had acquired jurisdiction of person and of subject-matter will be considered as judicial, for which he will not be held civilly liable even where he divests himself of jurisdiction under sentence, in absence of claim of malice.

6. **Judges** 🔑36

Judicial officer is not liable for acts done in official capacity within his jurisdiction.

7. **Municipal corporations** 🔑189(1)

In action for false imprisonment, second amended complaint, which was insufficient to state cause of action as against chief of police, *held* insufficient to state cause of action against surety on official bond of chief of police.

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Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Oscar S. Malone against E. J. Carey and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harold F. Sawallisch, of Richmond, for appellant.

Leonard J. Meltzer and George La Coste, both of Oakland, for respondents E. J. Carey, J. J. Carey, J. L. Kennon, Paul Lees and A. Sargent.

Joseph G. De Forest, of San Francisco, for respondent American Surety Co. of New York.

TYLER, Presiding Justice.

Action for damages for false imprisonment. Defendants are officers of the town of Emeryville and their official bondsmen, to wit, J. L. Kennon, city judge; E. J. Carey, chief of police; J. J. Carey, assistant chief; Paul Lees, city clerk; and A. Sargent, police officer. The second amended complaint alleges in substance that the defendant E. J. Carey, while acting in his official capacity as chief of police, through the agency of J. J. Carey, his assistant, swore to a complaint against plaintiff for the violation of a traffic ordinance of Emeryville; that defendant J. L. Kennon, city judge, without jurisdiction of the person or subject-matter, issued a warrant on said complaint, which warrant was delivered to the police department of the city of Richmond with instructions to apprehend plaintiff and hold him for the Emeryville authorities under and by virtue of said warrant. Pursuant to such instructions plaintiff was arrested by the Richmond police department at approximately 5:50 p. m. on the evening of January 11, 1935, and held until 7:25 p. m. of the same day, at which time he was delivered to the custody of defendant A. Sargent, a police officer of the town of Emeryville, then and there acting in his capacity as such officer under the direction of defendant E. J. Carey, chief of police of Emeryville. Such complaint further alleges that defendant A. Sargent returned to Emeryville with plaintiff, whereupon, discovering that an error had been committed in the arrest, defendants, police authorities, released plaintiff from custody. It is charged that the complaint was false and untrue in that plaintiff had theretofore, in November, 1934, appeared before said city judge and pleaded guilty of the offense charged and had been fined the sum of $2 by said city judge, which fine was satisfied and paid by manual labor, such labor being imposed by the judge, defendant being without funds. It is then alleged that the complaint upon which the second arrest was made was false and untrue and void; that it was erroneously, irregularly, and illegally issued, and the subsequent arrest and imprisonment under the complaint and warrant were wrongful and unlawful, all of which facts defendants and each of them well knew. Damages were claimed in the sum of $5,000. A demurrer to the second amended complaint was sustained with ten days' leave to amend. Plaintiff refused to amend and judgment was entered in favor of defendants. Plaintiff appeals from the judgment.

[1-3] In so far as the police officers are concerned it is obvious the complaint fails to state a cause of action. No allegation is contained therein to the effect that the warrant was not valid on its face. It was clearly the duty of the officers to make the arrest, having received a warrant valid on its face. Where a warrant valid in form and issued by a court of competent jurisdiction is placed in the hands of an officer for execution, it is his duty without delay to carry out its commands. The law is well settled that for the proper execution of such process the officer incurs no liability, however disastrous may be the effect of its execution upon the person against whom it is issued. Kalish v. White, 36 Cal.App. 604, 173 P. 494; Pankewicz v. Jess, 27 Cal.App. 340, 149 P. 997; Going v. Dinwiddie, 86 Cal. 633, 25 P. 129; Stubbs v. Abercrombie, 42 Cal. App. 170, 183 P. 458. Nor does the fact that the complaint alleges that the imprisonment was unlawful and void, alter or change the situation. Such an allegation tenders no issue. Lapique v. Agoure, 51 Cal. App. 56, 195 P. 1075. The confinement and restraint of plaintiff by the officers was unfortunate, but for this they are not responsible.

[4-6] The complaint also fails to state a cause of action against respondent Kennon as city judge. If a justice of the peace acquires jurisdiction of the person and jurisdiction of the subject-matter, his acts thereafter will be considered as judicial for which he will not be held civilly liable. Even where he divests himself of jurisdiction under a sentence he is not liable for damages for false imprisonment in the absence of a claim of malice. Ceinar v. Johnston, 134 Cal.App. 166, 25 P.(2d) 28; Platz v. Marion, 35 Cal.App. 241, 169 P. 697. That a judicial officer is not liable for acts done in his official capacity and within his jurisdiction is well established. It would be destructive of an efficient branch of our judicial system to promulgate a rule whereby a justice of the peace would be subject to a civil suit for damages for a mere error in judgment in the doing of some act within the general scope of his judicial powers. Platz v. Marion, supra.

The case of Donati v. Righetti, 9 Cal. App. 45, 97 P. 1128, is on all fours with the instant case. There the complaint showed that plaintiff and defendant quarreled with each other in the city of San Luis Obispo; that a constable of the township made complaint in the justice's court against plaintiff for disturbing the peace, and upon this complaint plaintiff was arrested and fined and his fine paid. Four days later defendant procured the arrest of plaintiff upon a complaint filed by him in the justice's court of a different township, stating the same offense as that of which plaintiff had been convicted. It was there held that where the complaint for false imprisonment failed to show that the warrant issued was void, voidable, or irregular it failed to state a cause of action and a demurrer thereto was properly sustained. It was further held that in the absence of contrary allegations, it will be presumed that the complaint under which the warrant was issued stated facts proper to give the justice of the peace jurisdiction to issue the warrant under which the arrest and imprisonment were made, and that they were made in the legal execution of a lawful warrant, and the facts that a prior arrest was made for the same offense and plaintiff had paid his fine does not establish that the arrest and imprisonment upon the second complaint were unlawful.

[7] As the second amended complaint is insufficient as to the chief of police, E. J. Carey, it is insufficient as to his surety defendant American Surety Company of New York.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN,

17 Cal.App.2d 498

CULLEY v. COCHRAN, Constable (ROSS, Intervener).

Civ. 1942.

District Court of Appeal, Fourth District, California.

Nov. 13, 1936.

Hearing Denied by Supreme Court Jan. 1, 1937.

1. Contracts ⚿147(2)

In construction of contract, intent of parties is to be discovered from all language and terms employed therein, rather than from some particular language of instrument disassociated from other provisions of agreement.

2. Licenses ⚿44(2), 54

Agreement providing for maintenance by ranch operators of herd of dairy cattle and payment of proceeds from sale of milk to lessee of premises, to be disbursed by him in payment of designated charges, and which contained no words indicative of an intention to demise the premises, fixed no term, and required payment of no specified rental, *held* not a "lease," but a mere licensing agreement, and hence lessee on practical abandonment of premises by licensees was entitled to maintain action for conversion of hay grown on premises when attached and removed by a creditor of licensees.

[Ed. Note.—For other definitions of "Lease," see Words & Phrases.]

3. Attachment ⚿374

Evidence *held* to justify judgment against constable levying attachment on hay as property of licensees of a ranch when hay in fact belonged to lessees of ranch, as against contention that constable had no notice of lessee's claim.

4. Appeal and error ⚿1011(1)

Reviewing court will not disturb finding which is based on conflicting evidence.

5. Appeal and error ⚿1071(1)

In action against constable for conversion of hay seized under attachment against licensee in possession of farm from lessee, reference in findings to quantity of hay in excess of amount of hay which evidence showed had been seized *held* harmless error, where amount that plaintiff was permitted to recover was market value of tonnage of hay shown to have been seized.

Appeal from Superior Court, Imperial County; Arthur L. Mundo, Judge.

Action by B. F. Culley against Leslie L. Cochran, Constable of Westmoreland Township, wherein J. Edgar Ross intervened. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lester L. Cochran, in pro. per.

Hickcox & Trude, of El Centro, for respondent.

J. Edgar Ross, in pro. per.

JENNINGS, Justice.

Plaintiff instituted this action to recover from the defendant, Constable of Westmoreland Township, Imperial County, the value of 24 tons of hay which it was alleged the plaintiff owned and the defendant had wrongfully converted. Defendant's answer denied that plaintiff owned the hay and that defendant had taken it from plaintiff's possession. Trial of the action resulted in the rendition of a judgment in plaintiff's favor, from which this appeal has been taken.

Appellant presents three contentions in his effort to secure reversal of the judgment. These contentions are: First, that a certain written instrument received in evidence during the trial of the action is a lease contract; second, that the evidence showed that appellant in taking the hay acted under written instructions to attach the same in another action and without knowledge that any one other than the defendant in the attachment action claimed to be the owner of the hay or entitled to its possession; third, that the evidence was insufficient to sustain the trial court's finding that appellant converted 24 tons and 340 pounds of hay. It is apparent that all of the aforesaid contentions in effect resolve themselves into an attack upon the trial court's findings on the familiar ground of evidentiary insufficiency.

Examination of the transcript on appeal demonstrates that the following facts were developed by the evidence submitted to the trial court: Approximately 24 tons of baled hay were seized by appellant as constable under a writ of attachment issued by a justice of the peace in an action entitled Ross v. Orr, filed in said justice court. Appellant in attaching the hay acted in accordance with written instructions given him by the plaintiff in said action. At the time the hay was attached it was taken from a certain ranch known as the Goodsen ranch and the defendants in said attachment suit were then residing in a dwelling house located on said ranch. The ranch had been leased by the owner to respondent herein and the latter had entered into a written contract with respect to it with the Orrs to which contract more explicit reference will hereafter be made. The hay which was attached was grown on the Goodsen ranch and all expense incident to its cultivation and harvesting including the cost of irrigation was borne by respondent.

The written contract to which reference has been made was entered into between respondent and the Orrs, defendants in the attachment action, on July 30, 1927. This instrument, after making reference to a prior contract between respondent and Dan Orr with respect to the maintenance of a dairy herd by Dan Orr on a ranch operated by respondent, contains a lengthy description of a certain transaction which had occurred between Orr and his wife and respondent whereby the latter sold to the former 36 dairy cows and other personal property and the buyers thereupon executed two promissory notes secured by chattel mortgages on the entire dairy herd owned by them. The agreement then recites that the prior contract had been canceled and that the Orrs would move their dairy herd and equipment to the Goodsen ranch and would there maintain the herd consisting of approximately 78 milk cows on the terms and conditions specified in the present contract. Certain mutual promises of the parties to the agreement are then set out. By them the Orrs agreed that they would maintain their dairy herd on the Goodsen ranch and would deliver the milk produced by said herd to any creamery in Imperial county designated by respondent for the latter's credit and account and that payment for the milk thus delivered should be made directly to respondent. Respondent on his part agreed that he would furnish the Goodsen ranch to the Orrs for their use in maintaining thereon the dairy herd until July 15, 1929, unless he should sooner be prevented therefrom through no fault of his own and that he would disburse the proceeds received by him monthly from the sale of milk in the payment of certain designated charges. The first of these charges is a monthly payment of $200 and interest on the first chattel mortgage note executed by the Orrs. The second charge specified is the payment to respondent himself of the sum of $166.67, which is expressly stated to be the monthly rental of the Goodsen ranch which respondent as lessee of said ranch is obliged to pay to the owner thereof. The third item is the sum of $175 to be paid to the Orrs. It is then provided that any amount remaining after payment of the above-mentioned items shall be applied on the interest due and payable on the second chattel mortgage note.

The uncontradicted evidence further disclosed that on March 16, 1928, the Orrs revoked the order which they had given to the creamery to pay over to respondent the proceeds of milk sales, and on April 12, 1928, the dairy herd which was being maintained on the Goodsen ranch was taken in a claim and delivery action by the mortgagee in the first chattel mortgage and sold. It was also shown that after the cattle were removed the Orrs did no work on the ranch either by way of cultivating the alfalfa crop which was then growing thereon or in irrigating the crop or in cleaning the irrigating ditches although they continued to reside in the dwelling house located on the ranch. It also appeared that on April 20, 1928, respondent made written demand on the Orrs to surrender possession of the Goodsen ranch to him and to quit the premises within three days and on May 4, 1928, he instituted an action in unlawful detainer against them wherein he alleged that the reasonable rental value of the ranch was $166.67 per month and demanded restitution of the premises together with judgment for two months' rent at the above-mentioned rate and that such rental be trebled. It further appeared that after trial of the action thus brought respondent was permitted to amend his original complaint to conform to the evidence and that it was alleged in the amended pleading that after April 20, 1928, respondent had secured possession of all the premises except the farm buildings which the Orrs continued to occupy. It was further alleged that the reasonable rental value of that part of the premises which the Orrs continued to occupy was $25 per month, and the prayer of the pleading was for judgment in the amount of $50 for two months' rental and that such sum be trebled.

[1, 2] A study of the record on appeal impels the conclusion that the trial court interpreted the written agreement which was entered into between respondent and the Orrs on July 30, 1927, as not constituting an agreement of lease. In thus interpreting the agreement we are constrained to declare that the court did not err. It is apparent that the principal object of the

agreement was the maintenance by the Orrs of a specified herd of dairy cattle to the end that the proceeds derived from the sale of milk produced by the herd should be delivered to respondent to be disbursed by him in the payment of designated charges. The particular clause of the agreement upon which appellant especially relies as evidentiary support for his contention that the trial court erroneously construed the agreement as not being a contract of lease is the following: "Said Culley agrees to furnish said Goodsen ranch to said Orrs for their use in caring for and maintaining same, and in producing feed thereon, and in keeping and maintaining said dairy herd thereon as aforesaid, to July 15th, 1929 (unless said Culley is prevented through no fault of his own)." With respect to this language it is proper to observe, first, that no apt words indicative of an intention to demise the premises appear therein, and, second, that no fixed term is clearly designated. It is also proper to note that there is not at any place in the agreement a promise or covenant on the part of the Orrs to pay any specified rental for the premises. In this connection, it may be observed that one of the charges which the respondent agreed that he would pay monthly from the proceeds which he should receive from the sale of milk was one of $166.67 to himself "for money payable by said Culley to Goodsen for rent of said Goodsen ranch." Appellant argues that this peculiar provision in reality amounts to a covenant by the Orrs to pay the designated sum as monthly rental for the premises. While it may be conceded that the language would conceivably bear this interpretation, it must also be borne in mind that it was the duty of the trial court to discover the intent of the parties not from some particular language of the instrument disassociated from other provisions of the agreement but from all the language employed in the contract and all of the terms thereof. It is apparent that the agreement was not artistically drawn and that its true meaning is, in many respects, ambiguous and doubtful. It is not unreasonable to construe it as an agreement by respondent to give the Orrs the use of the land as licensees for the specified purpose of maintaining thereon the dairy herd which was the principal object of the contract. The trial court evidently so interpreted the agreement and, as indicated, it is our conclusion that, taking the agreement in its entirety, such interpretation is not so unreasonable that we feel justified in substituting therefor the interpretation for which appellant contends. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710; Whepley Oil Co. v. Associated Oil Co., 6 Cal.App. (2d) 94, 101, 44 P.(2d) 670.

[3] Our conclusion that the trial court's interpretation of the above-mentioned written agreement as not constituting a lease contract may not, under the circumstances, be disturbed on this appeal, very largely disposes of appellant's second contention. This contention is that, since appellant in taking the hay did so by virtue of a writ of attachment which had issued in another action and under written instructions to attach the hay without knowledge that any one other than the defendant in the attachment suit was making any claim to the hay, he could not be guilty of a wrongful taking. In this regard, it may properly be observed that not only do we entertain the opinion that the trial court correctly interpreted the written agreement as a mere licensing contract but that certain additional facts which were developed by uncontradicted evidence demonstrate that appellant's contention of an innocent taking is untenable. The evidence showed, for example, that after the cattle were removed from the ranch on April 12, 1928, the Orrs did no work on the ranch and in particular that they did nothing with respect to the cultivation of the hay then growing on the premises and that from that time, at least, respondent assumed the burden of cleaning the irrigating ditches and of irrigating the crop which respondent finally harvested. There was also evidence before the court which showed that the Orrs who continued to reside in the house on the Goodsen ranch made no claim of ownership or right to the hay and made no objection to any of the work that was done on the ranch by respondent. We think that this evidence warranted the trial court in concluding that the Orrs, prior to appellant's seizure of the hay, had abandoned any right that they might have had to use any part of the ranch premises other than the house which they continued to occupy, and that the taking of the hay by appellant was a wrongful taking from respondent who was entitled to its possession.

[4, 5] Appellant's third contention of evidentiary insufficiency to sustain the trial

court's finding that the quantity of hay taken amounted to 24 tons is likewise entirely untenable. Examination of the record shows that evidence was submitted which tended to show that the quantity of hay seized by appellant was 24 tons. Some evidence was produced by appellant which tended to show that the quantity seized did not exceed 22 tons. No rule of appellate procedure is more firmly established than that which precludes disturbance of a finding which is based on conflicting evidence. It may be observed that the finding as to the quantity of hay taken is that it amounted to 230 pounds in excess of 24 tons. No evidence was produced which tended to show that the quantity exceeded 24 tons by any amount. However, it is also evident that the amount of $384, which respondent was permitted to recover, is for 24 tons at the value of $16 per ton which was the market value which the hay was shown to have had at the time of seizure. It is clear, therefore, that no account was taken of the excess of 230 pounds and any reference to this excess in the findings may be disregarded as harmless error.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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17 Cal.App.2d 401

THOMPSON v. BUFFUMS', Inc.

Civ. 11024.

District Court of Appeal, Second District, Division 1, California.

Nov. 7, 1936.

1. Negligence 🔑125

Evidence as to previous accidents is admissible as tending to show dangerous character of place, cause of later accident, and knowledge of person maintaining place of dangerous condition thereof, but inquiry as to previous accidents must refer to accidents similar to one in question, occurring under substantially similar circumstances that surrounded subsequent accident.

2. Negligence 🔑119(2)

In action for injuries sustained in fall caused by alleged defective tenth step on stairway, cross-examination testimony of assistant superintendent of defendant's store as to whether other women had fallen on stairs *held* properly excluded where questions did not limit inquiry to tenth step (Code Civ.Proc. § 2055).

3. Appeal and error 🔑205

Question addressed to witness must show its purpose and materiality of evidence sought to be elicited, or an offer of proof is necessary to permit review thereof.

4. Appeal and error 🔑901, 1031(4)

Prejudicial error will not be presumed in ruling of trial court sustaining objection to introduction of evidence, and error, if any, must be made to affirmatively appear in record.

5. Appeal and error 🔑205

Where question to which objection is sustained does not itself indicate that answer would be favorable to party seeking to introduce testimony and upon issue material and relevant, before ruling will be reviewed on appeal, offer of what is proposed to be proved must first be made to trial court.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Agnes Thompson against Buffums', Inc. From an adverse judgment, plaintiff appeals.

Affirmed.

Russell H. Pray, of Long Beach, and J. R. Girling, of Los Angeles (John F. McCarthy, of Long Beach, of counsel), for appellant.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondent.

WHITE, Justice pro tem.

The jury returned a verdict in favor of defendant in this action commenced by plaintiff to recover damages for personal injuries sustained in a fall while walking down stairs maintained by defendant at its store in the city of Long Beach. Judgment for defendant was entered upon the verdict, from which plaintiff appeals.

Each step of the stairway in question was equipped with what is known as "Wooster Safety Tread." The tread consisted of a metal strip. When the metal strip was manufactured and originally installed, it contained certain grooves. Between each groove was a raised metal abrasive strip. The safety feature of the tread consisted of a combination of open grooves and abrasive strips. Every alternate groove was open and the others were filled in with lead. Some time after the installation of the stairway in the store, the alternate grooves which were open were also filled in with lead. With this accomplished, all the grooves were filled in, evidently because it was easier to sweep the tread if all of the grooves were filled than if each alternate groove were open. At the time of the accident here in question, a strip of this lead which had been filled in the groove on the tenth step had in some way, not apparent from the evidence, been removed from the groove next to what is termed the "nose" of the tread, leaving an open space about eighteen inches long in the groove. It was upon this step that plaintiff's shoe was caught, and she fell. In its answer defendant denied that the stairway was in a dangerous or defective condition; that it had any knowledge or notice thereof; and, as separate defenses, alleged that plaintiff's injuries were the result of an unavoidable accident and that plaintiff was herself guilty of contributory negligence.

Appellant earnestly urges a reversal, mainly on the ground that the trial court erred in excluding evidence of prior accidents claimed to have occurred in respondent's store. In that connection, the record discloses the following: R. H. Cochran, assistant superintendent of respondent's store, was called as a witness under section 2055 of the Code of Civil Procedure. In substance, he testified that he had been employed by respondent for fifteen years and had been assistant superintendent for seven or eight years; that for a number of years his position required his presence on the first floor, and that he was familiar with the stairs upon which appellant fell; that he was aware of the fact that the lead filling was gone from the tenth step prior to the date of appellant's accident. The following questions were then propounded to him by appellant's counsel:

"Q. During that time, and at any period before the date on which Mrs. Thompson fell, have any other women fallen upon these particular stairs?

"Mr. Crider: I object to that as calling for a conclusion of the witness, and unless he was there and saw it, it would be incompetent, irrelevant and immaterial.

"The Court: Objection sustained.

"Mr. Pray: Has it occurred, to your knowledge, in your official capacity during the seven years you have been on that floor, that any other women have fallen on those stairs?

"Mr. Crider: I object to that as incompetent, irrelevant and immaterial, whether they did or whether they didn't. The fact it might have come to his knowledge, if any did fall, is irrelevant, incompetent and immaterial. It would not have anything to do with the circumstances and can serve no useful purpose at all.

"The Court: Will counsel approach the bench?

"(Consultation at the bench.)

"The Court: The objection will be sustained."

It is contended by respondent that this testimony was inadmissible because it called for hearsay testimony and brought into the case a collateral issue; that in any event there was no showing that the circumstances and conditions of the previous accidents were similar to those in the case at bar. Respondent also urges that no offer of proof was made which would indicate that the answers to the questions propounded and to which objections were sustained would have been favorable to appellant; in the absence of which it is asserted error cannot be predicated upon the rulings of the trial court. The specific ground of objection was: First, that the questions called for the conclusion of the witness and were incompetent, irrelevant, and immaterial, unless the witness was present and saw the accident. Further objecting, counsel urged that, even if other people had fallen on the stairs in question, such testimony was nevertheless incompetent, irrelevant, and immaterial, and "could not have anything to do with the circumstances and can serve no useful purpose."

[1-5] While it is true that evidence as to previous accidents is admissible upon the general proposition that testimony of previous accidents tends to show the dangerous character of the place, tends to disclose the cause of the later accident, and bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place, yet the inquiry as to previous accidents must refer to accidents similar to the one in question, occurring under substantially the same circumstances that sur-

rounded the subsequent accident. Long v. John Breuner Co., 36 Cal.App. 630, 639, 172 P. 1132; Dyas v. Southern Pacific Co., 140 Cal. 296, 305, 306, 73 P. 972; District of Columbia v. Armes, 107 U.S. 519, 2 S.Ct. 840, 27 L.Ed. 618; Smith v. Seattle, 33 Wash. 481, 74 P. 674; Wigmore on Evidence, § 458; Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Magnuson v. City of Stockton, 116 Cal.App. 532, 3 P.(2d) 30; Chamberlayne on Modern Law of Evidence, § 3198. In the instant case, the questions to which objections were sustained did not limit the inquiry to the tenth step on the stairway, where the evidence showed appellant fell and which was admittedly the only step on the stairway from which the lead filling was missing. Any number of persons may have fallen on other steps of this same stairway due to other causes, and yet such evidence would not be relevant or material to show the alleged dangerous condition of the tenth step upon which appellant fell, nor would such evidence tend in any way to bring home to respondent knowledge of the alleged dangerous condition of the step here in question. The question addressed to a witness must show its purpose and the materiality of the evidence sought to be elicited, or an offer of proof is necessary. 38 Cyc. p. 1330. In the instant case, the questions were not in proper form and did not call for nor admit of an answer relevant to the issues and favorable to the party calling the witness. Therefore it was not error for the trial court to exclude them. Buckstaff v. Russell & Co., 151 U.S. 626, 637, 14 S.Ct. 448, 38 L.Ed. 292. Notwithstanding that the witness was called under section 2055 of the Code of Civil Procedure and was being cross-examined, there was nothing in the questions asked to indicate, nor was any offer of proof made which indicated, that counsel expected an affirmative answer which would show that previous accidents had occurred under circumstances that indicated their happening due to a dangerous condition existing on the step upon which appellant fell. Prejudicial error will not be presumed in a ruling of the trial court sustaining an objection to the introduction of evidence. If error is alleged to exist, it must be made to appear affirmatively in the record. Snowball v. Snowball, 164 Cal. 476, 479, 480, 129 P. 784; County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 83, 22 P. 61. Where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony and upon an issue material and relevant, before the ruling will be reviewed on appeal by this court, an offer of what is proposed to be proved must first be made to the trial court, so that this court can determine whether the proposed evidence would be material or relevant and beneficial to the party offering the evidence. County of Sonoma v. Hall, supra; Whitelaw v. Whitelaw, 122 Cal.App. 260, 263, 9 P.(2d) 874; Marshall v. Hancock, supra, 80 Cal. 82, 84, 22 P. 61.

The record failing to show any error in the rulings of the trial court, the judgment, for the foregoing reasons, is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

17 Cal.App.2d 406

PEOPLE v. JACKLIN.

Cr. 2918.

District Court of Appeal, Second District, Division 1, California.

Nov. 9, 1936.

Hearing Denied by Supreme Court Dec. 7, 1936.

1. Criminal law 🔑1159(3)

Reviewing court *held* without authority to disturb conclusion of jury based on conflicting evidence that defendant was guilty of offense of robbery.

2. Criminal law 🔑1036(2)

Defendant who on his arraignment in robbery prosecution admitted that he had theretofore been convicted of a felony could not complain of his cross-examination as to such conviction, where he had not objected to such cross-examination which was to obtain explanation of his statement on direct examination that he was a "two-time loser" (Pen. Code, § 1025).

3. Criminal law 🔑1129(3)

Specification of error that failure of court to give certain requested instructions constituted error which precluded defendant from having a fair trial *held* insufficient to present matter for appellate review (Rule 8 of the Supreme Court and the District Courts of Appeal).

4. Criminal law ⚷911

Whether defendant in robbery prosecution should have been granted a new trial was question resting wholly within trial judge's discretion.

5. Criminal law ⚷938(1)

Trial court *held* not to have abused discretion in refusing new trial, in robbery prosecution, on ground of newly discovered evidence, where such evidence was merely cumulative and it did not appear that defendant had exercised diligence to discover such evidence or that he was unaware of its existence prior to time of trial or that it would have resulted in different verdict.

6. Criminal law ⚷1156(1)

Reviewing court could not disturb order denying new trial in robbery prosecution, where there was no abuse of discretion.

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Norman A. Jacklin was convicted of robbery, and he appeals.

Affirmed.

Ray L. Smith, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

By the terms of an information that was filed in the superior court against defendant, he was charged with having committed the crime of robbery; also, that theretofore defendant had been convicted of the commission by him of a felony, for which he had served a term of imprisonment in the state prison. On his arraignment, he pleaded not guilty to the charge of robbery, but admitted his prior conviction of a felony as alleged in the information.

Following defendant's conviction and the subsequent denial of his motion for a new trial, he has appealed, not only from the ensuing judgment, but also from the order by which his motion for a new trial was denied.

[1] For the reason that in many particulars appellant has failed to comply with the rules of the Supreme Court and the District Courts of Appeal with reference to the preparation of his brief, it is difficult, if even possible, for this court to be certain as to the exact points which appellant desires to have considered on his appeal. But from a careful reading of his brief, it appears that appellant's principal point is that the evidence adduced on the trial of the action was insufficient to support the judgment, for the reason that the testimony that was given by the complaining witness was not only unbelievable, but also that the testimony that was given by defendant was more probably true. In that connection, in substance, the testimony that was given by the former was to the effect that after with his automobile he had pushed defendant's apparently "stalled" automobile across an intersection of two streets, defendant's engine "sputtered" and defendant then drove it close to the curb and there stopped it; at which time and place he alighted and seemed to begin an inspection of his engine. The complaining witness, also having stopped his automobile, then personally approached defendant and inquired of him if he might be of assistance; whereupon defendant placed "something" against the back and side of the complaining witness and told him that it was a "stickup"; and thereupon, through the influence of threats of bodily injury made to the complaining witness by defendant, the former was robbed by defendant of certain articles of personal property, which included the sum of 30 cents in cash. The substance of defendant's story was that the complaining witness had given those articles to him as security for the sum of $3, which the complaining witness had agreed to pay to defendant in consideration of the submission by defendant to the commission by the complaining witness upon the person of defendant of an immoral act.

From a reading of the evidence adduced on the trial of the action, this court is unable to find anything that is inherently improbable in the testimony that was given by the complaining witness. On the other hand, the testimony that was given by defendant contained much that bore the unmistakable stamp of its falsity. If possibly it may be said that the story that was told by the complaining witness was in any respect questionable regarding its truth, by comparison, that which was narrated by defendant on its face was so unbelievable that the English language contains no word that is capable of conveying to one's mind an adequate impression of its incredibility. Besides testifying in his own behalf that he was "a two-time loser," defendant's statement as to the relations which he claimed had been willingly sustained between him and the complaining witness placed him in a position where his veracity might be viewed with great suspicion. But in any event, the question of deciding where the truth lay was one for the jury to determine, and it having decided against defendant, this court has neither authority nor inclination to disturb that conclusion.

[2] Appellant also asserts that prejudicial error was committed, in that, notwithstanding that on his arraignment defendant had admitted the fact that theretofore he had been convicted of a felony, thereafter, in the course of the trial, contrary to the statutory provision with reference thereto (section 1025, Pen.Code), the deputy district attorney, who was in charge of the prosecution, on cross-examination of defendant had asked him concerning his former conviction of a felony. But in that connection, the record herein discloses the fact, as hereinbefore has been indicated, that on his direct examination in his own behalf defendant had testified that he was "a two-time loser"; and on cross-examination the deputy district attorney merely sought to have that expression explained to the jury; which was done without objection on the part of defendant. In such circumstances defendant has no just cause for complaint.

[3] With reference to the failure and refusal of the trial court to give to the jury certain instructions that were offered by defendant, his specification of error and his argument in that regard is as follows:

"Defendant believes that the instructions offered to the Court and requested by him, which were refused, should have been given to the jury, with the exception of instruction number 8 which was properly denied.

"The failure of the Court in giving the rest of these requested instructions amounted to error which precluded the defendant from having a fair trial."

Such a specification of error not only is entirely inadequate to inform this court as to the nature of the prejudice which he asserts prevented him from "having a fair trial," but, as heretofore has been indicated, fails to comply with the requirements of rule 8 of the Supreme Court and the District Courts of Appeal. Consequently, as a result of appellant's own fault, this court is unable to give consideration to any error which possibly may be contained in the record in that regard.

Finally, appellant complains that the trial court erred to his prejudice in denying his motion for a new trial. With respect thereto, appellant asserts that his said motion was based upon an affidavit which is said to have been made by one Reid; and which, by a very liberal construction of the language employed therein, was to the effect that at about the time when, and not far from the place where, the alleged robbery was committed, he saw defendant "Norman Jacklyn driving (an automobile) and another man sitting side of him."

[4-6] At the outset, it should be noted that the record on this appeal contains nothing that even indicates that any such affidavit was ever presented to the trial court. But even waiving that irregularity, from a reading of the affidavit, as it is set forth in the brief filed by appellant, it is manifest that at most, if the affiant had been present at the trial and then and there had testified to the identical facts that were stated in his affidavit, they would have been but cumulative of evidence that already was before the trial court. Nor does it appear that defendant used or exerted any diligence to discover the said witness, or the said facts, or even that he was not aware of them, prior to the time when the trial took place. There was no evidence that tended to disclose the identity of the man who was riding in the automobile with defendant. It is wholly improbable that if the facts stated in the affidavit had been regularly placed before the jury, the verdict would have been other than that which was returned. Moreover, the decision by the trial court as to whether an order should be made by which a new trial would be granted rested wholly within the discretion of the trial judge. There was no abuse of such discretion; consequently, that decision may not be disturbed by order of this court.

No other suggestion of error is worthy of discussion.

The judgment and the order are affirmed.

We concur: YORK, J.; DORAN, J.

17 Cal.App.2d 464

THORSEN v. PACIFIC GREYHOUND LINES, Inc., et al.

Civ. 5629.

District Court of Appeal, Third District, California.
Nov. 13, 1936.

Automobiles ⚷170(1), 245(79)

Where stage driver, to avoid colliding with oncoming truck which was on wrong side of highway, swung onto right shoulder of road about 50 feet in front of bridge, and either through excessive speed, defective brakes, or swinging too sharply back on highway, collided with second oncoming truck crossing bridge, which was wide enough to accommodate two vehicles, driver of second truck *held* not contributorily negligent as matter of law in failing to anticipate danger and stop truck in time to avoid collision, and stage driver was negligent.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Harry Thorsen against the Pacific Greyhound Lines, Incorporated, and others. From an adverse judgment, defendants appeal.

Affirmed.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, and Mervin C. Lernhart, of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondent.

PULLEN, Presiding Justice, delivered the opinion of the court.

The controversy arose out of an automobile accident in which three vehicles were involved, and occurred on the Napa Valley highway at a stone bridge about five miles north of St. Helena.

A Greyhound stage driven by Arthur J. Burke was traveling north on its right side of the highway at approximately 40 miles per hour. Going south was a truck and trailer driven by Gordon Vejarano and owned by Manuel S. Leslie, since deceased, and whose estate is represented by the administratrix. Following the truck and trailer was a truck belonging to Harry Thorsen, plaintiff and respondent herein. The Greyhound and the truck of plaintiff met at the southerly portal of the bridge almost head-on, causing the damage which was the basis of this action.

It is the contention of appellants Vejarano and the administratrix of the estate of Leslie, deceased, that the driver of the stage was negligent, which negligence was the sole proximate cause of the accident. These appellants pointed out in the evidence that the stage was traveling between 40 and 45 miles an hour, and when about 200 feet from the truck and trailer, which was then still on the north side of the bridge, the driver of the stage saw the truck and trailer was on the left side of the highway. The driver of the stage then took his foot off the gas, applied his brakes, and pulled over on to the dirt shoulder of the highway. At that point the brakes locked and the stage slipped, whereupon the driver of the stage, in an attempt to avoid running into the creek or striking the stone abutment of the bridge, swung to his left grazing the bridge and striking the truck of plaintiff which was following the truck and trailer of Leslie. Marks upon the highway indicate the stage had skidded approximately 75 or 80 feet and was going about 20 miles per hour at the instant of the impact. From this, appellant Vejarano and the administratrix contend the stage was either traveling at an excessive speed or the brakes were faulty. It was also claimed the driver of plaintiff's truck was contributorily negligent in that he saw the stage approaching, saw it to be in a position of danger, but did not apply his brakes until about 80 or 90 feet from the point of the impact, and that he was still traveling about 15 miles per hour when the two vehicles collided. The particular appellants claim therefore that the negligence of the operator of the truck and trailer in driving on the left side of the highway was not the proximate cause of the accident, but that the damage resulted from the negligence of the driver of the stage concurring with the contributory negligence of the respondent.

The stage company pointed out that upon rounding a curve as it approached the bridge in question their driver was confronted with a truck and trailer proceeding toward him on the wrong side of the highway. In order to avoid colliding with the truck and trailer, the driver swung to the extreme right of the road and onto the dirt shoulder. The truck and trailer passed, but about 50 feet ahead of the stage was a narrow stone bridge over a steep ravine. The bridge is not as wide as the shoulders on the highway and in order to avoid striking the parapet of the bridge and plunging into the ravine, the driver of the stage was compelled to make an abrupt turn back on to the highway. Just as he accomplished this he saw approaching the truck of plaintiff. The stage struck the parapet of the bridge, then collided with the truck.

The driver of the stage testified that when the truck and trailer passed him he was about 40 or 50 feet from the bridge and the trailer had not yet fully returned to the right side of the road, and it was not until the truck and trailer had passed him that he could see the oncoming truck of plaintiff.

Plaintiff testified that when he saw the stage it was on its right side of the highway, and continued on its right until it turned abruptly to the left in order to avoid hitting the bridge. Both the driver of the stage and the driver of the truck testified that the truck and trailer was proceeding down the highway upon the wrong side of the road, and it is not disputed that the truck of plaintiff was at all times upon its right side of the highway. The only negligence attempted to be charged against the driver of plaintiff's truck is that he failed to anticipate the position or danger in which the stage found itself and failed to stop his truck in time to avoid the collision.

The traversable portion of the bridge is 18 feet in width, which under normal circumstances was sufficiently wide to accommodate two vehicles.

We can see no negligence as a matter of law in any of the acts of the driver of the truck of plaintiff, but the negligence of the driver of the truck and trailer approaching the bridge and negotiating the curve as he did upon the wrong side of the highway, and the course taken by the stage, either through excessive speed or defective brakes or swinging too sharply back on to the highway, clearly places the negligence upon them.

Therefore from an examination of the record and of the opening briefs of appellants, it is apparent that appellant herein was entitled to judgment and that the trial court committed no error in so holding.

The judgment should be therefore affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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17 Cal.App.2d 389

MILES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 10913.

District Court of Appeal, Second District, Division 1, California.

Nov. 7, 1936.

Rehearing Denied Dec. 7, 1936.

Hearing Denied by Supreme Court Jan. 4, 1937.

1. Appeal and error 🔑867(1)

On appeal from order granting or denying new trial, reviewing court is allowed to investigate matters considered by court on motion for new trial.

2. Appeal and error 🔑901

While every presumption is in favor of order granting new trial, and it devolves upon party appealing therefrom to affirmatively show error, such may be done by presenting record showing what was before court on hearing of motion.

3. Appeal and error 🔑854(6)

Although single ground stated in order granting new trial after judgment of nonsuit was that defendants were estopped to plead limitation, reviewing court was not foreclosed from considering whether nonsuit was properly granted on other grounds urged by defendants, where record showed that whether evidence justified granting nonsuit, whether granting nonsuit was against law, and whether there were errors of law occurring at trial, were before trial court on hearing of motion for new trial.

4. Appeal and error 🔑662(2)

As respects scope of review of order granting new trial, statements or recitals in order as to showing made constitute no part of order, and neither party can be deprived by recitals in order of what record on appeal shows.

5. Limitation of actions 🔑66(6)

Where evidence showed that repurchase of bonds was demanded and for first time unequivocally refused in March, 1932, buyer's action on agreement to repurchase, which was brought in November, 1933, *held* not barred by two-year limitation (Code Civ.Proc. § 339, subd. 1).

6. Appeal and error 🔑1008(1)

Question of what is reasonable time for buyer to make demand for repurchase of bonds by seller under agreement is primarily for trial court.

7. Estoppel ⚿55

When act or promise of one person causes another in reliance thereon to do or forbear from doing anything to his detriment, which he would have otherwise performed, promisor is estopped from taking advantage of act or omission of promisee.

8. Limitation of actions ⚿15

Defendants were estopped to set up limitation against buyer's action on agreement to repurchase bonds where buyer was repeatedly assured that, if he would be patient, agreement would be carried out, and he was urged not to "start anything by going to any attorney," to "lay low and they would do just like they promised" (Code Civ.Proc. § 339, subd. 1; § 1962, subd. 3).

9. Limitation of actions ⚿15

Defendant will be estopped to set up limitation in bar of plaintiff's claim when delay which would otherwise give operation to statute has been induced by inducing plaintiff to believe that amicable adjustment of claim will be made without suit (Code Civ.Proc. § 1962, subd. 3).

10. Limitation of actions ⚿15

Where delay in commencing action is induced by conduct of offending party, it cannot be availed of by him as a defense (Code Civ.Proc. § 1962, subd. 3).

11. Limitation of actions ⚿15

Promisor need not sign written agreement to waive limitation to bar him from subsequently repudiating his agreement, but promisor's conduct, or even his silence, may result in equitable estoppel (Code Civ.Proc. § 1962, subd. 3).

12. Banks and banking ⚿237

Evidence *held* to establish sufficient succession of interest by national bank formed by consolidation of state banks, and by corporation owned by shareholders of consolidated national bank, to impress on them responsibility for agreement to repurchase bonds made to buyer from investment corporation owned by stockholders of state bank.

13. Banks and banking ⚿237

Change of state bank into national bank did not relieve new national bank so created from its former liability as state bank on agreement to repurchase bonds, where state bank had full authority to make such agreements (12 U.S.C.A. § 24).

14. Banks and banking ⚿237

Changing of state bank into national banking association does not destroy identity of original bank, but all assets and rights of state bank pass to national bank without any formal assignment, and are subject to all existing liabilities and obligations of state bank as if change had not taken place.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Joseph Miles against the Bank of America National Trust & Savings Association and others. Judgment of nonsuit, and, from an order granting a new trial, defendants appeal.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and Freston & Files, all of Los Angeles, for appellants.

Irl D. Brett, of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal from an order granting a new trial after a judgment of nonsuit. The action is one for damages for breach of contract. The contract relied upon consisted of a verbal promise made by the vendor of certain bonds that such bonds would be repurchased from the vendee at the original purchase price on demand of the buyer. Three bonds out of a total of eight were in fact repurchased, but the remaining five bonds, of the nominal or par value of $1,000 each, were not repurchased, on demand or at all. At the close of plaintiff's case defendants moved for a nonsuit. This motion for nonsuit was based upon several grounds, among which it was urged that the evidence did not show any relationship between the defendant Bank of America National Trust & Savings Association and Bankamerica Company and America Investment Company, the actual vendor of the bonds, which could impose liability in the two first-mentioned defendants on any theory. It was further contended that plaintiff's claim in any event was barred by the statute of limitations (section 339, subd. 1, Code Civ.Proc.). After argument on and submission of the motion for nonsuit, the court granted the same. Judgment was accordingly entered in favor of defendants. A motion for a new trial was made, based on the following grounds:

"1. Insufficiency of the evidence to justify the granting of said motion for a nonsuit and the rendering of a judgment of non-suit, and that the granting of said motion of non-suit and the rendering of said judgment thereon is against law.

"2. Errors in law, occurring at the trial and excepted to by plaintiff.

"Said motion will be based upon the minutes of the court, the court reporter's stenographic report of said proceedings at said trial, and upon all of the papers, records and files in said action."

The court then made the following order granting the motion for a new trial: "After consideration of the record, my notes of the testimony in this case, and argument, it seems to me now that from the evidence, a prima facie case of 'equitable estoppel' was established by plaintiff as against the non-suit granted on the ground that the Statute of Limitations had run, and for that reason plaintiff's motion for a new trial is hereby granted."

[1-4] Respondent contends that on appeal this court is restricted to consideration only of the single ground stated by the trial court in its order as the reason for granting a new trial, and that, if the trial court was correct in granting a new trial upon that single ground, this court is foreclosed from considering the question of whether or not the non-suit was properly granted on one or more of the other grounds urged by appellants in their motion for such nonsuit. With this claim of respondent in the instant case we are not in accord. Upon appeal from an order granting or denying a new trial, we are allowed to investigate the matters considered by the court upon such motion for a new trial. Marsteller v. Leavitt, 130 Cal. 149, 151, 62 P. 384. The record before us includes the reporter's transcript, containing all the evidence at the trial, including all grounds urged by appellants in presenting their motion for a nonsuit. While it is true the trial court specified in its order granting a new trial the single reason that "a prima facie case of 'equitable estoppel' was established by plaintiff as against the nonsuit granted on the ground that the Statute of Limitations had run," still the reasons given by the court for its action are not always material. Power v. Fairbanks, 146 Cal. 611, 615, 80 P. 1075. The reason given for the decision may be good and the decision at the same time incorrect for other reasons. It is the action of the court, and not the reasons given therefor, with which we are concerned. Every presumption, it is true, is in favor of the order made, and it devolves upon the party appealing from an order granting a new trial to affirmatively show error. This, however, may be done by presenting a record showing what was before the court upon the hearing of the motion. The record before us indicates that the motion for a new trial squarely presented to the trial court the question as to whether or not the granting of the motion for a nonsuit was justified by the evidence or was against law. The order simply indicates the action of the court, and not the showing upon which such action is based. Therefore, statements or recitals in the order as to the showing made constitute no part of the order. These things can be shown only by the record on appeal in the preparation of which the party in whose favor the order is made has an opportunity, by the presentation of proposed amendments, to make the record speak the truth. Neither party can be deprived by recitals in the order of what the record on appeal shows. The record before us in the instant case presents for determination the question as to whether the evidence justified the trial court in granting the motion for a nonsuit, whether the granting of the same was against law, and whether there were errors of law occurring at the trial and excepted to by respondent. All these issues were tendered to and were before the trial court on the hearing of the motion for a new trial.

Before proceeding to a discussion of the grounds upon which this appeal is predicated, we deem it appropriate to epitomize the evidence in the case.

Respondent, Joseph Miles, it appears, came to Los Angeles some time in 1928. Shortly after his arrival respondent went to the Bank of America and introduced himself to an officer of said bank, telling the latter that respondent had some money maturing in the middle west which he wanted to transfer to the local bank and deposit in a savings account. This being arranged, respondent some months later called at the bank to obtain the interest earned on his savings account. Respondent testified that on this occasion he again encountered an officer of the bank, to whom he said, "My money is maturing here and I have some interest due me." Whereupon the bank official said, "Well, you can't afford to keep your money in this savings; that amount of money. I will get you in touch with a representative of the bond department." According to respondent, the bank's officer introduced him to Mr. A. E. Nichols, as sales manager of the bond department, saying, "This man has a certain amount of money here and you take care of him, give him some sort of very good bonds that is all right." Respondent purchased eight $1,000 bonds of Marblehead Land Company. Subsequently, respondent was invited to contact the bank with reference to these bonds, which he did, and, after a conversation with Mr. Nichols, respondent exchanged the Marblehead Land Company bonds for bonds of Pacific Coast Aggregates. On this occasion, respondent testified, Mr. Nichols said to him, "Any time you need money or any time you want to, just bring them in here to this bank and we will pay you the full amount that you paid for them, plus the interest, the full amount." About September, 1929, respondent decided to sell one of the bonds and returned to see Mr. Nichols, but the latter was out of the city, and respondent was directed to see a Mr. Smith at the Seventh and Figueroa street branch of Bank of America. Locating Smith occupying a desk at the Seventh and Figueroa Bank of America branch, respondent advised Smith of his desire to sell one of the bonds. Smith appeared reluctant to repurchase, but, after respondent said to him, "When I bought the bonds they told me at the time they sold it to me that any time I need money, all I had to do, bring the bonds and the bank will buy it back from you for the full amount I paid plus the interest," Smith replied, "Well, all right." Respondent further testified that on this occasion Mr. Smith wrote something on a slip of paper and told respondent to go to Bank of America at Seventh and Spring, where the bond would be cashed. Following these directions, respondent went to Seventh and Spring, to the same office where he had purchased the bonds from Mr. Nichols, and there obtained cash for the bond concerning which he had talked with Mr. Smith.

About August, 1930, according to respondent's testimony, he again approached Mr. Nichols in the same office where he had originally purchased his bonds, telling Mr. Nichols that he needed some money and wanted to sell all of the remaining bonds. Respondent testified that Mr. Nichols said, "I don't know that the bank could pay you the full amount, because bonds are going down." To which respondent testified, he replied, "That ain't in accordance with the agreement that you—we had at the time you sold me these bonds; you told me any time you need money, why, you bring the bonds in and the bank will buy back from you for the full amount that you paid." According to respondent, Mr. Nichols replied, "Well, yes, that is right, but conditions are different now, and everything is changed." Respondent testified that after further conversation he finally said to Mr. Nichols, "Aren't you in charge of the bank now, in the bond department?" To which Nichols replied, "Yes, but I couldn't do the things like I used to; conditions are different, things are changed * * * but the bank will carry out the promise just like I told you at the time you bought them." After further conversation along these lines, during which, according to respondent, Mr. Nichols assured the former that the bonds were "gilt-edged," and urged him not to dispose of them, respondent was persuaded not to cash them, and he went away. Again a few months later, according to respondent's testimony, he contacted Mr. Nichols in an effort to dispose of the remaining bonds, but was unsuccessful in doing so. Along about September, 1931, respondent testified, he went to Mr. Nichols' office again, but was unable to locate the latter. Respondent thereupon went downstairs into the Bank of America, and making known the purpose of his mission to a man sitting at a desk marked "Vice-President," was directed to go back to the office upstairs and see a Mr. Lemon. Talking with Mr. Lemon, respondent testified, he advised the former of what he claimed to be the agreement to repurchase made at the time he secured the bonds and stated he desired to dispose of them, as he needed money. According to respondent, Mr. Lemon stated, "Yes, Mr. Miles, I heard of the deal, I am familiar with the deal. It is a ruthless deal ever was known, to take a man like you and load him with them kind of bonds, but I am in charge of this Bank of America bond department, I am going to San Francisco in a few days * * * I will then take this matter up with the head office in San Francisco." A few days later, according to respondent, word was left at his home for him to call at the bank, at which time, according to respondent, Mr. Lemon stated to him, "Well, I just got back from San Francisco. All we can do is cash you one bond at a time. I worked very hard with them—when I was there, with the main office at San Francisco. I told them that you were here several times, you wanted to cash this bonds and that they didn't live up to their agreement as they promised you at the time they sold you the bonds. * * * All we could cash for you now is just one bond and just be patient and they will carry out the terms just like they told you. * * * And whatever you do, don't start anything, don't go to any attorneys, lay low, and they will do just like they promised." On this occasion, according to respondent, he was paid the full value of one bond plus the amount of interest due up to that date. Thereafter, according to respondent, he continually contacted Mr. Lemon from time to time and was advised to be patient and not start anything, to "just lay low, don't rock the boat or go to any attorneys or anything like that, and the thing will be all right." These visits by respondent to Mr. Lemon, according to the former, continued up to approximately March of 1932, when, according to respondent, he was advised by Mr. Lemon that no more bonds would be cashed for him. Respondent further testified that during his conversations with Mr. Lemon the latter told him that Mr. Giannini was "the head man, or something like that," whereupon respondent decided to write to Mr. Giannini and prepared a letter which was signed by the wife of respondent. The record contains, as Plaintiff's Exhibit 1, a letter under date of May 28, 1932, on stationery of "Bank of America National Trust and Savings Association, A. P. Giannini, Chairman of the Board of Directors," and addressed to respondent's wife, in acknowledgment of her letter concerning the bonds here in question. This communication signed "A. P. Giannini, Chairman," reads in part as follows:

"In referring to our records, we find that the America Investment Company, from whom the bonds were originally purchased, repurchased $1,000 par value at 99 on September 23, 1929. Subsequently, Bankamerica Company, successors to America Investment Company and National Bankitaly Company, repurchased $1,000 par value at 99 on September 1, 1931, and $1,000 par value at 99 on October 15, 1931. When the last two purchases were made at 99, the market on the bonds was 30 and 25 bid, respectively. You can therefore see, Mrs. Miles, that in repurchasing the above bonds, Bankamerica Company absorbed quite a loss in paying you your purchase price of 99."

After discussing then existing economic conditions and their effect on the market, the letter concludes: "We shall be pleased to keep your account before us and endeavor, when the opportunity presents itself, to work out some trade which will enable you to recover some of your loss."

Again, under date of June 18, 1932, Mr. Giannini wrote respondent's wife in part as follows: "Viewing your case from every angle we must reiterate that there are thousands of instances where investors have lost practically all their money due to unforeseen causes and have not received any reimbursement such as you have. We believe that we have done our part, inasmuch as we have sustained considerable loss in the purchase of the last 2,000 par value Pacific Coast Aggregate 6½% Bonds from Mr. Miles."

Under date of December 2, 1932, W. F. McGrath, vice-president of Bankamerica Company at San Francisco, wrote respondent's wife in part as follows: "As Mr. Giannini informed you in his letter dated June 18, 1932, we cannot be held responsible for investors who purchased securities through any of our affiliated companies, where the market on the bonds has depreciated to a point where they incur a loss."

Respondent brought the action here in question on November 4, 1933, and at the time of the trial testified that the bonds were then in his possession, unencumbered, and that he was able and willing to deliver the remaining bonds to appellants.

[5, 6] Appellants first urge a reversal of the order on the ground that the action was clearly barred by the statute of limitations. Section 339 of the Code of Civil Procedure bars an action upon a contract not founded upon an instrument in writing in two years. Appellants contend there was a demand made to repurchase and a refusal so to do in August, 1930, and again in September, 1931. The facts of the instant case, however, impress us that the statute did not commence to run until March, 1932, when repurchase of the bonds was demanded and for the first time unequivocally refused. As to appellants' contention that the demand to repurchase was not made within a reasonable time, it is sufficient to say that the

question of what was a reasonable time for making a demand must depend upon the facts of each case and is primarily a question to be decided by the trial court. Kaplan v. Reid Bros., Inc., 104 Cal.App. 268, 272, 285 P. 868; Johnston v. Keefer, 48 Idaho, 42, 46, 47, 280 P. 324, 325.

[7-9] Even though it be conceded that the statute of limitations commenced to run as contended for by appellants, we are nevertheless of the opinion that appellants were estopped by reason of their conduct toward respondent from taking advantage of the statute. As was said in Calistoga Nat. Bank v. Calistoga Vineyard, 7 Cal.App.(2d) 65, 72, 46 P.(2d) 246, 249: "It is a well-established rule of law that when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promisor is estopped from taking advantage of the act or omission of the promisee. The violation of such a promise amounts to fraud and estops the promisor from repudiating the agreement on the doctrine of equitable estoppel." In view of the foregoing evidence which we have set forth herein, we are of the opinion that appellants are estopped to set up the bar of the statute. Respondent was repeatedly assured that, if he would be patient and wait, the bank would carry out its agreement. He was urged not to "start anything by going to any attorneys"; to "lay low and they would do just like they promised." Acceptance by appellants of the favor so solicited from respondent involved as a matter of fair dealing an implied undertaking on appellants' part not to rely upon a defense based upon facts coming into existence solely from the granting of that favor by the plaintiff and his forbearance from bringing the suit within the statutory period. In 37 Corpus Juris, pp. 725 and 726, it is said: "The prevailing rule is that the doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the statute of limitations, it being laid down as a general principal that when a defendant electing to set up the statute of limitations has previously by deception or any violation of duty toward plaintiff, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold. Thus defendant will be estopped to set up the statute of limitations in bar of plaintiff's claim when the delay which would otherwise give operation to the statute has been induced by * * * *inducing plaintiff to believe that an amicable adjustment of the claim will be made without suit,* or by other forbearance to sue induced by defendant, or by defendant's husband as her agent." (Italics ours.)

[10, 11] In the instant case it appears to us that the delay about which the appellants now complain was induced by their own representations that they would make a voluntary adjustment with plaintiff. Where the delay in commencing action is induced by the conduct of the offending party, it cannot be availed of by him as a defense. Mitchell v. J. H. Roth & Co., 124 Cal.App. 96, 99, 12 P.(2d) 91. Nor is it necessary that the promisor shall sign a written agreement to waive the statute of limitations to bar him from subsequently repudiating his agreement. Calistoga Nat. Bank v. Calistoga Vineyard, supra. The authorities are uniform to the effect that the conduct of a promisor, or even his silence under certain circumstances, may result in an equitable estoppel. Section 1962, subd. 3, Code Civ.Proc.; Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021, 1033. In the last-cited case it is said (152 Cal. 655, at page 683, 93 P. 1021, 1033): "An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped. * * * An estoppel may arise also from silence as well as words." To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 812, p. 1671.

The trial court therefore was correct in its conclusion on hearing the motion for a new trial that under the evidence in this case an equitable estoppel had arisen.

[12] Appellants' claim that they are not responsible for the promise to repurchase on any theory, whether of assumption of obligation by reason of corporate succession or upon the claim of the existence of an agency, actual or ostensible, is without merit. It would unduly prolong this opinion to here restate that portion of the evidence showing appellants' responsibility. Suffice it to say, we have read the record and find therein ample evidence showing there was a consolidation of Bank

of America with Commercial Bank as America Commercial Corporation, a holding company; that Bank of America was ultimately consolidated with Bank of Italy and operated as Bank of Italy; that thereafter Bank of Italy, a state bank, obtained a national charter, taking the name of Bank of Italy National Trust & Savings Association, which was subsequently changed to Bank of America National Trust & Savings Association, one of appellants herein. The evidence further shows that at the time the promise was made to respondent to repurchase his bonds Bank of America had an investment agency known as America Investment Company, which was owned by the stockholders of Bank of America of California, and that Bankamerica Company, an appellant herein, was owned by the shareholders of Bank of America National Trust & Savings Association. In addition to the foregoing, we have the documentary evidence hereinabove set forth, tending very strongly, in our opinion, to establish a sufficient succession of interest by appellants herein to impress upon them responsibility to respondent. There is also abundent evidence, some of which we have herein outlined, to support both the actual and ostensible authority of Mr. Nichols to make the agreement with respondent, both on behalf of America Investment Company and appellant bank.

[13, 14] Appellants urge a reversal upon the ground that no liability could be imposed upon the appellant Bank of America National Trust & Savings Association in any event upon any theory of agency, express or ostensible, for the reason that the promise made to respondent was a promise to repurchase certain bonds at the price originally paid, plus accrued interest. This claim is based upon the fact that section 5136 of the Revised Statutes of the United States, as amended (12 U.S.C.A. § 24), prohibits a national bank from making such a repurchase agreement. We think the evidence in this case establishes the fact that, at the time the contract here in question was made with respect to repurchasing the Pacific Coast Aggregate bonds, the America Investment Company was an affiliate and agent, so far as respondent was concerned, of Bank of America, which was a state bank and not operating under a national bank charter. Under such circumstances, we are of the opinion that the change of the state bank, which had full authority to make the agreement with respondent, into a national bank, did not relieve the new national bank so created from its former liability as a state bank. Under the banking laws of the United States, the changing of a state bank into a national banking association does not destroy the identity of the original bank. All the assets and rights of the state bank pass to the national bank without any formal assignment and *are subject to all the existing liabilities and obligations of the state bank as if the change had not taken place.* Michigan Ins. Bank v. Eldred, 143 U.S. 293, 12 S.Ct. 450, 36 L.Ed. 162; Metropolitan National Bank v. Claggett, 141 U.S. 520, 527, 12 S.Ct. 60, 35 L.Ed. 841; Estate of Barreiro, 125 Cal. App. 153, 172, 13 P.(2d) 1017; Bank of America v. Granger, 115 Cal.App. 210, 218, 1 P.(2d) 479; Kelsey v. National Bank, 69 Pa. 426, 431. Where a state bank reorganizes into a national bank, it passes from one jurisdiction to another, but its identity is not thereby necessarily destroyed. It remains substantially the same institution under another name and subject to new control. Coffey v. National Bank, 46 Mo. 140, 2 Am.Rep. 488; City National Bank v. Phelps, 86 N.Y. 484. With these rules before us, the conclusion is inevitable that the transition of Bank of America, a state institution, into a national bank, carried with it responsibility for the obligations of the state bank and its agents to respondent.

For the foregoing reasons, the order by which plaintiff's motion for a new trial was granted is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

McGUIRE v. BAIRD.*

Civ. 10472.

District Court of Appeal, Second District, Division 1, California.

Nov. 7, 1936.

Hearing Granted by Supreme Court Jan. 4, 1937.

1. Evidence ⚷554

In action for malpractice, requiring medical expert to answer "yes" or "no," without explanation, long hypothetical question whether defendant used degree of skill and care ordinarily exercised by physicians in vicinity *held* error where witness understood that affirmative answer was approval of all defendant had done, which witness could not honestly give, but negative answer was condemnation of defendant's whole conduct, a position witness was even more reluctant to take.

2. Appeal and error ⚷1048(1)

In malpractice action, error in requiring medical witness to answer "yes" or "no" hypothetical question whether defendant used skill and care ordinarily exercised by physicians in vicinity *held* not harmless on ground that witness had disqualified himself by stating that he did not know how other physicians would treat disease, where he did not know of previous case in community.

3. Appeal and error ⚷1048(1)

In malpractice action, error in requiring medical witness to answer "yes" or "no" hypothetical question whether defendant used skill ordinarily exercised by physicians in vicinity *held* not harmless on ground that, though question was answered in affirmative, it did not appear that, if witness had been permitted to expand his answer, it would have been helpful to plaintiff, where it was apparent that witness had opinion that X-ray should have been taken, and, had he been permitted to so testify, foundation for further question respecting results of taking X-ray would have been laid.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Anne Teresa McGuire against Dr. Marion W. Baird. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Henry G. Bodkin, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

In this malpractice action, where a judgment of nonsuit was rendered, we have concluded that an error prejudicial to plaintiff-appellant was committed, when the trial court approved of the position insisted upon by defense counsel and ruled that a long, hypothetical question propounded to a doctor be answered yes or no, without explanation.

The question put to the witness consisted first of a recital of the history of plaintiff's ailment, and defendant's diagnosis of it and treatment for it. To appreciate the length of the statement, it should be noted that the framing of the question began before the morning recess, continued over until the noon recess, and was then completed in the afternoon. The witness was told of the plaintiff's first visit to the defendant about the middle of December, 1932, with a thumb throbbing painfully, but bearing no visible signs of trouble. The doctor, the statement continued, diagnosed the trouble as a felon and prescribed hot epsom salt baths for the thumb. There followed a narration of events up to March 14, 1933: The thumb getting worse, danger signals appearing up the forearm, the treatment becoming more severe, lancings and probings and drains. No X-ray was taken until just before March 14. Of the events from March 14 on, the witness did not need to be told, as it was to him plaintiff came for relief. He declined to take any action without an X-ray. One was procured, revealing that plaintiff was suffering from osteomyelitis, inflammation of the marrow of a bone, and the witness amputated plaintiff's thumb.

These events beginning with March 14, not forming a part of the hypothetical question, were brought out after the recital of the history of the case before it reached the witness' hands. Then the second part of the hypothetical question took this form: "Assuming, Doctor, all the facts recited in this hypothetical question to be true, would you say that the doctor who had charge of the patient and who treated the patient as we have hereinbefore stated, from the 9th day of December, 1932, until on or about March 16, 1933, used that degree (of) skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing * * * in the vicinity of Torrance, Redondo and thereabouts?" After some sparring, during which it developed that the witness had an opinion on the subject involved, this question was asked him: "And, in your opinion, did that physician use that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in this vicinity?" Now we quote from the record:

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*For subsequent opinion see 70 P.2d 915.

"Defendant's Counsel: Will your Honor direct that must be answered yes or no?

"The Court: By yes or no, Doctor. Do you understand the question? You want the reporter to read it again? A. I believe I understand it.

"The Court: Very well. You may answer the question. Do you want to have the question read again? A. I would like to have it read again.

"The Court: All right; read the question, Mr. Reporter. (Last question read by the reporter.)

"Q. (by plaintiff's counsel). In that particular vicinity. You can answer that and then explain. Answer yes or no and then you may explain.

"Defendant's Counsel: If your Honor please, the question must be answered yes, he did, or no, he did not.

"The Court: Yes, that is what I understand, Mr. Bodkin.

"Defendant's Counsel: He has no right to explain his answer to a hypothetical question. His whole hypothesis is there and he must answer yes or no.

"The Court: Yes, it is on that hypothesis.

"Plaintiff's Counsel: And the entire treatment I am referring to.

"The Court: All right; you must answer yes or no.

"A. I would say that he did.

"Q. (by plaintiff's counsel). You would say that he did use that? A. Yes, to the best of his ability.

"Q. Now, Doctor, I am not talking about the best of his ability; I am saying, did he use that skill, care and learning ordinarily possessed and exercised by physicians practicing in that particular vicinity? A. Well, I do not know anything about how the physicians in that vicinity would treat cases. I have not had any experience with them in osteomyelitis.

"Q. I am talking about Torrance. Have you not had experience down there? I understood you did. A. I have had association through cases, but not any experience with doctors in Torrance with osteomyelitis.

"Q. I am talking about Torrance and Redondo? A. Well, I don't know how the other fellows treat it.

"Q. Now, Doctor, assuming the facts stated in this hypothetical question, I will ask you if a physician, using that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in that vicinity, of Torrance and Redondo, would not have taken an X-ray?

"Defendant's Counsel: Now, I object to that, if your Honor please, because, in the first place, it is not a proper hypothetical question. I can't take the question apart, sentence by sentence; but, in the first place, the doctor testified he did not know what the general run of physicians do down there.

"The Court: Sustained.

"Plaintiff's Counsel: May we take a recess at this time, if your Honor please?

"The Court: Yes, take a recess. Ladies and gentlemen, bear in mind the admonition heretofore given.

"(Whereupon a recess was taken and proceedings were resumed in chambers as follows, out of the hearing and presence of the jury.)

"The Court: Let the record show we are in the court's chambers, the court and counsel and the doctor present, together with the reporter, in the absence of the jury.

"(Examination continued out of the hearing and presence of the jury as follows:)

"Q. (by plaintiff's counsel). Doctor, you were just asked a hypothetical question by me, in which I asked you to assume certain facts to be true, and I asked you, if, in your opinion, the ordinary, careful physician—I don't remember the exact words—but the ordinary, careful physician, with the ordinary skill and learning, would have used that treatment and done as that physician did. Your answer was 'yes.' Now, did you mean by that to say that the treatment, that all of the treatment was correct, or that the treatment as a whole was such that the ordinary physician would have given?

"Defendant's Counsel: I object to that, if your Honor please, as cross-examination of his own witness.

"The Court: That is what it amounts to.

"Defendant's Counsel: This doctor was given the entire treatment of this patient from the beginning to the time the defendant doctor closed his connection with the case. He was then asked the question, assuming all the facts in the hypothesis to be true, whether or not the physician and surgeon under consideration exercised that degree of skill, care and learning that an ordinary physician practicing in that community would have used under the same or similar circumstances, and he said, 'Yes.' Now, that is the only hypothesis that can be put to any expert in a case of this kind; we have to have all the facts; they have been stated to him. You can't begin at the middle of the treatment and say, did he do so and so, or should he have done so and so.

"The Court: I think that is true.

"Plaintiff's Counsel: I think that is true, but when I am taken by surprise by the statement of the physician I think I have a right to do it, and I stated I was taken by surprise.

"Defendant's Counsel: As I stated, I have the most profound respect for the doctor, from his face and appearance; and I don't know what surprise you had, because I asked the doctor, after he listened to the statement of the treatment on the stand, if he criticized that statement, and he said no.

"Q. (by plaintiff's counsel). Is that true, Doctor? A. Part of the treatment, yes.

"Q. Did you tell Mr. Gilbert, after listening to all this testimony, that you found nothing to criticize? A. May I speak?

"The Court: Yes, but it is not a matter of criticism. A. I was informed that I had to answer yes or no—

"The Court: That is right.

"The Witness: —whether this treatment was correct or whether it was wrong. I didn't know that that meant all of the treatment; I didn't know that that was the whole treatment, all the way through the case.

"Q. (by defendant's counsel). But the question is, I asked you about the whole treatment and you told me the treatment, taken as a whole, would be correct, didn't you? A. Well, Mr. Gilbert, I understood you to mean—

"Q. I am talking about the treatment as a whole; there might be parts of it you disagree with; all you answer is the statement as a whole, whether or not from the time he started until he got through it met with that degree of ordinary care, skill and learning as ordinarily possessed and exercised by physicians and surgeons in that vicinity.

"Plaintiff's Counsel: Did you tell Mr. Gilbert, as a whole, it was proper? A. If I did, I didn't understand it meant all the treatment.

"Q. (by the Court). Well, did you tell Mr. Gilbert that? A. If he says I did, I did.

"Defendant's Counsel: Well, Doctor, let me clear your mind. I stood on that treatment, and I said, 'Doctor, you have heard this whole statement, now, was there anything criticizable about it' I said 'That means taken from one end to the other,' and you said, 'No, not that I can see.' That was standing right there at the railing. I had a right to talk to you the same as Mr. Bodkin.

"Plaintiff's Counsel: Well, I didn't think that you would talk to my witness.

"Defendant's Counsel: I didn't know you owned him.

"Plaintiff's Counsel: I have him under subpœna.

"The Court: That is correct, what Mr. Gilbert has said?

"The Witness: That is correct.

"Q. (by plaintiff's counsel). Doctor, do you desire to correct that statement you made on the stand in which you stated the entire treatment was correct?

"Defendant's Counsel: That is not the proper question and not proper examination.

"The Court: No. If you object to it—

"Defendant's Counsel: Objected to on that ground. The only hypothesis that can be presented to this or any other expert witness in the case is to give him the whole picture.

"The Court: Yes, that is correct.

"Defendant's Counsel: He says, viewed from the whole picture, the doctor did, in his judgment, the right thing.

"Plaintiff's Counsel: I know, but, Doctor, you stated here that you misunderstood the question to the extent that you believed you were called upon to say, if you said 'No,' that you were saying that the entire treatment was wrong, is that right? Is that what you understood when you were asked that question, if you said 'No'? A. Yes, if I said no I thought that meant none of his treatment was correct.

"Q. And do you desire to change that answer?

"Defendant's Counsel: I object to that.

"The Court: We are getting back to the proposition of separating the question and dividing it into parts.

"Defendant's Counsel: Doctor, you heard this whole picture, did you? A. Yes, sir.

"Q. And you have got to assume, so far as my question is concerned, that it is all true, from the time she came in on December 12th until she went out on March 14th. Now, taking this treatment as a whole, just considering it all together, as shown by the hypothesis, I said, that the man exercised ordinary care; I asked you if you understood that question, and you said, 'Yes,' is that right, and that is the question you answered, isn't it? A. Yes, sir.

"Q. And you certainly intended to give that answer on the stand, didn't you? A. To the best of his ability he exercised it.

"The Court: Well, in your opinion and judgment?

"Plaintiff's Counsel: Not this particular physician, but as to the ordinary physician practicing in that vicinity, did he exercise that degree of care and skill exercised and used by physicians practicing there?

"Defendant's Counsel: Taken as a whole.

"Q. (by plaintiff's counsel). Taking this treatment together; you can't isolate one part of it? A. I should say that physicians practicing in my community, after a period of time elapsed and the thumb was not improved, showed no improvement, that the ordinary physician in my community would perhaps have called in consultation or had an X-ray taken.

"Defendant's Counsel: That does not answer the question.

"The Court: No.

"Q. (by plaintiff's counsel). In other words, you mean by that last answer that the ordinary, careful physician, careful and capable physician, practicing in that community would have done something in addition to what was done by this physician?

"Defendant's Counsel: I object to that as cross-examination of his own witness.

"The Court: Sustained. You understand, Doctor, taking the whole picture, the things set forth in the hypothetical question, assuming all those facts to be true as given, then can answer upon that theory.

"Defendant's Counsel: But he has answered.

"Plaintiff's Counsel: No, he said it was not.

"The Court: He said it was.

"Defendant's Counsel: No, he said it was.

"Plaintiff's Counsel: Was that the last answer?

"The Court: He said he would have taken some X-rays.

"Defendant's Counsel: He has got to take the treatment as a whole or not at all.

"Plaintiff's Counsel: Part of it may have been right or wrong.

"The Court: Taking it all, as a whole, the entire treatment.

"Plaintiff's Counsel: All I want to know is this: Just taking the treatment—in other words, as I understand the question, it is this: If everything in the treatment was not correct—

"Defendant's Counsel: I object to that. That is not the question. The question is, whether the whole picture represents what a man of ordinary care and skill practicing in the same community would do.

"The Court: That is right.

"Defendant's Counsel: And the doctor says it does.

"(Discussion.)

"The Court: Sustained. You may reframe the question.

"Q. (by plaintiff's counsel). Now, Doctor, you have heard the hypothetical question I asked you out there in the court room; you remember the question I asked you— A. Yes.

"Q. —respecting the history of the case? A. Yes.

"Q. Now, assuming all those things to be true, in your opinion, would the ordinary, careful physician, with ordinary capability and training and learning, have done the things—that is, would he have done as that physician did do in that case?

"Defendant's Counsel: I object to that, if your Honor please, as not the proper question.

"The Court: Sustained.

"Plaintiff's Counsel: Just one moment, if your Honor please; I want to use the language of the cases.

"The Court: Whether a person would have done it differently is not the test.

"Defendant's Counsel: No, the question is, was what he did consistent with the exercise of ordinary care—

"The Court: By reputable physicians in that community.

"Defendant's Counsel: —by reputable physicians in that community, yes, and the witness has already said it was.

"Plaintiff's Counsel: And he has attempted to say that he misunderstood the question.

"Q. I will ask you this, Doctor: Assuming the facts recited in this hypothetical question, the one which I read to you in the court room, to be true, would you say that the doctor who had charge of the patient, who treated the patient, as we have hereinbefore stated, from the early part of December, 1932, until the time he was discharged, on or about March 13, 1932, used that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in Torrance or Redondo or that vicinity?

"Defendant's Counsel: I object to that question as having been asked and answered.

"The Court: That is identically the same question.

"Plaintiff's Counsel: I understand it, and it is quite apparent here that he was mistaken.

"The Court: Overruled. You may answer, Doctor. You want the reporter to read that again?

"The Witness: The question just now asked me?

"The Court: Yes.

"A. I would have to answer that yes, that he did use the proper care. Now, if you won't let me tell—

"Plaintiff's Counsel: That is all there is to it.

"The Witness: Well, I can't say no.

"The Court: Well, that is all there is to it."

[1] As we reread the record there remains with us but one conclusion: Plaintiff's sole medical witness answered the hypothetical question in the belief that he had to answer it with an unqualified "yes" or "no"; that he understood that the first was an approval of all that his fellow doctor had done, an approval he could not honestly give, but the second was a condemnation of his whole conduct, a position he was even more reluctant to take. He solved the dilemma in which the court's ruling and his understanding placed him by answering in the affirmative.

Respondent gives us no authority in support of the proposition that the question had to be answered categorically. Indeed, he states in his brief that: "The witness was not precluded from explaining his answer (if an explanation was necessary) after answering the question 'yes' or 'no.'" The record shows, of course, rulings consistently to the contrary. We not only agree with the declaration in Webber v. Auto Park Transp. Co. (1926) 138 Wash. 325, 244 P. 718, 719, 47 A.L.R. 590, that "a witness is ordinarily permitted to explain his answers where the question calls for an answer either 'Yes' or 'No,'" but are of the opinion that under the circumstances of the case at bar especial reason existed for permitting him to do so.

[2] Respondent argues that no prejudice flows from any error there may have been in the rulings respecting the doctor's testimony because he had effectively disqualified himself by the series of statements, quoted above, concluded with, "Well, I don't know how the other fellows treat it." Whatever effect his statements may have made on the weight to be given his testimony, they did not destroy him as an expert witness. That is to say, we hold that one who, himself a qualified physician and surgeon with experience in diagnosing and treating a particular ailment, has lived for 13 years in a community, knowing and practicing with the other physicians and surgeons in the community, may be qualified to give testimony as an expert respecting that degree of skill, care, and learning ordinarily possessed by physicians and surgeons practicing in the community, with regard to that ailment, although he may not have known of the ailment having been treated before in the community. If a doctor, otherwise qualified, cannot measure another doctor's diagnosis and treatment of a particular case by the standard of the community, because he does not know of an actual case having established that standard, it follows necessarily that no standard of skill or care would be available upon the first appearance of an ailment in a community, nor would there be any standard in a new community. Does a doctor, who has passed the rigid tests required before he may practice in our state, hold himself out to exercise no degree of skill in diagnosing or treating a case of gout because neither he nor any of his fellow doctors in the lo-

cality has ever had an actual case before? The limitation upon the liability of doctors, that they shall be held only to that degree of care and skill which is the standard in the community, is not to be extended to relieve them of the duty of exercising any care and skill in a new situation. They have been trained for new situations, and by their training and general experience have some standard to which they can be held.

We find no support in the authorities for respondent's theory, unless Rasmussen v. Shickle (1935) 4 Cal.App.(2d) 426, 41 P.(2d) 184, be so interpreted. In Hutter v. Hommel (1931) 213 Cal. 677, 3 P.(2d) 554, 556, the court answered the objection that a witness trained as a homeopathic physician and surgeon was not shown to be qualified to testify as to the degree of care and skill required of the defendant, of the allopathic school, by pointing out that he had stated that he was "familiar with the general treatment under allopathic and any other school of surgical cases" and had had personal experience with the surgical problem under consideration. The precise objection made to us was not discussed, but what we believe to be the correct test was applied.

[3] Nor is this a situation where we can say that the error is not shown to be prejudicial because it does not affirmatively appear that, if the doctor had been permitted to expand his answer, it would have been helpful to plaintiff. It is quite apparent to us that plaintiff's counsel expected the witness to testify and that probably he would have testified that, had the defendant exercised that degree of care and skill usual in the community, he would have discovered long before March 14, that it was not a felon causing plaintiff her distress, but some other condition, and that he would have turned to the X-ray to see if it would not reveal the real trouble. It is apparent that the witness had an opinion that common care dictated that an X-ray should have been taken. Had he been permitted to so testify, a foundation for further questions respecting the results of taking the X-ray would have been laid. The present lack of answers to those further questions may not be pointed to as proof that the error was harmless.

For the reasons given, the judgment of nonsuit is reversed.

We concur: HOUSER, P. J.; DORAN, J.

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17 Cal.App.2d 360

CRANE et al. v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

Civ. 10976.

District Court of Appeal, Second District, Division 1, California.
Nov. 6, 1936.

1. Schools and school districts 🔑39

Board of supervisors, in adopting resolution by which boundaries of school district were changed, exercised a "judicial function" within statute providing that certiorari may issue when it appears that inferior board exercising judicial function has exceeded its jurisdiction, and hence order made by board of supervisors changing boundaries of school district was reviewable by superior court through certiorari (School Code, §§ 2.102, 2.151, 2.152; Code Civ.Proc. § 1068).

[Ed. Note.—For other definitions of "Judicial Function," see Words & Phrases.]

2. Schools and school districts 🔑39

Taxpayer and board of trustees of school district which was affected by order of board of supervisors changing boundaries of district *held* proper parties to petition for writ of certiorari to test question of jurisdiction of board to make order (School Code, §§ 2.102, 2.151, 2.152; Code Civ.Proc. § 1068).

3. Statutes 🔑227

Generally, when by terms of statute performance of specified act is required antecedent to acquisition of jurisdiction by inferior tribunal or board, statutory provisions in that regard are "mandatory," but jurisdiction may not be made to depend upon precompliance with acts which are immaterial to foundational elements of jurisdiction.

[Ed. Note.—For other definitions of "Mandatory," see Words & Phrases.]

4. Statutes 🔑227

Although language of statute may be clear in its specification of that which may appear to be prerequisite to acquisition of jurisdiction by inferior tribunal or board, validity of decision by tribunal or board may depend upon whether specified act constitutes a mandatory requirement, and, in determining whether requirement is "mandatory," controlling principle is that unless act or action properly may be regarded as "of the essence" of particular object sought to be obtained or purpose to be accomplished, required act or action will be deemed "directory" only.

[Ed. Note.—For other definitions of "Directory (Adjective)," see Words & Phrases.]

5. Statutes ⟹227

Act specified by statute should be regarded as "directory" if it is immaterial in that its consequence amounts merely to a matter of form, possible convenience, or to expeditious or orderly conduct of business, and especially so when a failure of performance of such act will result in no prejudice to substantial rights of interested person.

6. Schools and school districts ⟹37(3)

Board of supervisors *held* not without jurisdiction to make order changing boundaries of school district because petition for change was not accompanied by recommendation of county superintendent of schools, since statutory requirement that petition for change of boundaries of school district should be accompanied by recommendation of county superintendent of schools was "directory" only (School Code, §§ 2.102, 2.151, 2.152; Code Civ.Proc. § 1068).

7. Schools and school districts ⟹39

Taxpayer and board of trustees of school district could not maintain certiorari to question jurisdiction of board of supervisors to make order for change of boundaries of school district because petition for change was not accompanied by recommendation of county superintendent of schools, where petitioners failed to disclose that recommendation of superintendent would not have been in accord with ruling of board (School Code, §§ 2.102, 2.151, 2.152; Code Civ.Proc. § 1068).

8. Schools and school districts ⟹39

Certiorari *held* not to lie to question jurisdiction of board of supervisors in making order for change of boundaries of school district because board allegedly refused to grant request for continuance, and failed to "hear" from persons who desired to be heard with reference to petition, since such ruling constituted error only and remedy therefor could not be reached through certiorari (School Code, §§ 2.102, 2.151, 2.152; Code Civ.Proc. § 1068).

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Certiorari proceeding by Ralph G. Crane and others, as members of the Board of Trustees of the San Gabriel School District, County of Los Angeles, State of California, and another, against the Board of Supervisors of the County of Los Angeles and others, as members of such Board of Supervisors. From a judgment after sustaining a demurrer to the petition, petitioners appeal.

Affirmed.

William J. Clark and Harold M. Davidson, both of Alhambra, for appellants.

Everett W. Mattoon, Co. Counsel, and Clarence B. Penn and W. B. McKesson, Deputy Co. Counsels, all of Los Angeles, for respondents.

HOUSER, Presiding Justice.

In substance, it appears that in assumed compliance with statutory provisions affecting the matter, a petition for change in the boundaries of one school district that adjoined a second school district, so that a part of the area that had been included in the latter district would be taken from it and thereafter would be included within the area of the first district, came on for hearing before the respondent board of supervisors, and that thereupon the said petition was granted and an order was entered in accordance therewith. Thereafter, an individual taxpayer, acting in concert with the board of trustees of the school district which, by reason of the said action of the board of supervisors, was about to lose a part of its territory, procured a writ of certiorari to issue from the superior court for the purpose of testing the question of the jurisdiction of the board of supervisors to make the order in question. A general demurrer to said petition was sustained by the said court; and it is from the ensuing judgment that the instant appeal is prosecuted.

[1] The first question that requires consideration is whether an order made by a board of supervisors on a petition for change of boundaries of a school district is subject to review by the superior court through the medium of a writ of certiorari.

As far as is pertinent herein, in substance, section 1068 of the Code of Civil Procedure provides that a writ of certiorari may issue when it appears that an inferior board, "exercising judicial functions," has exceeded its jurisdiction. Under that statutory provision, if, in making its order or in adopting the resolution by which the boundaries of the school district were changed, the board of supervisors was not exercising a "judicial function," manifestly the writ of certiorari was improperly issued; from which it would follow that the demurrer to the petition for the writ of certiorari was properly sustained. In that connection, although the appellate courts of this state have not passed directly upon the precise point, in each of several opinions, in as many cases, language has been used which, in a broad and liberal construction thereof, would indicate that in exercising its functions with reference to a change in the boundaries of a school district, a board of supervisors acts in a legislative and not in a judicial capacity. For example, in the case of Hughes v. Ewing, 93 Cal. 414, 28 P. 1067, among other expressions relative to the question, it was said: "The power to change the boundaries of the (school) district, as well as to define them in the first instance, is of legislative origin, and whether exercised immediately by the legislature or mediately by a board of supervisors,—the local legislature,—is, whenever exercised, a legislative act."

And the identical language was quoted with approval in the case of Antelope Valley, etc., District v. McClellan, 55 Cal.App. 244, 247, 203 P. 147. However, in its facts and in its applicable statute, neither of such cases presents a situation analogous either to the facts or to the controlling statutes which are pertinent to the instant case. In the first of the cited cases, the issue related to the legality of a school tax that had been caused to be levied by order of a board of supervisors on property that had been taken from a certain school district and added to the district as to which the tax had been levied. The authority of the board was derived from the provisions of sections, as then numbered, 1617, 1830 and 1832 of the Political Code, which in their nature were unrelated to those which pertain to the instant matter. If, in deciding the issue therein involved, the declaration of law made by the court to which attention hereinbefore has been directed was at all pertinent thereto, it nevertheless is apparent that it may not be here relied upon as controlling. In the other case, the decisive question was whether the chairman of the board of supervisors should be compelled to sign certain bonds which had been voted "for high school purposes," such bonds to relate to property which included area of certain intermediate school districts "which were annexed by orders of the board of supervisors made long prior to the election at which the bonds were voted." As in the former case, it is not apparent in what respect any question of whether the action of the board of supervisors in ordering the annexation of such intermediate school districts to the high school district was in the exercise of a judicial function, was in any way involved. Consequently, although possibly persuasive, the law there announced should be regarded as dictum as far as the precise point here presented is concerned.

Other than an announcement of legal principle which may or should govern a judicial determination as to whether a given action or decision by an inferior board was taken or had either in a judicial, or in a legislative, capacity, it fairly may be said that none of the other cases which are cited by respondent is particularly helpful in reaching a correct conclusion herein. On the other hand, especially in view of the provisions of the existing statutes, by virtue of which the instant order of annexation was authorized, certain statutes and authorities to which appellant has directed attention would seem to indicate that in making its order in the premises the board of supervisors was acting in a judicial capacity. With reference thereto, the language employed in sections 2.102 and 2.151 of the School Code is as follows:

"§ 2.102. When a petition for a change of boundaries is presented, as provided in this article, the county superintendent of schools shall examine the same and if he finds it sufficient and signed as required by law, he shall set the same for hearing by the board of supervisors at a regular meeting thereof, and shall file said petition with the board of supervisors accompanied by his recommendation thereon, and a notice containing a general statement of the purpose of the petition and of the change of boundaries, and the time and place when and where the petition will be heard."

"§ 2.151. Upon the filing with it of the petition, the recommendation, notice and affidavit as required, the board of supervisors shall have jurisdiction to hear and determine said petition."

It thus may appear that before a board of supervisors may be qualified to make an order respecting a proposed change in the boundaries of a school district, a compliance with certain procedural conditions precedent by the county superintendent of schools, including the giving by him of a certain prescribed notice, together with his "recommendation" with respect to the granting of the petition for such change, is required. Furthermore, that a "hearing" must be had, at which time "all persons interested in the petition" are entitled to be heard. Section 2.152, School Code. Especially in view of the necessary fulfillment of the said statutory conditions precedent to the right or authority of the board of supervisors to make an order of the nature of that here under consideration, to the effect that pursuant to notice thereof, a *hearing* must be had by such board and that "all persons interested are entitled to be heard," the cases of Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780, 782, and Broyles v. Mahon, 72 Cal.App. 484, 237 P. 763, 764, are particularly applicable with reference to the point regarding the character of the act or action of the board of supervisors in making its order.

In the first of such cases it was held that the order that was made by a board of supervisors in pursuance of the taking of each and all of the various steps that were required in the organization of an irrigation district, constituted the exercise of a judicial function, and consequently that its decision might be subject to review in certiorari. In that connection, in ruling upon the point then under consideration, in part the Supreme Court said:

"Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them. In Robinson v. Board, 16 Cal. 208, the court says: 'It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially whatever may be their public character.' There are many decisions to the same effect. [Citing authorities.] Where in a proceeding before such a board, a public notice is required to be given, and a hearing of objections or protests to the contemplated action is provided for, and the order to be made thereon is one which affects the property or rights of the citizen, the proceeding is usually held to be judicial and subject to be reviewed on certiorari. It is sufficient to come within the purview of the writ if such proceedings are of a judicial nature and are exercised by a quasi judicial body. 6 Cyc. 752; 4 Ency. of Pl. & Prac. 74. * * *

"This scheme presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment. * * * By this act the Legislature has committed to the board of supervisors the power to determine and dispose of these rights. * * * It is, therefore, a proceeding subject to be reviewed in certiorari."

In the second case it was contended that an order which had been made by a board of supervisors, by virtue of which "certain named common school districts" were annexed to a high school district, "was a legislative act and not reviewable by certiorari." Respecting that point, in part the court said: "It may be conceded that the creation of the proposed Chico high school district, as it will be after the annexation of the common school districts, is a legislative act; but it appears to be the law that where the Legislature delegates legislative power to a local board and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after notice and hearing to interested parties, the proceeding thus authorized is of a judicial character which may be reviewed by writ of review. Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780; 4 Cal.Jur. 1074, and citations note 19."

Such precedents impel the conclusion that in the instant matter the action by the board of supervisors was judicial in character.

[2] In effect, the respondents herein assert that even though it be ruled that in the first instance the issuance of a writ of certiorari may have been available to some person or persons, neither an individual taxpayer, nor the board of trustees of a school district which was affected by the order that was made by the board of supervisors, was a proper party to the petition for the writ of certiorari. In that regard, the general weight of authority is to the contrary of the contention of respondents. 56 Cor.Jur. 245, 250. To the same effect, see, also, 4 Cal.Jur. 1088; and cases there respectively cited.

Assuming then, that the petitioners for the writ were properly in court, it becomes necessary to consider their several reasons for their ultimate contention, to-wit, that in making the order here in question the board of supervisors acted in excess of its jurisdiction. And in that behalf, it is urged by appellants that even conceding that the board of supervisors acted in a judicial capacity, it had no authority to make the order of which complaint is made, for the reason that said board never acquired jurisdiction in the premises.

As hereinbefore has been set forth, by

the terms of sections 2.102 and 2.151 of the School Code of this state, in order that "the board of supervisors shall have jurisdiction to hear and determine" a petition for change of boundaries of a school district, it is provided, not only that the county superintendent of schools shall examine the petition for the purpose of determining its sufficiency and whether it has been "signed as required by law," but also that he shall "set the same for hearing by the board of supervisors * * * and shall file said petition with the board of supervisors *accompanied by his recommendation thereon*, and a notice," etc. In that connection, it is conceded by respective counsel herein that all such requirements were properly performed, with the sole exception that the county superintendent of schools neglected to make any "recommendation" with regard to the petition; and relying upon that defect as far as a complete compliance with the statutory provisions was concerned, appellants confidently assert that for that reason the board of supervisors never acquired jurisdiction to make the order in question.

[3] Generally speaking, it may be conceded that when, by the terms of a statute, the performance of specified acts is required antecedent to the acquisition of jurisdiction by an inferior tribunal or board, the statutory provisions in that regard are mandatory; but it is equally true that jurisdiction may not be made to depend upon a pre-compliance with acts which manifestly are immaterial to the foundational elements of jurisdiction.

[4] When the issue involves a determination of whether an inferior tribunal or board was vested with jurisdiction that is dependent upon the antecedent performance of designated acts, and the fact appears that one or more of such acts has been omitted to be performed, that fact will not necessarily be determinative of whether a decision or ruling made by such tribunal or board was void and of no effect. In other words, in such a case, although the language of the statute may be clear in its specification of that which may appear to be prerequisite to the acquisition of jurisdiction, the validity of a decision by the tribunal or board may depend upon whether the specified act constitutes a mandatory requirement. If it was directory only, manifestly the omission of performance thereof will be considered as having no effect upon the question of jurisdiction; and in reaching a conclusion of the character of such an act in that regard, the controlling principle of construction appears to be to the effect that unless the act or action properly may be regarded as "of the essence" of the particular object sought to be obtained, or the purpose to be accomplished, the required act or action will be deemed directory only.

[5] As inclusive abstract illustrations of the meaning of such a declaration, the authorities indicate that the specified act should be regarded as directory if it is immaterial in that its consequence amounts merely to a matter of form, possible convenience, or to expeditious or orderly "conduct of business"; and especially so when a failure of performance of such act will result in no injury or prejudice to the substantial rights of interested persons. 59 Cor.Jur. 1074; 25 R.C.L. 767; Sutherland on Statutory Construction. p. 575; In re Johnson's Estate, 98 Cal. 531, 33 P. 460, 21 L.R.A. 380; Derby & Co. v. City of Modesto, 104 Cal. 515, 38 P. 900; Ryan v. Byram, 4 Cal.(2d) 596, 51 P.(2d) 872; Kavanaugh v. Fash (C.C.A.) 74 F.(2d) 435; Winston Co. v. Vaughan (D.C.) 11 F. Supp. 954.

In the case of Gallup v. Smith, 59 Conn. 354, 22 A. 334, 335, 12 L.R.A. 353, it was held that the citation by a probate judge of another judge to act in his place was valid, although the statute provided that the clerk should cite the other judge; and it was said: "It is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory, and when mandatory or imperative, but, of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matter material or immaterial,—to matter of convenience or of substance."

An excerpt from the annotation in 12 L. R.A. 354, includes the declaration that: "Provisions are directory where they relate to some immaterial matter not of the essence of the thing to be done, and where a departure from the statute will cause no injury to any person affected by it." Citing People ex rel. McKune v. Weller, 11 Cal. 49, 70 Am.Dec. 754, and other cases.

In the case of State ex inf. McAllister ex rel. Lincoln v. Bird, 295 Mo. 344, 244 S. W. 938, 939, it appears that the pertinent statute provided for posting of notices and plats of a proposed consolidated school district prior to an election, and that such notices and plats should be signed by the county superintendent of all counties in which any part of the proposed district lay. The court held that the failure of the superintendent to sign the plats did not invalidate the election; that he signed the notices, which act constituted a substantial compliance. The court pointed out that the purpose of the statute was to give notice and information to the voters, and said: "But it is contended that the statute by its terms is applicable to all county superintendents and is mandatory in its nature. Even if the signature of the superintendent to the notices had been omitted, as it was from the plats, the essence of the thing to be done, mainly to give notice to the people of the districts, was completely effected, and no possible injury could have resulted from the omission. However, as we have stated, the notices were signed, and this constituted a substantial compliance with the statute. Under this state of facts, there is little ground for the holding that the proviso should be construed as mandatory."

But in its facts and in the conclusions reached thereon, the case of Clay v. Board of Commissioners (1917) 30 Idaho, 794, 168 P. 667, 669, presents a situation that is not only instructive, but as well, that is directly in point on the instant issue. Therein the statute required that upon the filing of a petition for the creation of a school district, the county superintendent "must transmit the said petition to the said board [of county commissioners] with his approval or disapproval, and, if he approve the same, he may note such change in the boundaries as in his judgment shall be for the best interests of all parties concerned." Instead of complying literally with the statutory requirements, the superintendent appeared personally before the board, and orally approved the petition and recommended some modification of the proposed boundaries. In affirming a judgment upholding the validity of a district so organized, the court, in answering a contention that the approval should have been in writing, said: "This statute does not require the recommendation of the superintendent to be in writing. The board of commissioners is not bound by the recommendations made by the superintendent, but may act in a manner directly contrary thereto. It cannot be held that the recommendation of the superintendent in writing is necessary to give the board jurisdiction to act."

[6, 7] Reasoning from the foregoing, it should follow that in the instant matter, the statutory requirement that when the petition for change of boundaries of the school district was filed with the board of supervisors, it should be accompanied by the "recommendation" of the county superintendent of schools, was not "of the essence of the thing required," or the ruling that was sought upon the petition for change of boundaries of the school district. Manifestly, it was the bounden duty of the board of supervisors to consider all the material facts that properly might be presented to it in connection with the hearing upon the petition, and thereupon to render its decision, which might, or might not, be in accord with any "recommendation" with reference thereto that might have been made by the county superintendent of schools. By no means might the board of supervisors escape or evade its direct and manifest duty to itself render a judgment. In the end, the decision in the matter was its act, its final responsibility. What the county superintendent of schools may have thought about the proper disposition of the petition, or what was or might have been his "recommendation" with reference thereto, was wholly immaterial and of no consequence when it came to the decision to be rendered by the board. In other words, what the judgment of the county superintendent of schools with respect to either the granting, or the denial, of the petition might have been, certainly was neither of binding force, nor in any wise controlling in the premises. On hearing the facts, the board was under no compulsion to agree with his "recommendation." Clearly, if it were, the submission of a petition to a board of supervisors for its judgment with reference to the facts that might be adduced on a hearing would be but an empty form and purely a perfunctory act. Nor in the instant matter does it appear that, if made, the "recommendation" of the county superintendent of schools would not have been in entire accord with the ruling of which complaint is made. Hence, in that regard also, in line with the authorities to which reference hereinbefore has been had, the petitioners for the writ of certiorari in the court below failed to make a sufficient showing for the relief which they sought.

[8] As constituting additional reasons for a ruling by this court to the effect that the board of supervisors was without jurisdiction in the premises, and as a consequence thereof, that the judgment that was rendered by the superior court should be reversed, appellants assert that when the petition for change of boundaries was called for hearing by said board it refused to

grant a request for a continuance that was made by the protestants to the granting of said petition; also, that at such hearing the said board failed to "hear" from certain persons who were present at said hearing, and who desired to be heard with reference to said petition. But in that connection it should be noted that nowhere does it appear that on the occasion in question did any of such persons make known to said board any such desire on his part. However, in response to such suggestions, it should be sufficient to attract attention to the fact that neither of such points touches the question of jurisdiction. To the contrary, each of them is purely procedural; and even assuming that each of such statements is substantially correct in point of fact, it is well established law that such rulings would constitute error only, and that the remedy therefor, if any, may not be reached through the medium of a writ of certiorari.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.

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17 Cal.App.2d 345

OSGOOD v. CITY OF SAN DIEGO et al.

Civ. 1970.

District Court of Appeal, Fourth District, California.

Nov. 4, 1936.

As Modified on Denial of Rehearing Dec. 1, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

1. Appeal and error 🔑930(1)

On appeal by defendant, reviewing court is required to resolve all conflicts in the evidence in favor of plaintiff, and to draw all reasonable inferences from the evidence in favor of affirmance of judgment.

2. Appeal and error 🔑1001(1)

Record on appeal from judgment for plaintiff motorist was required to contain some evidence showing negligence on part of driver of defendant's automobile and absence of contributory negligence of plaintiff before reviewing court could conclude that implied finding of negligence and absence of contributory negligence by jury had evidentiary support.

3. Appeal and error 🔑1001(1)

Though appellate court is slow to reverse judgment based on jury's verdict, court in reviewing evidence cannot permit jury's verdict to change proven facts.

4. Appeal and error 🔑994(2)

Where some facts were not in dispute and some were stipulated during trial, such facts would be accepted as true on appeal and could not be contradicted by testimony of witness whose evidence amounted to little more than expression of opinion.

5. Automobiles 🔑168(6)

Where motorists were driving along same street in opposite directions and first motorist on reaching intersection while second motorist was about 130 feet distant gave signal for left turn and after an instant's hesitation continued on his course while second motorist was over 100 feet away, first motorist's conduct imposed duty on second motorist to keep his automobile under control (St.1931, p. 2120, § 113).

6. Automobiles 🔑245(78)

Fact that motorist at time of accident was driving at considerably less than statutory speed did not render him free from contributory negligence as matter of law, since statutory permissive speed on highway is subordinate to imperative command of statute requiring driver to keep automobile under control (St.1931, p. 2120, § 113(a).

7. Automobiles 🔑244(16)

In action by motorist against city for injuries sustained in collision at intersection with city's automobile driven by police officer, evidence *held* insufficient to support implied finding of negligence of officer (St.1931, p. 2120, § 113; St.1929, p. 541, § 129; St.1925, p. 413, § 130).

8. Automobiles 🔑171(13)

Where motorists were driving along same street in opposite directions and first motorist on reaching intersection hesitated and then started to make left turn while second motorist was between 120 and 300 feet distant, and approaching at not more than 35 miles per hour, first motorist, having right of way, had right to assume that second motorist would obey law and yield him right of way and would not attempt to cross intersection in front of him (St.1931, p. 2120, § 113; St.1929, p. 541, § 129; St.1925, p. 413, § 130).

9. Automobiles 🔑171(13)

Where automobile has actually entered intersection before other automobile approaches it, driver of first automobile has right to assume that he will be given right of way and be permitted to pass through without danger of collision, and that driver of other automobile will obey law, slow down.

and yield right of way if slowing down be necessary to prevent collision.

10. Automobiles ⚷171(4)

Motorist is not required to yield right of way to second motorist considerable distance away whose duty it is to slow down in crossing intersection.

11. Automobiles ⚷245(19, 67)

In action by motorist against city for injuries sustained in collision at intersection with city's automobile driven by police officer, negligence and contributory negligence *held* questions of law for court and not of fact for jury, where evidence was not conflicting and reasonable minds could only reach conclusion.

12. Appeal and error ⚷843(2)

In action by motorist against city and police officer for injuries sustained in automobile collision, reviewing court, having reached conclusion that motorist was guilty of negligence that proximately contributed to his injury and that officer was not guilty of any negligence, would not consider assignments of error of city, since, without negligence of officer, city could not be liable.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Russell W. Osgood against the City of San Diego and Solon C. Armstrong. From an adverse judgment, the City of San Diego appeals.

Reversed.

D. L. Ault, City Atty., J. H. McKinney, and William Roy Ives, all of San Diego, for appellant.

Dempster McKee and Charles Fox, Jr., both of San Diego, for respondent.

MARKS, Justice.

This is an action for damages for personal injuries suffered by plaintiff in an automobile collision.

The City of San Diego is a municipal corporation operating under a freeholders' charter. On February 27, 1935, Solon C. Armstrong was one of its police officers and was driving a city-owned automobile on city business, but not as an authorized emergency vehicle. At the time of the accident the provisions of the Motor Vehicle Act were in effect, and not the Vehicle Code which was subsequently adopted (St. 1935, p. 93). Therefore, our citations of statute law will be from the former.

On February 27, 1935, Russell W. Osgood, a young man of the age of twenty-three years, was a student in the San Diego State College. At about 11:30 o'clock on the morning of that day he was traveling from his classes to his home in a Ford coupé, westerly on El Cajon avenue, a public street of the City of San Diego. At the intersection of that street with Fifty-Sixth street he was seriously injured in a collision between the coupé which he was driving and the Ford sedan driven by Armstrong. He filed suit against the City of San Diego and Armstrong. The case was tried before a jury. At the close of plaintiff's case the trial judge granted a motion for nonsuit made on behalf of Armstrong. The jury returned a verdict against the city in the sum of $6,000.

[1-3] While the city urges several grounds for reversal of the judgment, we need consider but two of them here, namely, that there is no evidence to show any negligence on the part of Armstrong, and that the evidence shows Osgood guilty of contributory negligence as a matter of law. In considering these questions we are mindful of the rules that require us to resolve all conflicts in the evidence in favor of plaintiff, and to draw all reasonable inferences from the evidence in favor of the affirmance of the judgment. While we must bear these rules in mind, we are firmly bound by the rules that the record must contain some evidence showing negligence on the part of Armstrong before we can conclude that the implied finding of the jury of negligence on Armstrong's part has evidentiary support, and that we cannot be influenced by any feeling of sympathy for plaintiff because of his serious and permanent injuries. The same applies as to the question of the contributory negligence of plaintiff. While an appellate court is always slow to reverse a judgment based on a verdict of a jury, still, to partially paraphrase language used in Austin v. Newton, 46 Cal.App. 493, 497, 189 P. 471, 472, the members of such a court in reviewing evidence are bound to use their intelligence. They cannot permit the verdict of a jury to change the proven facts because, "as said in Quigley v. Naughton, 100 App.Div. 476, 91 N.Y.S. 491, to do so would, in effect, destroy the intelligence of the court." No mere sympathy for a badly injured plaintiff can justify any departure from the firmly established rule that upon him rests the burden of proving the negligence of his adversary. Matthews v. Southern Pacific Co. (Cal.App.) 59 P.(2d) 220.

[4] A study of the record discloses that many facts of the case are not in dispute. Some facts were stipulated to dur-

ing the trial. Such facts should be accepted as true, both in the trial court, and here, and cannot be contradicted by the testimony of a witness whose evidence amounts to little more than the expression of an opinion. Upon the few points wherein the evidence conflicts we will confine our statement of the facts to those most favorable to plaintiff, and will disregard the conflicting evidence.

El Cajon avenue runs in an easterly and westerly direction and is a main artery of traffic, sixty feet in width, at least east of Fifty-Sixth street. At the place of the accident it has three traffic lanes on the south side of its center line. On the north side of its center line, east of Fifty-Sixth street, it has three traffic lanes, while on the west side of Fifty-Sixth street it has but two traffic lanes. Fifty-Sixth street is thirty feet wide between curbs. Fifty-Eighth street intersects El Cajon avenue at right angles and is over six hundred feet east from Fifty-Sixth street. It is on the top of a rise and El Cajon avenue rises on a 5⁹⁶⁄₁₀₀ per cent grade from Fifty-Sixth street to Fifty-Eighth street so that plaintiff was descending this grade for more than six hundred feet when approaching the scene of the accident. The day was clear and the pavement dry at the time of the accident. There were no other vehicles near enough to affect the free movement of the two cars.

In his testimony plaintiff thus described the accident: "Reaching to about a point about one block (three hundred feet) east of Fifty-sixth street I saw a Ford sedan approaching the intersection of Fifty-sixth and El Cajon. I slowed down my car as soon as I saw his hand reach out of the window to make a left-hand turn, and he started to do so. Well, he started to make the turn and then he hesitated; so I have decided that he was going to give me the right of way, so I accelerated my car. At this point his car started up and I had no alternative. He had cut off my path of the road. And so I tried to swing right, to my right, into Fifty-sixth street. In doing so I was turning my car to turn into Fifty-sixth street, and when my left rear bumper caught on his right front bumper it threw me over this way."

He further testified that when he first observed the city-owned automobile it was about fifty feet west of the Fifty-Sixth street intersection and that Armstrong was signaling a left turn; that Armstrong continued making the turn; that Armstrong "hesitated or stopped" when the automobile he was driving reached the first white traffic line on the north side of the center line of El Cajon avenue; that when plaintiff was about one hundred twenty feet from the intersection he slowed his car to about fifteen miles per hour for about ten feet and then accelerated to twenty-five or thirty miles an hour; that Armstrong proceeded across the north half of El Cajon avenue at about five miles an hour until six or eight feet south of the north curb line of El Cajon avenue, when he stopped; that the four-wheel brakes of plaintiff's car were in good working condition and were sharply applied when that automobile was between forty-five and fifty feet from the defendant's car. At another place in his testimony plaintiff said when he reached the top of the rise at Fifty-Eighth street, more than six hundred feet east from the Fifty-Sixth street intersection, he then first saw the Armstrong car fifty feet west of the Fifty-Sixth street intersection. The defendant's car was about twelve feet six inches long. The four wheels of plaintiff's car left skid marks between fifty and sixty feet long, before the impact, and after it turned over it skidded on its side between five and fifteen feet. It is not disputed that in making the turn into Fifty-Sixth street the rear of the plaintiff's car skidded to its left so that its left rear bumperette hooked onto the right end of the front bumper of the Armstrong car and this caused the Osgood car to turn over on its side.

[5] On the question of the contributory negligence of plaintiff, his counsel argue that because Armstrong hesitated, or practically stopped, when his car reached the first white line on the north half of El Cajon avenue, that fact was sufficient to convey to plaintiff the information that Armstrong was yielding his right of way to plaintiff, and that plaintiff was justified in proceeding on his course. Plaintiff was unwilling to testify that Armstrong brought his car to a complete stop. It was plaintiff's opinion that it did not stop, but hesitated, and then continued on its course when plaintiff was between one hundred ten and one hundred twenty feet away from it, and when plaintiff had reduced the speed of his car to fifteen miles an hour. The duration of Armstrong's hesitation, or possible stopping, was instantaneous, and was immediately followed by that car proceeding on its way. If the momentary hesitation or stopping of the automobile was sufficient to convey to plaintiff the idea that Armstrong was going to yield the right of way to him, Armstrong's immedi-

ate start, after hesitating, should have been sufficient notice to plaintiff that Armstrong had changed his mind, and should have caused plaintiff to keep his car under control and drive it "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic * * * of the highway" and not to drive it "at such a speed as to endanger the life, limb or property of any person" as required by subdivision (a) of section 113 of the California Vehicle Act (St.1923, p. 553, § 113(a), as amended by St.1931, p. 2120).

[6] Plaintiff suggests that as the permissive speed on El Cajon avenue at and near the place of the accident was forty-five miles an hour, and as he was driving at considerably less than that speed, he should not be held guilty of contributory negligence as a matter of law. A statutory permissive speed on a highway is not a grant of right to enjoy such speed on all occasions. Such permissive speed is always subordinate to the more imperative command of subdivision (a) of section 113 of the California Vehicle Act that a driver must always keep his automobile under control and never drive it "at such a speed as to endanger the life, limb or property of any person."

[7] When we turn to the question of the negligence of Armstrong, we find the record entirely lacking in any evidence to support the implied finding of negligence on his part.

Armstrong was lawfully proceeding easterly on El Cajon avenue at a speed estimated at between twenty and twenty-two miles an hour and close to his right-hand side of the center of the street. Section 113 (as amended), and section 129 (St.1923, p. 558, § 129, as amended by St.1929, p. 541), California Vehicle Act. He gave the proper arm signal to indicate his intention to make a left turn. Section 130, California Vehicle Act (St.1923, p. 558, § 130, as amended by St.1925, p. 413). He entered the intersection first, and when plaintiff was about one hundred thirty feet away, and had the right of way which plaintiff should have respected and should have yielded to him. Section 131, California Vehicle Act (St.1923, p. 560, § 131, as amended by St.1931, p. 2126). Every rule of the road gave Armstrong the right of way and every rule of caution and prudence as well as law required plaintiff to respect this right of way and to keep his car under control so that he could avoid the serious accident which happened.

[8-10] Plaintiff urges in effect that because Armstrong hesitated or stopped in the intersection he should have realized that Osgood would consider this act an invitation to proceed and that it was negligence for Armstrong to continue on his way. Armstrong denied so stopping or hesitating, but as his testimony was disputed we must disregard it. When Armstrong started to make his left turn, plaintiff was between one hundred twenty and three hundred feet distant from him and approaching at a speed of not more than thirty-five miles an hour. Armstrong had the right of way, which plaintiff should have respected (section 131, California Vehicle Act), and, as he was obeying the law, had the right to assume that plaintiff would also obey the law and "would yield him the right of way, and would not attempt to cross said intersection in front of him." Driscoll v. Shipp, 13 Cal.App.(2d) 59, 57 P.(2d) 177, 178. Furthermore, it should be observed that there was about forty feet of unoccupied and clear space on the paved portion of the highway to the rear of the Armstrong car when it finally stopped. Had plaintiff kept his car under proper control he could have passed to the rear of the Armstrong car in safety and without exposing himself or anyone else to the danger of injury. The following quotation from Page v. Mazzei, 213 Cal. 644, 3 P.(2d) 11, 12, is particularly appropriate here: "The case, in all material respects, is so similar to the case of Couchman v. Snelling [111 Cal.App. 192], 295 P. 845, 847, recently decided, that we approve and adopt the language of Mr. Presiding Justice Tyler in the opinion handed down in that cause, viz.: 'Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Keyes v. Hawley, 100 Cal.App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679.' "

[11] Plaintiff urges that the questions of his contributory negligence, and the negligence of Armstrong, are questions of fact addressed to the jury and that the implied findings of that body on those questions should not be disturbed on appeal.

There is no more firmly founded nor closely followed rule than the one just stated when the evidence on either of the two questions is conflicting. In order to bring the rule into play there must be a conflict in the evidence. Where, as here, the evidence is not conflicting on these two questions, and reasonable minds, uninfluenced by a natural sympathy for plaintiff, can only reach the conclusion that the plaintiff was guilty of contributory negligence, and Armstrong was not guilty of any negligence, there is no place for the application of the rule and the questions are of law for the court and not of fact for the jury.

[12] Having reached the conclusion that plaintiff was guilty of negligence that proximately contributed to his injury, and that Armstrong was not guilty of any negligence, it is unnecessary for us to consider the other assignments of error, for without negligence on the part of Armstrong there can be no liability on the part of the City of San Diego.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

WALKER v. ADAMSON.*

Civ. 9976.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1936.

Rehearing Denied Dec. 10, 1936.

Hearing Granted by Supreme Court Jan. 4, 1937.

1. Automobiles 🔑245(24)

Where facts were not in conflict, question as to whether person accompanying motorist was "guest" was one of law.

2. Automobiles 🔑181(2)

Person accepting automobile ride is "guest" where no compensation is given for ride.

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

3. Automobiles 🔑181(2)

Status of "guest" exists where ride is accepted for business or pleasure of the acceptor, or where ride is accepted on joint venture to which acceptor is a party.

4. Automobiles 🔑181(1)

Purpose of guest statute is to rid courts of litigation arising out of automobile accidents in which close relatives and associates sue others and engage in what is in reality a collusive suit for ultimate spoliation of insurer (St.1923, p. 517, § 141¾, as added by St. 1929, p. 1580, and amended by St.1931, p. 1693).

5. Automobiles 🔑181(2)

Person accompanying business associate on joint business trip under arrangement for sharing expenses equally, whether such person accompanied her associate or not, *held* "guest" within statute precluding recovery from associate as motorist for injuries sustained through motorist's alleged negligence, where there was no willful misconduct (St. 1923, p. 517, § 141¾, as added by St.1929, p. 1580, and amended by St.1931, p. 1693).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by May E. Walker against Stella H. Adamson. From a judgment in favor of the plaintiff and an order denying a new trial, the defendant appeals.

Judgment and order reversed.

Decoto & St. Sure, of Oakland, for appellant.

Bianchi & Hyman, of San Francisco, and Augustin Donovan, of Oakland, for respondent.

TYLER, Presiding Justice.

Action to recover damages for personal injuries received in an automobile accident. The complaint contained two causes of action. The first charged willful misconduct; the second, negligence. Each cause of action alleged plaintiff to be a passenger in the automobile at the time of the accident. The answer was a general denial with a special defense of contributory negligence. The first cause of action was withdrawn by plaintiff. The case was not tried on the theory of defendant's willful misconduct and no proof was offered on this issue, it being conceded that there is no evidence of willful misconduct. The case proceeded to trial on the second cause of action which charged negligence, it being alleged that plaintiff was riding as a passenger and not as a guest in defendant's automobile at the time of the accident. Plaintiff recovered judgment in the sum of $25,000 and costs. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

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*For subsequent opinion see 70 P.2d 914.

Appellant relies upon five points for a reversal. She first claims plaintiff was a guest and the judgment lacks evidentiary support for the reason that no willful misconduct was involved. She also claims the record fails to show that any negligence of defendant proximately caused the accident. The further claim is made that the evidence establishes the fact that plaintiff assumed the risks of the ride. Complaint is also made of certain instructions and that the verdict is excessive.

It appears from the evidence that plaintiff and defendant had been friends for years and had become business associates in acquiring real estate. One of their holdings consisted of property at Lake Tahoe, which was improved with two houses and appurtenant guest houses, which they rented, and shared equally the income derived therefrom. The management and supervision of the property required the parties to make occasional trips to Lake Tahoe. Each was the owner of an automobile and they were both experienced drivers and their autmobiles were used alternately on the trips which they had occasion to make. Defendant usually drove from Oakland, whichever automobile was used, as far as Sacramento, and plaintiff would then drive over the mountain roads to Tahoe. Expenses of the trip were borne equally by each party. In May, 1934, the parties were completing a guest cottage on their property and they left to take material to the carpenters who were working there. Defendant's automobile was used on this occasion. So far as the record shows it was in good mechanical condition, but the rear tires had worn smooth. The trip was commenced in the early morning with defendant driving and plaintiff seated alongside of her in the front seat. A drizzling rain prevailed as the trip commenced, and the parties desiring to get to the lake as soon as possible defendant it would seem was driving rapidly, but plaintiff made no protest, she testifying that defendant at all times drove in a careful manner. As they progressed on their journey they concluded, as the road was in better condition, they could safely increase their speed, which they did. Shortly thereafter the machine skidded, crashed into a telephone pole, and overturned in a ditch; plaintiff receiving the injuries of which she complains.

The only evidence in the record as to the rate of speed the parties were traveling at the time of the accident is found in the testimony of defendant which shows it to have been from thirty to thirty-five miles an hour. Plaintiff testified that defendant was driving in a careful and conscientious manner. Under these facts defendant claims she is in no manner liable for plaintiff's injuries.

[1, 2] The question as to whether or not plaintiff occupied the status of a guest is one of law as there is no factual conflict. The parties were on a business trip in which they were mutually interested, and they shared the expenses equally between them. It is apparent, therefore, that the determining factor in the case is plaintiff's status at the time of the accident. It seems clear to us that the evidence establishes without conflict that plaintiff was a guest of defendant, and as it is conceded that there was no willful misconduct on defendant's part, plaintiff has no right of recovery even assuming there was negligence on the part of defendant. Our courts have uniformly held that where compensation is not given for a ride, the person accepting the ride is a guest, and a cause of action sounding in negligence is not maintainable by such person against the operator of the automobile. The evidence shows without dispute that plaintiff paid one-half the expenses of the business trip which was made for the benefit of both. She did not, therefore, confer any benefit upon the defendant. Had the defendant made the trip alone, under the arrangement of the parties, plaintiff would have been required to pay her one-half of the expenses. They were engaged in a joint venture and each was looking after her own interest.

[3] In Crawford v. Herzog, 3 Cal.App. (2d) 705, 40 P.(2d) 954, the facts show that plaintiff was riding in defendant's automobile for the common purpose of inspecting a mine. Because the excursion bore the indicia of a joint venture, plaintiff was held to be a guest and denied recovery for the negligence of defendant. So, also, in Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, a guest is described to be one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car, who accepts such hospitality and who takes a ride either for his own pleasure *or his own business* without conferring any benefit upon the driver of the car. The guest status exists where the ride is accepted for the business or pleasure of the

acceptor [Redwing v. Moncravie, 131 Cal. App. 569, 21 P.(2d) 986], and it also exists where the ride is accepted on a joint venture to which the acceptor is a party. Crawford v. Herzog, supra; Wessling v. Southern Pacific Co., 116 Cal.App. 455, 3 P.(2d) 25. In the recent case of Rogers v. Vreeland (Cal.App.) 60 P.(2d) 585, it was definitely held that sharing of expenses did not constitute compensation for a ride. In this case there is a general review of the cases upon the subject. Olefsky v. Ludwig, 242 App.Div. 637, 272 N.Y.S. 158; Morgan v. Tourangeau, 259 Mich. 598, 244 N.W. 173; Clendenning v. Simerman, 220 Iowa, 739, 263 N.W. 248.

[4, 5] Clearly the instant case comes within the rule declared in these cases that the law places business associates in the guest category. The purpose and object of the guest law (St.1923, p. 517 § 141¾ as added by St.1929, p. 1580, as amended by St.1931, p. 1693), as stated by appellant, is to rid courts of litigation arising out of automobile accidents in which close relatives and associates sue others and engage in what is in reality a collusive suit for the ultimate spoliation of an insurance company. Plaintiff having given no reward or compensation for the ride she accepted, was a guest within the meaning of the statute, and it being conceded there was no wilful misconduct on the part of defendant, no liability attached to defendant for her alleged negligence. This conclusion renders unnecessary a discussion of the other questions raised by appellant.

The judgment and order are reversed.

We concur: CASHIN, J.; KNIGHT, J.

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17 Cal.App.2d 432

MacDONNELL v. SOUTHERN PAC. CO.

Civ. 9722.

District Court of Appeal, First District, Division 2, California.

Nov. 12, 1936.

Rehearing Denied Dec. 12, 1936.

Hearing Denied by Supreme Court Jan. 11, 1937.

1. Master and servant 🔑250¼

In death action based on Federal Employers' Liability Act, plaintiff must recover, if at all, under terms of that act as interpreted by the federal cases (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

2. Master and servant 🔑265(2), 278(1)

In death action based on Federal Employers' Liability Act, plaintiff must show that defendant was guilty of some breach of duty owed to deceased in respect to matter charged as negligence, and it is not sufficient merely to show that death was incurred while employee was engaged in course of his employment (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

3. Master and servant 🔑205(1)

Employer's violation of its rule or fixed custom relieves employee from application of assumption of risk doctrine.

4. Master and servant 🔑205(1)

Rule that employer's violation of rule or fixed custom relieves employee from application of assumption of risk doctrine is not an exception to assumption of risk doctrine, but is rather an expansion of that doctrine to make duty owing to employee inure to employee who has suffered injury through reliance upon rule of conduct established by employer.

5. Master and servant 🔑280

In action under Federal Employers' Liability Act for death of railroad employee, evidence that switching operation causing death of employee was not in accordance with routine practice, but was in violation of rule and customary practice on which employee was entitled to rely, *held* to relieve employee from assumption of risk doctrine (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59).

6. Death 🔑99(4)

$30,000 verdict for death of switchman who had steady employment at wage ranging from $175 to $200 per month, whose life expectancy was 25.27 years, and who left three minor children and a widow with life expectancy of 27.45 years, *held* not excessive.

7. Trial 🔑260(1)

Refusal to give requested instructions *held* not error, where instructions given fully and fairly instructed jury and presented issues with a degree of certainty adequate for all purposes.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frances MacDonnell, administratrix of the estate of Alexander MacDonnell, deceased, against the Southern Pacific Company. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

For prior opinion, see 56 P.(2d) 1258.

Arthur Bergin Dunne and Dunne & Dunne, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff had a verdict for $30,000 for damages for the death of her husband, who was killed while employed as a member of a switching crew in the freight yard of the defendant company. The action was brought under the Federal Employers' Liability Act (45 U.S.C.A. §§ 51–59) and charged negligence in the attempt to couple a group of standing freight cars. The defendant based its defense and rested its appeal on the main grounds that there is a failure of proof of negligence, and that the risk was assumed by the employee.

The facts are without material dispute. The only conflicts relied upon by the parties are more matters of interpretation and construction of the evidence than a conflict upon the facts. The deceased and another employee were walking to their work through the freight yard of the Southern Pacific Company, maintained at Bayshore just south of San Francisco, and attempted to cross a track upon which seven empty cars were standing. As they were in the middle of the track, these cars were struck by a moving train of thirty-three cars for the purpose of making a coupling. The coupling failed, and the standing cars moved so suddenly that the deceased was unable to get clear of the track. His companion was struck by the edge of the first freight car, but immediately got to his feet, climbed to the top of that car, and gave a signal to stop the train. The cars were practically at a stop when the signal was given, the movement from the point of contact with the deceased being variously estimated as between forty-eight and seventy-one feet. There is some dispute between the witnesses as to the speed of the cars at the time of the impact, as to the time when signals were given to stop the main train, and as to the clearance which deceased and his companion gave in endeavoring to pass in front of the freight car; but these do not affect the issues involved. The material facts are that the defendant was engaged in a common and routine railroad operation which was well known to all its employees and the nature of which was in itself a warning of danger to them and of such a character that no other notice or warning could be required from the defendant. The defense of assumption of risk is based upon these facts and also on the rule of the company which specially required the employees to expect trains or cars to be moved at any time on any track, and the warning to such employees to take care to avoid injury to themselves or others which might arise from these conditions. The plaintiff's case rests upon the theory that the coupling was not made in accordance with the rules and customary practice upon which the deceased relied when crossing the track.

[1, 2] The case differs from the ordinary action of negligence, where the question of the sufficiency of the evidence is so frequently left to the responsibility of the jury, because the action is based on the Federal Employers' Liability Act, and the plaintiff must recover, if at all, under the terms of that act as interpreted by the federal cases. Toledo, St. Louis & W. R. R. Co. v. Allen, 276 U.S. 165, 48 S.Ct. 215, 72 L.Ed. 513. For this reason it is not sufficient for plaintiff to show that injury or death was incurred while the employee was engaged in the course of his employment. It is essential to show that the defendant was guilty of some breach of duty owed to the deceased in respect to the matter charged as negligence. Chesapeake & O. R. Co. v. Mihas, 280 U.S. 102, 50 S.Ct. 42, 43, 74 L.Ed. 207; Baltimore & O. S. W. R. Co. v. Carroll, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566. It was said in Means v. Southern California Railway Co., 144 Cal. 473, 478, 77 P. 1001, 1 Ann.Cas. 206, that in order to constitute actionable negligence it must appear that the injury complained of resulted from a failure on the part of the defendant to discharge a duty or obligation which the defendant was under to protect the plaintiff from injury. The leading case on this subject is the Mihas Case, supra, where the facts are closely similar. Mihas was injured while crossing in front of standing cars which were suddenly struck in a switching movement. As to this point the Supreme Court said: "If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant." Here there is no evidence of any rule or custom to give warn-

ings to men working around the yard when cars are being moved or couplings are being attempted. There is no evidence of a duty to set brakes on standing cars when couplings are being made, and no evidence of any duty on the part of the engineer to give warning by whistle or bell from the locomotive, and no evidence that any sign or notice should be attached to the standing cars before a coupling is attempted. To the contrary, the evidence is that when a coupling will not be attempted a warning that standing cars are not to be moved is given by placing a blue flag on the end of the car. There is no evidence of any duty to place a man at the end of the standing cars to give warning of the attempted coupling to employees or others. The only evidence of a duty in this respect related to the maintenance of a man at the point of attempting coupling, and whether this man was in position at the time or not is immaterial because he could not have been seen or heard by the deceased if any warning had been attempted.

[3, 4] Plaintiff must recover then, if at all, upon the single theory that the switching operation causing the injury was not in accord with common and routine practice, but in violation of the rule and customary practice upon which the deceased was entitled to rely. This theory rests in turn upon the relative principle that the employer's violation of a rule or fixed custom relieves the employee from the application of the assumption of risk doctrine. Though this theory has often been referred to as an exception to the doctrine of assumption of risk, it is in truth merely an expansion of that doctrine to make the "duty owing to the employee" referred to in the foregoing cases inure to an employee who has suffered injury through reliance upon a rule of conduct established by the employer.

[5] Evidence supporting the theory is that, in harmony with the company rule that "switching must be carefully done to avoid shocks from abrupt starting and stopping of cars or from impact in making couplings," it was the established custom and practice in the railroad yard to stop or cut off the motive power by timely signal before contact between the moving cars and the standing cars. Evidence was also given showing that when the couplings were made in accordance with this rule and practice the movement of the standing cars would not be more than a couple of feet under ordinary conditions. Testimony was given by those experienced in these coupling operations that, under the particular conditions existing at the time of the injury, and giving consideration to the slack in the seven standing cars, there should have been no appreciable movement of the seventh car (the one which struck deceased) if the coupling had been made in accordance with the rule and practice.

There can be no question that this record discloses evidence which, if believed, would justify the jury in finding the existence of the practice in making such couplings, the failure of the engine crew to observe that practice in this instance, and the reliance of the employees in the yard upon the observance of the practice as regulating their conduct in crossing the tracks. We must assume in support of the verdict that the jury found all these matters in favor of the plaintiff and thus created a case which comes within the exception to or modification of the rule of the Mihas and similar cases. Upon this theory the judgment finds support in N. Y. Central R. Co. v. Marcone, 281 U.S. 345, 50 S.Ct. 294, 74 L.Ed. 892; Chesapeake & Ohio R. Co. v. Proffitt, 241 U.S. 462, 36 S.Ct. 620, 60 L.Ed. 1102; Erie R. Co. v. Downs (C.C.A.) 250 F. 415, and Chicago, B. & Q. R. Co. v. Kelley (C.C.A.) 74 F.(2d) 80.

[6] Appellant complains that the damages allowed are excessive. The deceased left a widow and three minor children; he had steady employment at wages ranging from $175 to $200 a month; he had a life expectancy of 25.27 years; and his widow had an expectancy of 27.45 years. The jury's estimate of damage was not so high that prejudice or passion is suggested, and hence the verdict is not subject to attack upon this ground.

[7] The appellant complains of a number of instructions given and of a number of proposed instructions refused, all relating to the conduct of the deceased and to appellant's duty toward him as an employee. It is not claimed that these issues were not correctly covered by the instructions given; the complaint is that the instructions proposed by appellant and refused stated the issues more clearly and concretely than those which were given, and that the latter were in some instances vague and uncertain. We have examined these and are satisfied that the jury was fully and fairly instructed and that these particular issues were presented with a de-

gree of certainty adequate for all purposes of the case.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

7 Cal.2d 671

THOMSON v. THOMSON.

SAME v. THOMSON et al.

S. F. 15593.

Supreme Court of California.

Nov. 18, 1936.

1. **Quieting title 🔑12(1)**

Landowner may bring action to quiet title under statute regardless of whether he is in or out of possession of land (Code Civ. Proc. § 738).

2. **Jury 🔑14(9)**

Action to quiet title where possession of property is not involved is an equitable action, as respects right to jury trial (Code Civ. Proc. § 738).

3. **Jury 🔑14(9)**

Where right of possession is involved in action to quiet title to property in possession of plaintiff, but no claim is made that he has ousted defendant of possession, action is equitable and triable by court without jury (Code Civ.Proc. § 738).

4. **Jury 🔑14(9)**

Where defendant by answer or cross-complaint in action to quiet title to property in plaintiff's possession avers that he was recently ousted of possession of such property, action is one at law, and parties are entitled to jury trial (Code Civ.Proc. § 738).

5. **Jury 🔑14(9)**

Proceeding to recover possession of property by action to quiet title is a law action as respects right to jury trial (Code Civ.Proc. § 738).

6. **Jury 🔑13(15)**

Where defendant by answer or cross-complaint in action to quiet title to property in plaintiff's possession seeks to eject plaintiff and recover possession, both equitable and legal issues are involved, and plaintiff is entitled to have equitable issues tried by court without jury, and defendant is entitled to have legal issues submitted to jury (Code Civ. Proc. § 738).

7. **Jury 🔑13(15)**

Plaintiff, in action to quiet title to property of which he had been in possession for 2½ years, *held* entitled to trial by court without a jury, notwithstanding that defendant's cross-complaint alleging that he was ejected from property raised purely legal issues, since defendant had had ample opportunity to test right to possession in ejectment action (Code Civ.Proc. § 738).

8. **Jury 🔑13(15)**

Where court determined equitable issues presented by plaintiff's complaint in action to quiet title in plaintiff's favor, denial of defendant's demand for jury trial of issues raised by his cross-complaint alleging ejectment *held* not error, since there was nothing further to consider after determining that plaintiff was owner of property (Code Civ. Proc. § 738).

9. **Quieting title 🔑39**

Defendant in action to quiet title could not properly maintain cross-complaint for money had and received, where such demand was in no way related to main action (Code Civ.Proc. §§ 442, 738).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche and Daniel C. Deasy, Judges.

Action by Milo Thomson against Samuel Clark Thomson, wherein defendant filed a cross-complaint against plaintiff and Retta Tuttle Thomson. Judgment for plaintiff and the other cross-defendant, and defendant appeals.

Affirmed.

Meurice Swim, of San Francisco, for appellant.

Barrett & Barrett, of San Francisco, for respondent.

CURTIS, Justice.

Action to quiet title to real property situated in the city and county of San Francisco. The complaint is in the usual form of actions of that type. The defendant answered and alleged that he was the owner of an undivided one-fourth of the real property of which the plaintiff claimed to be the sole owner. In addition to his answer, he filed a cross-complaint making the plaintiff a cross-defendant, and bringing in and making a party to said action Retta Tuttle Thomson, the mother of the plaintiff and defendant, the two parties named in the original complaint being brothers. In his cross-complaint, the defendant claimed that under a verbal agreement with his mother on or about the 25th day of July, 1925, in consideration of certain monthly payments to be made by him to his mother, he "would then and there and from said aforementioned date, have a one-fourth (¼) interest," subject to a life estate to his mother, in the real property described in the complaint. He further alleged that, after the making of said agreement, he and his mother resided on said land as their home until the mother conveyed the whole of said real property to the plaintiff, who thereafter ejected defendant from said real property. In a separate count, the defendant alleged that the plaintiff and his mother were indebted to defendant in the sum of $1,680 for money had and received by them to and for the use of the defendant. An answer to this cross-complaint was filed by the plaintiff and his mother in which they denied the material allegations of the cross-complaint. They also raised by answer, as they had previously done by demurrer, the question as to whether the second count of the cross-complaint was barred by the provisions of section 442 of the Code of Civil Procedure. By this we understand that they intended to raise, and did raise, the question as to whether a cross-complaint for money had and received would lie in an action to quiet title.

Prior to the action being called for trial, and within the time provided by law and the rules of said court, the defendant demanded a trial by jury, which the court denied. The case was subsequently tried by the court without a jury, and resulted in a judgment in favor of the plaintiff and his mother, from which the defendant has appealed.

Practically the sole point made by the defendant is that the court erred in denying him a jury trial in this action.

As we have before stated, the action of the plaintiff is an action to quiet title to real property. The plaintiff was, at the time of the commencement of the action, and for a long time prior thereto had been, in possession of said real property. In the answer and cross-complaint defendant avers that he was at a time some two and one-half years prior to the commencement of the action in possession of said real property and that plaintiff ousted him of such possession.

The action to quiet title to real property, and by subsequent amendment to personal property, is provided for by section 738 of the Code of Civil Procedure. This is a statutory action, and in the early case of Curtis v. Sutter, 15 Cal. 259, Mr. Justice Field discusses the character of such an action and the nature of the issues therein, that is, whether they are equitable and triable by the court, or legal and therefore cognizable in a court of law. We quote from this discussion as follows: "This statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. Such bills were of two classes. Those of one class lay where the right which the plaintiff asserted, was controverted by numerous persons, holding distinct and separate interests depending upon a common source. A right of fishery asserted by one party, and controverted by numerous riparian proprietors on the river, and a right to tithes claimed by a parson and controverted by his parishioners, are instances cited by Story where a bill of this nature would lie. Bills of the other class lay where the plaintiff was in possession of real property, and his possession had been disturbed by legal proceedings, in which his title had been successfully maintained. To the prosecution of bills of this latter class, the concurrence of three particulars was essential—the possession in the plaintiff, the disturbance of that possession by legal proceedings on the part of the defendant, and the establishment of the right of the plaintiff by judgment in his favor in such proceedings. (Sheply v. Rangely [Fed.Cas.12,756], Davies' R. of the U. S. Circuit Court for Main, 249.) The necessity of bills of this class naturally arose from the nature of the action of ejectment, which being founded on a fictitious demise between fictitious parties, a recovery therein constituted no bar to another action. Thus the successful party might, by repeated actions, be subjected to vexatious and harassing litigation, and to procure repose, Courts of Equity interposed and finally terminated the controversy. It was in this way, only, that adequate relief could be administered. (Devonsheer v. Newenham, 2 Sch. & Lef. 208; Welby v. The Duke of Rutland, 6 Bro.Parl.Cas. 575.) Under the statute of this State it is unnecessary for the plaintiff to delay seeking the equitable interposition of the Court, until he has been disturbed in his possession, by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity, that the determination of questions purely of a legal character in relation to the title, will necessarily be withdrawn from the ordinary cognizance of a Court of Law. The Court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the Court will then act, by either dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and of no effect, and awarding a perpetual injunction against its assertion to the property in question. There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties, and at the same time to secure the beneficial result afforded by a Court of Equity in bills of peace—which is, repose from further litigation. Indeed, the remedy under the statute is eminently simple, direct and efficacious for this purpose (Merced Mining Co. v. Fremont, 7 Cal. [317], 319 [68 Am.Dec. 262].)"

[1] The statute which was the subject of this comment by Mr. Justice Field was section 254 of the Practice Act,[1] which is the same as the original section 738 of the Code of Civil Procedure, except that the section of the Practice Act limited the action to quiet title to one in possession of real property. Section 738 of the Code of Civil Procedure makes no such limitations, and under its provisions an action to quiet title may be brought by the owner of land even if he is out of possession. Cobe v. Crane, 173 Cal. 116, 119, 159 P. 587.

In Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 22 Am.St.Rep. 283, the action was instituted under section 738 of the Code of Civil Procedure to quiet title to a certain quartz-mining claim and land called by the plaintiff the "Uncle Sam" claim. The complaint was in the usual form and contained an averment that the plaintiff was in possession of the premises in contest. In the answer all the averments of the complaint were denied except that of possession. It was further averred in the answer that defendant was entitled to the possession of the south half of said claim, and was lawfully possessed thereof for several years next preceding April 6, 1889, when the plaintiff wrongfully entered thereon and ousted defendant therefrom and that plaintiff wrongfully withholds the same from defendant. In the prayer of the answer, the defendant asked to be restored to possession. In proper time, the defendant demanded a jury "on the issue raised by his said averments of prior possession and ouster," which the court refused. This court, after discussing Judge Field's language quoted above and some later cases, comments upon the action to quiet title, as provided in section 738 of the Code of Civil Procedure as follows (88 Cal. 121, at page 127, 25 P. 1096, 1098, 22 Am.St.Rep. 283): "It is really a statutory action. The Code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights clearly cognizable in courts of law it is to that extent an action at law." The court further held that under the facts presented in that case the defendant was entitled to have his case tried by a jury and reversed the judgment of the trial court. In so holding the court expressed its conclusion as follows (88 Cal. 121, at page 128, 25 P. 1096, 1098, 22 Am. St.Rep. 283): "In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession, of the disputed premises a short time before the commencement of the action, and was ousted by the plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the Code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but, while the legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him, the privilege of thus depriving defendant of his constitutional right."

In Angus v. Craven, 132 Cal. 691, 696, 64 P. 1091, 1093, this court held as follows: "It is argued from various standpoints, one of which is that the action must be treated solely as an action to quiet title under section 738 of the Code of Civil Procedure. Taking this view of the case, it may be said that a complaint under section 738, having no averments inconsistent with the scope of that section as heretofore construed, presents on its face a case for equitable remedy. It seeks to have something done which a court of law cannot do. It invokes a decree in equity, not a mere judgment at law, which in its nature is only for the recovery of the possession of specific real or personal property, or for damages. The purpose of the section is evidently to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. See Curtis v. Sutter, 15 Cal. 259. Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated where at the commencement of the action the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not by such inversion of parties avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this court has gone in Donahue v. Meister, 88 Cal. 121, 25 P. 1096 [22 Am.St.Rep. 283]; Newman v. Duane, 89 Cal. 597, 27 P. 66; Gillespie v. Gouly, 120 Cal. 515, 52 P. 816; Moore v. Copp, 119 Cal. 429, 434, 51 P. 630; and kindred cases. As was substantially said in Donahue v. Meister, supra, the decision of the question whether, in an action brought under section 738, either party is entitled to a jury, must depend greatly upon the facts in that particular case. It has never been held by this court that an action to quiet title under the Code cannot be maintained as an equitable action where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he has title, and praying that he, for the first time, be let into possession. A complaint showing that plaintiff is the owner of the land and in actual possession of it, and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and not showing prior possession in defendant, seems to present the very action contemplated by the Code provision; and, under these conditions, its continued equitable character is not affected by the particular kind of right which the defendant sets up. Therefore, if we are to consider the case at bar solely in the light of an action to quiet title under section 738, we do not think that, under the conditions above stated, the court below erred in denying appellant's demand for a jury."

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[1] St.1851, p. 92.

In McNeil v. Morgan, 157 Cal. 373, 378, 108 P. 69, 71, the plaintiff brought an action to quiet his title to real property against the administrator of the estate of James McNeil, deceased. Margaret McNeil, the surviving wife, and James McNeil, the son of the deceased, intervened in the action, claiming to be the owners of the land in question and prayed that they recover possession of the land. The original parties to the action had waived a jury, but, after interveners came into the case, they demanded a jury trial. Thereafter, Margaret McNeil dismissed her complaint in intervention. The court denied the demand for a jury, and the case went to trial before the court alone. This court held that the fact that the original parties to the action had, before the interveners came into the case, waived a jury trial, did not affect the right of the intervener to have his case tried before a jury, provided he was entitled to a jury trial. In passing upon this question the court held as follows: "Intervening in a case in which the possession of the property had been alleged by the original plaintiff who also asserted exclusive ownership, James McNeil is in exactly the position of an original defendant out of possession who asserts title and the right of possession as against the person in actual possession. As such a defendant he would not have a right to a trial of the matters of fact by jury unless he had been recently dispossessed by the nominal plaintiff. In such a case he would be treated as really a plaintiff in possession entitled to demand a trial by jury of the issues of fact involved."

In that case the court cites with approval the case of Johnson v. Peterson, 90 Minn. 503, 97 N.W. 384, and quotes from it as follows: "The character of this action has been heretofore stated. It was brought to determine an adverse claim to real property; the plaintiff being in possession, and the answer setting up a counterclaim in ejectment. Except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court and not by a jury.—Roussain v. Patten, 46 Minn. 308, 48 N.W. 1122. See, also, Larkin v. Wilson, 28 Kan. 513; Angus v. Craven, 132 Cal. 691, 64 P. 1091, in which the same rule is announced. Under the complaint, the case was for trial by the court without a jury, and the fact that the answer contained a counterclaim in the nature of ejectment did not change the procedure."

In the case of Cobe v. Crane, 173 Cal. 116, 119, 120, 159 P. 587, we find the following statements which in our opinion bear upon the question now before us: 173 Cal. 116 at page 119, 159 P. 587, 589: "Plaintiff's complaint was in the ordinary and usual form to quiet title, to which was added the allegations of the excessive and unwarranted litigation brought and prosecuted by Arthur Crane for purposes of harassment. We are told by appellants that 'it is fatally deficient in that it does not state any possession or right of possession.' The owner of land does not have to be in possession to enable him to maintain his action to quiet title"—citing authorities. 173 Cal. 116, at page 120, 159 P. 587, 589: "Appellants further complain that they were denied a trial by jury. Plaintiff's complaint was not that of a plaintiff out of possession seeking to recover possession. His action was one simply to quiet title. The evidence showed that plaintiff was in possession. The judgment makes no mention of possession. Of course defendants were not entitled to a jury trial under the circumstances. Angus v. Craven, 132 Cal. 691, 64 P. 1091."

[2-6] These authorities establish the following principles of law respecting the nature and character of an action to quiet title:

(1) In a simple action to quiet title when the possession of the property is not involved, it is an equitable action.

(2) When the right of possession is involved, the nature of the action, that is whether it is cognizable in an action at law, or in a court of equity, depends upon the following facts and circumstances.

(a) If plaintiff is in possession and no claim is made that he has ousted the defendant of possession, the action is equitable and triable by the court without a jury.

(b) If plaintiff is in possession and defendant by answer or complaint avers that he was recently ousted of possession of the property involved, the action is in reality one at law, and the parties thereto are entitled to a jury trial.

(c) If the plaintiff is out of possession and seeks by an action to quiet title to recover possession, the action is triable in a court of law.

(d) If plaintiff is in possession, and the defendant by answer or cross-complaint seeks to eject the plaintiff and recover possession, the action involves both equitable and legal issues. The issues arising out of plaintiff's cause of action are equitable, and those resulting from defendant's answer and cross-complaint are legal. In such an action the plaintiff is entitled to have the equitable issues tried by the court without a jury, and the defendant is entitled to have the legal issues submitted to a jury.

[7] In the present action, the plaintiff was in possession of the real property at the commencement of the action. The defendant claimed to be entitled to possession and averred in his cross-complaint that plaintiff ousted him from possession some two and a half years before the commencement of said action. Defendant seeks to bring this case within the rule announced in Donahue v. Meister, supra, where the plaintiff ousted the defendant of possession, and then almost immediately brought his action to quiet title against defendant. Defendant in that action by answer alleged his possession and plaintiff's ouster of defendant from possession. As we have seen, the court in that action held that plaintiff could not oust the defendant of possession and turn around and bring an action to quiet title, and in that manner deprive the defendant of the right to a jury trial to determine the right of possession. The court held the action in its entirety was an action at law. In the present case, the defendant, it is true, avers that he was entitled to possession, and that while he was in possession he was ousted by plaintiff. But he admits in his answer that plaintiff had been in possession of the property involved for some two and a half years prior to the commencement of the action. He had ample opportunity during that period of time to test his right to possession in an action in ejectment which he failed to do. After this long delay, he cannot, by merely alleging that he was ejected from said real property by plaintiff, convert the action to quiet title instituted by the plaintiff into an action for possession and thus oust the court of its equitable jurisdiction to try the issues arising under plaintiff's complaint to quiet title. These issues the

plaintiff was entitled to have tried by the court without a jury. On the other hand, the defendant's cross-complaint stated a cause of action in the nature of an action in ejectment and presented purely legal issues cognizable in a court of law. We therefore have for trial in the same action both equitable and legal issues. The procedure to be followed when such a condition exists has been indicated by Mr. Justice Henshaw in a concurring opinion in the case of Angus v. Craven, supra, 132 Cal. 691, at page 699, 64 P. 1091, 1095, in the following apt language: "Under our system, equitable and legal rights are determined in the same forum. It is within the discretion of the court to control the order of proof upon the issues joined. In the natural order, before defendant was entitled to a hearing upon the legal issues tendered she must defeat plaintiffs upon the equitable issues presented by them. This was the view of the trial court, and, in pursuance of it, it took to itself, as was proper, the determination of these equitable matters. The result was that it found defendant's deeds to have been forgeries. Had it reached the opposite conclusion, then defendant might with right have insisted that the remaining issues of law be tried before a jury. But that time never arrived, and I do not concede the right of a litigant to oust a court of equitable jurisdiction, in an action of purely equitable cognizance, merely by tendering additional issues which are triable at law before a jury. It is sufficient if a jury be had when those issues come to trial."

[8] This procedure, as indicated above, was followed substantially by the trial court in the present action. It first passed upon the equitable issues presented by plaintiff's complaint to quiet title and defendant's answer thereto. Having determined these issues in favor of the plaintiff, that is, having found that the plaintiff was the owner of said real property and that defendant had no interest therein, there was nothing further for the court to consider. It necessarily followed, if plaintiff was the owner of said real property at the time the defendant claims he was illegally ejected therefrom and entitled to the possession thereof, that defendant's action by cross-complaint must fail. Had the court found against plaintiff in the action to quiet title, then it would have been its duty to try the issue of ejectment under defendant's cross-complaint. But as Mr. Justice Henshaw said: "That time never arrived," and it was only that issue which the defendant was entitled to have tried by the jury. Under these circumstances, the trial court did not err in denying defendant's demand for a jury trial.

[9] A further claim is made by defendant that his demand for a jury should have been granted, based upon the second count of his cross-complaint for money had and received. This was a purely legal right, and entitled the defendant to a jury trial if the subject matter of said count was a proper matter to be litigated by means of a cross-complaint. This count simply set forth a cause of action for money had and received. It in no way related to or depended upon any transaction upon which the action to quiet title was brought, nor did it affect any property to which the action related. It failed to meet the requirements of section 442 of the Code of Civil Procedure. A mere money demand unrelated to plaintiff's cause of action is not a proper subject for a cross-complaint in a quiet title suit. Meyer v. Quiggle, 140 Cal. 495, 74 P. 40.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

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7 Cal.2d 685

EMERSON v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

L. A. 15905.

Supreme Court of California.

Nov. 19, 1936.

1. Justices of the peace ⚷166(2)

Statute requiring dismissal of appeal from Justice's Court, not brought to trial within a year, is mandatory, in absence of written stipulation extending time (Code Civ. Proc. § 981a).

2. Justices of the peace ⚷166(2)

"Stipulation" contemplated by statute requiring dismissal of appeal from Justice's Court, not brought to trial within a year, in absence of written stipulation extending time, is a written stipulation expressly waiving right to move for dismissal or expressly extending time of trial to date beyond such year (Code Civ.Proc. § 981a).

[Ed. Note.—For other definitions of "Stipulate; Stipulation," see Words & Phrases.]

3. Justices of the peace ⚿166(2)

Written stipulation that appeal from Justice's Court should go off-calendar to be reset at court's convenience *held* not "stipulation" within statute requiring dismissal of appeal from Justice's Court not brought to trial within year, in absence of written stipulation extending time (Code Civ.Proc. § 981a).

4. Justices of the peace ⚿166(2)

Nonappealing party's joinder in written stipulation that appeal from Justice's Court should go off-calendar to be reset at court's convenience did not estop nonappealing party from asserting right to have case tried within statutory period (Code Civ.Proc. § 981a).

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In Bank.

Mandamus proceeding by E. E. Emerson against the Superior Court of the State of California, in and and for the County of Kern, and the Honorable Erwin W. Owen, presiding judge thereof.

Alternative writ discharged, and petition denied.

Matthew S. Platz, of Bakersfield, for petitioner.

Coker F. Rathbone, of Taft, for respondents.

EDMONDS, Justice pro tem.

Petitioner by this proceeding seeks to compel the Superior Court to vacate an order of dismissal and to proceed with the trial of an action on appeal from the Justice's Court.

On December 27, 1934, petitioner appealed to the Superior Court from a judgment entered against him in the Justice's Court. Within one year thereafter, the parties entered into a written stipulation "that the trial of the above entitled action now set in the above court for November 1, 1935, shall go off-calendar on said date and be re-set upon the said court's calendar at its earliest convenience." On November 1st when the case was called for trial the court made an order that "said cause be placed at the foot of the calendar to be re-set for trial." In February, 1936, more than one year after the appeal was filed, the case was set for trial in March, but before that time respondent moved the court for a dismissal of the action. This motion was granted.

[1] Section 981a of the Code of Civil Procedure provides that an action on appeal from the Justice's Court "must be dismissed" where the appealing party fails to bring the appeal to trial within one year from the date of filing thereof in the Superior Court "unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court." This provision is mandatory. It does not admit of construction, and a trial court may not exercise any discretion where the time fixed by the section has elapsed. In the absence of a written stipulation, any action not brought to trial within the statutory period must be dismissed. Kilker v. Superior Court, 128 Cal.App. 80, 16 P.(2d) 811.

[2, 3] Petitioner contends that the written stipulation by which it was agreed that the case "shall go off-calendar * * * and be re-set upon the said court's calendar at its earliest convenience" extended the period within which it might be tried. To this we cannot agree. A review of the authorities construing section 981a of the Code of Civil Procedure and similar statutes shows that nothing short of a written stipulation extending in express terms the time of trial to a date beyond the statutory period, or expressly waiving the right to move for a dismissal will toll the running of the statutory time. Pac. Gas Radiator Co. v. Superior Court, 70 Cal.App. 200, 232 P. 995; Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006; Prudential Ins. Co. v. Superior Court, 117 Cal. App. 528, 4 P.(2d) 294; 6 Cal.Jur.Supp. pp. 679 et seq., § 136. A stipulation for a continuance for an indefinite period, or an agreement that the cause "go off-calendar" to be reset at the court's convenience does not meet the requirements.

Petitioner cites Mercantile Inv. Co. v. Superior Court, 218 Cal. 770, 25 P.(2d) 12. But in that case the court held that the stipulation for a continuance was not determinative of the proceeding. An amended pleading had been filed which started the running of the time anew, and the case had been partially tried.

[4] The further contention of petitioner that respondent's joinder in the stipulation constituted a waiver of the advantage of having his case tried within one year and created an equitable estoppel cannot

be sustained. A waiver by equitable estoppel may not be relied upon in cases of this character as a substitute for the required written stipulation. Miller & Lux v. Superior Court, supra; Abbott v. Superior Court, 79 Cal.App. 746, 251 P. 221; Middlebrook v. Superior Court, 75 Cal. App. 35, 241 P. 914; 6 Cal.Jur.Supp. § 137, pp. 682, 683.

As the written stipulation here considered does not meet the requirements for one extending time under section 981a, supra, the order of dismissal was proper.

The alternative writ is discharged, and the petition is denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.

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7 Cal.2d 688

SHEA et al. v. CITY OF SAN BERNARDINO.

L. A. 15766.

Supreme Court of California.

Nov. 19, 1936.

1. Municipal corporations 🔑757(1)

City, in adopting plan for street grading, was not authorized to leave portion of street over railroad right of way without determination of grade therefor, or to relinquish to railroad right of establishing grade at right of way (St.1923, p. 106, § 3; St.1911, p. 763, § 77).

2. Municipal corporations 🔑757(1)

City owed duty to call upon Railroad Commission to order lowering of rail at street crossing to remove obviously dangerous condition in street, if jurisdiction to order track lowered was solely in Railroad Commission.

3. Municipal corporations 🔑798

City which claimed to have no control over railroad right of way at street crossing was not relieved from duty of warning travelers along street of dangerous condition existing because of undue elevation of rail.

4. Automobiles 🔑306(1)

Evidence *held* to sustain judgment against city for injury to occupant of automobile resulting from dangerous condition of street at railroad crossing, as against contention that city did not have control of street at crossing.

5. Negligence 🔑108(1)
Torts 🔑22

In California, joint tort-feasors are jointly and severally liable for injuries, and complaint which alleges only joint negligence sufficiently charges liability of each individually.

6. Release 🔑29(1)

Dismissal of action against one of joint tort-feasors *held* not to release other joint tort-feasor in absence of receipt of any satisfaction by plaintiffs.

7. Municipal corporations 🔑723½, 741(1)

Provisions of statute requiring filing of verified claim for injuries with legislative body of city are mandatory and applicable to accidents antedating effective date of act, since provisions were remedial and procedural in character (St.1931, p. 2475).

8. Municipal corporations 🔑741(1)

Where accident occurred more than 90 days prior to effective date of statute requiring filing of claim against municipality within 90 days of accident, filing of proper verified claim within 90 days after effective date *held* sufficient compliance with statute (St.1931, p. 2475).

9. Time 🔑8

As respects question whether filing of claim under statute was timely, filing of claim on November 12, 1931, *held* within 90 days after effective date of statute which went into effect August 14, 1931 (Code Civ. Proc. § 12; Pol.Code, § 12; St.1931, p. 2475).

10. Time 🔑10(1)

Where last day for filing claim against city falls on November 11, claim may be properly filed on following day, since November 11, being a legal holiday, must be excluded (Code Civ.Proc. § 12; Pol.Code, § 12; St.1931, p. 2475).

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by John J. Shea and another against the City of San Bernardino. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 52 P.(2d) 595.

William Guthrie, City Atty., W. D. Evans, Deputy City Atty., H. R. Griffin, City Atty. and Lowell E. Lathrop, Deputy City Atty., all of San Bernardino, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, and Leon Thomas David, Asst. City Attys., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ.

Swing & Swing, and Ralph W. Eckhardt, all of San Bernardino, for respondents.

WASTE, Chief Justice.

The city of San Bernardino appeals from a judgment for plaintiffs in an action to recover damages for personal injuries received by plaintiff Georgia O. Shea while she was a passenger in an automobile driven by her husband, plaintiff John J. Shea, on the streets of the city. The cause is here by transfer, after decision and judgment in the Fourth District Court of Appeal, per Jennings, J.

The accident occurred at a point on E street, San Bernardino, where said street intersects the right of way of the Atchison, Topeka & Santa Fé Railway Company. The crossing was very rough. There was a break in the grade of the street at that point, and the north rail of the railroad track was three inches higher than the south rail. As the automobile proceeded at about 20 miles per hour across the intersection, the rear part of the vehicle was suddenly thrown upward, causing Georgia O. Shea to be precipitated to the floor of the car, thereby sustaining a fracture of the dorsal vertebra. This action was originally brought against both the city and the railway company, but was dismissed as to the railway company on motion of plaintiffs prior to submission of any evidence.

In affirming the judgment for plaintiffs, the District Court of Appeal passed upon numerous points raised on the appeal. Appellant apparently had no criticism to offer of the major portions of the opinion. The petition for hearing in this court states but two contentions: (1) Failure of the District Court of Appeal to properly dispose of the claim that the evidence was insufficient to sustain the judgment, because the city did not have control of that portion of the street upon which the accident occurred; and (2) that release of one joint tort-feasor (the railway company) operates as a release of the other (the city). The complaint alleged not only joint negligence of the railway company and the city, but also a complete and separate individual liability of each of these parties. After dismissal of the railway company, the question of liability of the city was at issue. Evidence was adduced showing the grade of E street, a public street, and that the crossing had been established by city ordinance; that the street and crossing had been paved and improved under supervision and control of the city, and that the city had accepted this improvement work, negligently disregarding the fact that the crossing was left in a rough condition, with a break in the grade, and with a "hump" between the rails and for two feet on each side thereof. There was evidence that the city had both actual and constructive notice of the defective condition of the crossing, and that it was negligent in failing to see that the entire paving and improvement plan of the street was carried out and the defect remedied.

After stating the evidence in much more detail than we have synopsized it, the District Court of Appeal, through Jennings, J., said in its opinion:

[1] "Since the work was done under the 1911 Improvement Act, it may be conceded that the city council could have ordered the work to be done to a grade different from the established grade, section 3, Street Improvement Act of 1911, St. 1911, p. 733, as amended by St. 1923, p. 106. However, the city which was proceeding to improve a public street within its boundaries was required either to order the work to be done to the grade which had been formally established or, in any event, to some indicated grade. In adopting a plan for the work it was not authorized to leave a portion of the street which was included in the work of improvement without any grade being determined to which the work should there be done. In this connection, it must be remembered that the evidence showed that the paving of the right of way between the tracks and for a distance of two feet on each side thereof was done by the railway company. This was permitted by the provisions of section

77 of the Street Improvement Act. (St. 1911, p. 763). Presumably the city relinquished to the railway company the right to establish the grade to which the work of improving the right of way should be done. This the city was not entitled to do. Furthermore, in addition to relinquishing the right to establish the grade of the work over the right of way, it was not entitled to leave an additional portion of the street which it was proceeding to improve for the benefit of the traveling public without making provision for the grade to which the work should there be done. * * *

[2-4] "Some consideration should be given to the contention that the state Railroad Commission has exclusive jurisdiction to alter crossings at grade and that appellant was powerless to remedy the condition that existed at the railway right of way. This contention is necessarily based on the hypothesis that the difference in elevation of the rails was the single factor that was responsible for the defective condition that existed at the intersection. In giving consideration to appellant's contention that the city was powerless to remedy the defect, the above-mentioned hypothesis will be assumed to be correct. Nevertheless, the contention is not impressive. It must be remembered that the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city. If the Railroad Commission had the exclusive jurisdiction to order the north track to be lowered, it was the duty of the city at some time during the 6-year period to call upon the Railroad Commission to order the rail to be lowered and thus to remove an obviously dangerous condition in the street. Finally, if it be assumed that the city was entirely powerless in the premises, had no control over the right of way, and was entitled, so far as the condition which existed at the right of way was concerned, to rely on the lack of power and control to relieve it from liability, it was nevertheless not relieved from the duty to warn persons lawfully using the street that a dangerous condition existed. The evidence showed that no signs were exhibited giving warning to persons approaching the railroad crossing that it was a rough and dangerous crossing. It is our conclusion, based on all the facts and circumstances disclosed by the evidence, that appellant's contention of evidentiary insufficiency because of lack of control by the municipality over the particular place in the street where the accident occurred is not sustainable."

[5] As to the second contention of appellant, i. e., that the complaint does not state a cause of action by reason of the allegation of joint negligence of the city and the railway company, the District Court of Appeal says: "Examination of the complaint discloses that it was undoubtedly drawn on the theory that respondent's injuries were caused by the joint and concurring negligence of the city and the railway company. Passing for the moment the question of the effect of the peculiar statute under which liability was sought to be imposed upon the municipality and treating the action as one brought against two joint tort-feasors, it is clear that no obstacle to recovery against one is presented because of the fact that the complaint charged only joint negligence. It is settled in California that in tort actions, when two or more persons have been concerned in the commission of the tort, the injured party may proceed either jointly or severally against such joint tort-feasors who are both jointly and severally liable, and although the complaint may allege only joint negligence on the part of the joint tort-feasors it nevertheless states a complete and separate individual liability against each party so sued on account of the single act of which complaint is presented. Fowden v. Pacific Coast, etc., Co., 149 Cal. 151, 157, 86 P. 178; Cole v. Roebling Construction Co., 156 Cal. 443 [447], 105 P. 255; Dow v. City of Oroville, 22 Cal.App. 215, 134 P. 197."

[6] In its petition for hearing in this court after decision and judgment in the District Court of Appeal, and for the first time, appellant raises the point that the dismissal of the action against the railway company was a release of the city. There is no merit in the contention. It does not appear that plaintiffs received any satisfaction for the injury. The discontinuance, as to one tort-feasor, of an action brought against several tort-feasors, no satisfaction having been received, does not release the others. Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 164, 4 P. 1165;

Drinkhouse v. Van Ness, 202 Cal. 359, 381, 260 P. 869; Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N.W. 337; Thomas v. Pugh (Tex.Civ.App.1928) 6 S.W.(2d) 202, and cases from England and fifteen American jurisdictions cited in Young v. Anderson, 33 Idaho, 522, 196 P. 193, 50 A.L.R. 1056, 1091.

[7] Nor do we find any merit in the contention, stressed particularly by amicus curiæ, that the plaintiffs are precluded from maintaining this action because of their asserted failure to comply with the provision of an act (Stats.1931, p. 2475) requiring the presentment of a verified claim to the city council within 90 days after the accident occurred. The accident upon which this action is grounded occurred April 19, 1931, and the cited statute did not become effective until August 14, 1931, more than 90 days thereafter. Obviously, it was impossible for the plaintiffs to file such claim within 90 days after the accident for the prescribed period had completely expired prior to the effective date of the statute. The decisions declare that the provisions of the cited statute are mandatory and being remedial or procedural in character are applicable to situations where, as here, the accident antedated the effective date of the act, as well as to situations where the accident occurred subsequent thereto. Spencer v. Calipatria, 9 Cal.App.(2d) 267, 49 P.(2d) 320; Johnson v. Glendale, 12 Cal.App.(2d) 389, 55 P.(2d) 580; Thompson v. Los Angeles County, 140 Cal.App. 73, 35 P.(2d) 185; Norton v. Pomona, 5 Cal.(2d) 54, 53 P.(2d) 952, 957; Douglass v. Los Angeles, 5 Cal.(2d) 123, 53 P.(2d) 353. However, in the cited cases no proper verified claim was filed at any time by any of the several plaintiffs. When it was urged by the plaintiffs and appellants in the Norton Case, supra, that it was impossible for them to comply with the requirement of the statute because, as here, the full 90-day period had elapsed before the effective date of the statute, we declared: "This is true, but they still had, on August 14, 1931 [the effective date of the statute], three and one-half months remaining before their cause of action would become barred by the statute of limitation applicable to it. * * * They did not in fact commence their action thereon until December 31, 1931. During the intervening period, they had ample opportunity to comply with the statute by filing their claim. No advantage could rightfully be claimed or gained by the city by reason of the fact that the claim was not filed within ninety days after the occurrence of the accident, because in this case that requirement of the new law could not attach."

[8] The quoted portion of the Norton decision covers this case. Here, as distinguished from the Norton Case, the plaintiffs, before filing their complaint, filed a proper verified claim within 90 days after the effective date of the act when precluded from filing such claim within ninety days after the accident because of the expiration of that period before the act became effective. As declared in the Norton Case, supra, this was sufficient under the peculiar circumstances here present.

[9] It may not successfully be urged that the claim was not filed within 90 days after the effective date of the statute. As stated above, the act went into effect on August 14, 1931, and the plaintiffs filed their claim on November 12, 1931. Excluding the first day (August 14) and including the last (November 12), as required by section 12 of the Code of Civil Procedure and section 12 of the Political Code in the computation of time, it definitely appears that plaintiffs filed their verified claim on the 90th day after the effective date of the act, which, as we have seen, was sufficient under our declaration in the Norton Case.

[10] However, if in computing the time we include the first day, as the defendant city would have us do, it would avail the city nothing, for then the last or 90th day would fall on November 11, a legal holiday, which holiday would have to be excluded under the two cited Code sections, thus making timely a filing, as here, on November 12.

The judgment is affirmed.

We concur: THOMPSON, J.; SHENK, J.; SEAWELL, J.

16 Cal.App.2d 504

FIRST-TRUST JOINT STOCK LAND BANK OF CHICAGO v. MEREDITH.

Civ. 11052.

Supreme Court of California.

Nov. 19, 1936.

Venue 🔑52(1)

Convenience of witnesses who are parties is not a factor in determining motion for change of venue on ground of convenience of witnesses.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

On petition for hearing.

Petition denied.

For prior opinion, see 60 P.(2d) 1023.

William M. Hiatt and John M. Hiatt, both of Los Angeles, for appellant.

Freston & Files, and Ralph E. Lewis, all of Los Angeles, for respondent.

PER CURIAM.

In denying the petition for hearing herein after decision by the District Court of Appeal of the Second District, Division 2, we withhold approval of the statement in the opinion that the convenience of witnesses who are parties is a factor in determining a motion for change of venue on the ground of convenience of witnesses.

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7 Cal.2d 663

CHARD v. O'CONNELL.

S. F. 15597.

Supreme Court of California.

Nov. 16, 1936.

Rehearing Denied Dec. 14, 1936.

1. Trusts 🔑17(2), 43(1), 44(2)

Trusts in personalty may be created, declared, or admitted verbally and may be proved by parol evidence, but such evidence must be clear and unequivocal.

2. Evidence 🔑229

Statements of alleged trustor made after execution and delivery of assignment to alleged trustee could not bind trustee.

3. Appeal and error 🔑1010(1)

To secure benefit of rule that to establish parol trust evidence need not be entirely clear and convincing to an appellate court and that determination of trial court on question is conclusive, there must be some evidence tending to establish the trust.

4. Trusts 🔑44(2)

Evidence *held* not to support finding of trial court that at time of mother's assignment of proceeds of settlement under will contest to her son, son represented to mother that he would hold proceeds in trust and divide it equally among his brothers and sisters, so as to create a trust in favor of brothers and sisters.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Grace H. Chard, administratrix of the estate of Anna Wulff, deceased, against Daniel F. O'Connell. From a judgment for plaintiff, defendant appeals.

Reversed.

John S. De Lancey, of Oakland, for appellant.

Gillogley, Crofton & Payne, of San Francisco, Francis N. Foley, of San Mateo, and Abraham Glicksberg, of San Francisco, for respondent.

EDMONDS, Justice pro tem.

The judgment from which the defendant, Daniel F. O'Connell, appeals was rendered in an action brought against him by his sister for a share in money alleged to have been received by him in trust.

According to the allegations of the complaint, the defendant received the sum of $28,000 from his mother, Mary J. O'Connell, in trust, to be held by him during the lifetime of his mother and thereafter to be divided between her five children. The trial court found that defendant received the money under an assignment made by Mrs. O'Connell of her interest in the estate of her deceased brother; that the defendant at the time the assignment was executed represented to his mother that he would hold the proceeds of the settlement in trust as alleged by the plaintiff; and that he thereafter repudiated the trust.

There is no dispute concerning the facts in connection with the source of the money. The brother of Mrs. O'Connell died in California, leaving a will which was admitted to probate. Mrs. O'Connell had no property and prior to the death of her brother she was supported by him and the defendant. The defendant was one of five children. He, it seems to be conceded, was the only one of Mrs. O'Connell's children who had assumed any responsibility for her support. She had made her home with him for a number of years, but at the time of the death of her brother she was living with May Worley, her daughter.

After the death of his uncle the defendant went east on two occasions and made some investigation of his affairs. Concluding that his mother had not received her just share under his uncle's will, the defendant decided to contest it on her behalf. Unquestionably, Mrs. O'Connell had nothing to do with this decision. She was a woman 85 years of age who could neither read nor write. She was confined to her home and apparently relied entirely upon her son Daniel for advice and direction. According to his testimony he told her he "was going to take a chance and gamble and spend a little money and make a contest," and she replied, "Well, I hope you don't lose. I hope you win, because you are the only one who has ever done anything for me, and I hope you get something."

As a result of the contest initiated in the name of Mrs. O'Connell a settlement was reached by which she was to receive a share of the estate. This settlement was evidenced by an agreement between her and other heirs in the estate, which she executed in February, 1926. A month later Mrs. O'Connell assigned this agreement to her son, who about a year thereafter collected the money. After paying inheritance taxes and attorneys' fees, approximately $28,000 remained, which defendant received and deposited in a bank to his own credit.

The complaint alleges that "Mary J. O'Connell was of great age and impaired mentally and physically" and that "in all matters connected with the said contest and the settlement thereof * * * the said Daniel F. O'Connell acted as the confidential agent and trusted representative of his mother." However, plaintiff does not seek to set aside the assignment upon the ground of fraud. She claims one-fifth of the money received by the defendant upon the theory that it constitutes a trust fund. The complaint alleges: "That at the time of making said assignment and at the time of the receipt of said money as aforesaid, the said Daniel F. O'Connell represented to his said mother that he would hold the proceeds of said settlement in trust during the lifetime of said mother and thereafter divide the same equally between the children of the said mother, to-wit, the plaintiff and the defendants above named."

Under the issues as thus framed the only question presented is whether Daniel J. O'Connell received the money impressed with the trust conditions.

[1] In the case of Lefrooth v. Prentice, 202 Cal. 215, 227, 228, 259 P. 947, 952, this court said: "It is a cardinal rule that trusts in personalty may be created, declared, or admitted verbally and may be proved by parol evidence, but the authorities are uniform to the effect that such evidence must at all times be clear and unequivocal. Silvey v. Hodgdon, 52 Cal. 363; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Barker v. Hurley, 132 Cal. 21, 63 P. 1071, 64 P. 480. Mr. Pomeroy, in Equity Jurisprudence (4th Ed.) § 1009, states the rule as follows: 'The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail.'"

Applying this rule to the evidence in the case at bar, we do not find the position of the plaintiff supported by any evidence whatever. The only evidence which even remotely touches the issues before us is the testimony of Ida O'Connell, the widow of a son of Mary J. O'Connell, and that of Ed. O'Connell, her grandson. The former testified that the subject of the money expected from the will contest was a frequent topic of conversation at the home of May Worley, a daughter of Mrs. O'Connell with whom she was residing. Concerning what was said she stated: "A. Well, the conversation we generally had, or that was carried on, was never before Mrs. O'Connell, it was always between the—my husband and his sister and brother, but the brother was seldom there, and at the time of the suit, when the suit was first on, why then the conversation was about Dan going to get the money, that he thought that he would get that money, he told his mother he would get the money for his brothers and sisters, he didn't need it himself, and he didn't want a cent of it; and after the money was received, why they figured out that there was about $8000 coming to each one of them." When asked who was present and what was said and done, she stated: "Well, as near as I can remember my husband and his sister and myself. * * * Dan was never present. * * * Well, they talked over the suit, and then they talked over the money later."

In this testimony the witness specifically stated that the conversations were "never before Mrs. O'Connell" and "Dan was never present." Clearly there is nothing in them which could bind this defendant.

The other witness related a conversation which he said occurred in December, 1926, at which he, Mary J. O'Connell, Michael J. O'Connell, one of her sons and the father of the witness, Mrs. Worley, and the defendant were present. He said: "My grandmother at that time they were talking about this money, and she mentioned that her children had never had anything, and she hoped that they would get enough out of it to take care of them, she hoped that they would get the money before—or while she was still living, to enjoy it."

[2] The time of this conversation as fixed by the witness places it after the execution of both the agreement for settlement and the assignment and before the payment of the money. According to the undisputed evidence, the assignment had been delivered to the defendant nine months before. The statements of Mrs. O'Connell made after the execution and delivery of the assignment could not bind the defendant. Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196. Furthermore, her declarations do not support the terms and conditions of a trust under which the defendant was to hold the money during the lifetime of his mother and upon her death divide it between her children. Mrs. O'Connell's statement, as testified to by her grandson, was that "she hoped that they would get the money * * * while she was still living, to enjoy it."

Respondent lays great stress upon the fact that the defendant, immediately after he received the money, gave $4,000 to a sister and to each of two brothers. The defendant's answer to this is that the money was a gift to him from his mother; that he has always claimed it as his own; and that he had the right to give it away in such amounts and to such persons as he chose. According to the defendant, the gift was made to him because he had cared for his mother during many years and had advanced the expenses of the investigation which disclosed the facts upon which the successful contest was based.

It is significant in this connection that $4,000 is not one-fifth of the amount the defendant received; also that each of the three persons to whom he paid $4,000 knew the amount which had been received by him through the settlement and no one of the three made any demand for one-fifth of the fund. Moreover, the terms of the trust sought to be established by the respondent required distribution of the money upon the death of the mother; not immediately after its receipt by the defendant.

[3, 4] Respondent relies upon the rule stated in Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360, that to establish a parol trust, the evidence need not be entirely clear and convincing to an appellate court and that the determination of the trial court on the question is conclusive. But to secure the benefit of that rule there must be some evidence tending to establish the trust. In the present case there is no evidence whatever to support the findings of the trial court "that at the time of making said assignment at the time of the receipt of said money as aforesaid, the said Daniel F. O'Connell represented to his said mother that he would hold the proceeds of said settlement in trust and divide the same equally between the children of the said mother, to-wit: Anna Wulff, deceased, and the defendants above named, and the proceeds of said settlement were assigned to said Daniel F. O'Connell by the said Mary J. O'Connell to be held in trust for the use and benefit of Anna Wulff deceased, and defendants above named. * * *" Cases such as Campbell v. Genshlea, 180 Cal. 213, 180 P. 336, where an action is brought to set aside a deed or recover

property alleged to have been secured by fraud or undue influence, present an essentially different issue than is found in the case at bar.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.

7 Cal.2d 684

VENTURA COUNTY TITLE CO. v. CONSTANCE.

L. A. 15851.

Supreme Court of California.

Nov. 19, 1936.

1. Appeal and error ⚷771

Financial distress and illness of counsel *held* to excuse failure of appellant to file brief within time ordinarily allowed, where brief was filed two days before hearing of motion to dismiss appeal.

2. Appeal and error ⚷612(4)

Record including bill of exceptions duly settled by trial court and certificate of trial clerk certifying correctness of copies of papers in his office *held* properly authenticated.

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Proceeding between the Ventura County Title Company, plaintiff, and Sabbas Constance, defendant, wherein plaintiff moves to dismiss defendant's appeal.

Motion denied.

Stanley T. Tomlinson, of Santa Barbara, for appellant.

Merle J. Rogers and Rogers & Rogers, all of Ventura, for respondent.

PER CURIAM.

Motion to dismiss.

[1] The respondent advances three grounds in support of its motion to dismiss the appeal herein. The first ground has to do with appellant's failure to file his opening brief within time. Two days prior to the argument on the motion the appellant filed his brief and upon the hearing offered affidavits tending to establish that the delay in filing the same was attributable to financial distress and to illness of counsel. The showing so made is, in our opinion, sufficient to warrant relieving the appellant from his default, and he is so relieved.

[2] The second and third grounds of the motion have to do with the authentication and form of the record on appeal. Both grounds lack merit. The record is properly authenticated. Included therein is a bill of exceptions duly settled by the trial judge and a certificate of the clerk of the court below certifying to the correctness of the copies of the papers on file in his office. We find nothing in the arrangement of these several matters in the transcript that calls for a dismissal of the appeal.

The motion is denied, and, in accordance with our order of October 5, 1936, the respondent is given 30 days within which to file its brief.

7 Cal.2d 669

PEOPLE v. FOSS.

Cr. 4038.

Supreme Court of California.

Nov. 17, 1936.

Rehearing Denied Dec. 17, 1936.

1. Embezzlement ⚷8

Executive secretary and chairman of entertainment committee of club who fraudulently appropriated money from sale of tickets for club entertainment *held* guilty of embezzlement, as against contention that club was partnership or joint enterprise, and that members thereof were owners and hence could not embezzle from themselves, since secretary was merely "agent" of club, which was not partnership or joint adventure, in view of club by-law that members were not to receive compensation or profit from club (Civ.Code, § 2295; Pen.Code, §§ 503, 504).

[Ed. Note.—For other definitions of "Agent," see Words & Phrases.]

2. Embezzlement ⚷11(1)

Executive secretary and chairman of entertainment committee of club who fraudu-

lently appropriated money from sale of tickets for club entertainment *held* guilty of embezzlement, notwithstanding that no demand was made on him for accounting or for payment of money received for sale of tickets (Pen.Code, §§ 503, 504).

3. Criminal law ⚿1178

Refusal of requested defense instructions, supported neither by argument nor by citation of authority, will not be considered.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Garvin Foss was convicted of grand theft, and he appeals.

Affirmed.

Prior opinion, 58 P.(2d) 1297.

William W. Larsen, of Pasadena, and W. Frank Shelley and Franklin P. Bull, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Defendant was charged with and convicted of grand theft, the accusation stating that the amount involved was $254.50. He appeals from the judgment and from the order denying a new trial.

Appellant and four other individuals formed an association to be known as the Pasadena Stage and Screen Club, appellant being executive secretary and chairman of the entertainment committee. The by-laws of the organization expressly provided that no member of the organization should receive compensation for any work performed for the club. The club decided to put on a show, and appellant was given exclusive charge of securing the entertainment and selling tickets. He hired women solicitors to sell tickets for $1 each, the solicitors to receive 25 per cent. commission on all sales. The women turned over to appellant the money collected, and the charge is that he converted a portion thereof to his own use.

[1] Appellant's first contention on the law is that, being a member and officer of the club—whether the club was a partnership or joint adventure—he is one of the owners thereof and that, as such, he cannot steal or embezzle from himself. The rule that a partner cannot steal from the partnership is, of course, well settled, and while a partnership is in many respects a joint adventure, in the present case the five members who joined in the enterprise were not to receive any compensation or profit from the enterprise. The profits or proceeds from the sale of the tickets for the performance to be given were primarily for the erection of or securing a clubhouse. It therefore appears that appellant was neither a partner nor one engaged with others in a joint enterprise. He falls within the definition of an "Agent," given in section 2295 of the Civil Code as "one who represents another, called the principal, in dealings with third persons." In the transactions here complained of, and of which appellant was guilty, he was acting for and representing the Pasadena Stage and Screen Club. It has been found that he fraudulently appropriated money rightfully intended for, and the property of, the club, and he was guilty of embezzlement as defined in sections 503 and 504 of the Penal Code.

[2] A further contention of appellant is that no demand was made on him for an accounting or for payment of the money received for the sale of the tickets. No demand was necessary. People v. Goodrich, 142 Cal. 216, 75 P. 796: People v. Hill, 2 Cal.App.(2d) 141, 157, 37 P.(2d) 849.

[3] Appellant's general allegation that the court erred in refusing to give certain requested defense instructions, supported neither by argument nor by citation of authority, will not be considered by the appellate court. Bradley v. Butchart, 217 Cal. 731, 747, 20 P.(2d) 693.

Appellant complains that certain instructions given by the trial court were, in fact, comment by the court upon the evidence, and therefore violative of his rights under the Constitution. The comment of this court in People v. De Moss, 4 Cal.(2d) 469, 476, 50 P.(2d) 1031, disposes of the contention.

Our examination of the entire record in this cause confirms the verdict of the jury. Finding no error at law in the cause, the judgment and order are affirmed.

We concur: CURTIS, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; EDMONDS, Justice pro tem.

7 Cal.2d 712

In re MURPHEY'S ESTATE.

MURPHEY v. AMERICAN JEWISH CONGRESS et al.

HARRIS et al. v. HADASSAH AMERICAN JEWISH CONGRESS et al.

L. A. 15511, 15802.

Supreme Court of California.

Nov. 19, 1936.

Rehearing Denied Dec. 17, 1936.

1. **Wills 🔑14**

American Jewish Congress which was organized for political purpose of safeguarding civil, political, economic, and religious rights of Jewish people *held* "charitable organization" entitled only to pro rata share of bequests to it, in order to bring total bequests to charity to one-third of the distributive value of the estate.

[Ed. Note.—For other definitions of "Charitable Organization," see Words & Phrases.]

2. **Executors and administrators 🔑111(9)**

Denial of allowance of attorney's fees to attorney for executor employed after final account and petition for distribution to aid executor in proving charitable nature of certain beneficiaries *held* proper since services so rendered were not in aid of any duty owed by executor to the estate.

3. **Appeal and error 🔑151(3)**

Executor *held* not entitled to appeal from decree of distribution since executor as such was not "party aggrieved" by the decree.

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

4. **Appeal and error 🔑1119**

Where decree holding certain institutions to which bequests were made to be noncharitable was reversed so that amounts to such institutions were required to be reduced in order that total bequests to charity would not exceed one-third of distributive value of estate, amount deducted from bequests to institutions was required to be distributed to those to whom it should have been decreed in first instance even though only one of such parties appealed from lower court's decree.

5. **Appeal and error 🔑790(3)**
Costs 🔑232

Appeal from decree of distribution was dismissed and appellants were granted costs, where exact relief sought by appellants was granted by decision on another appeal by other appellants, since no justiciable question remained.

In Bank.

Appeals from Superior Court, Los Angeles County; Walton J. Wood and Thomas P. White, Judges.

Proceedings in the matter of the estate of Augusta Ascher Murphey, deceased, wherein Joseph L. Murphey was appointed executor. From decrees of distribution, separate appeals were taken by Joseph L. Murphey against the American Jewish Congress and others and by Bertha Harris and others against the Hadassah American Jewish Congress and others.

Decree on first appeal reversed in part and affirmed in part and second appeal dismissed.

Joseph L. Murphey, in pro. per., and Louis Luckel, both of Los Angeles, for appellant Murphey.

John Munger, of Pasadena (Louis Luckel, of Los Angeles, of counsel), for respondents Harris et al.

Loeb, Walker & Loeb, of Los Angeles (Walter S. Hilborn, of Los Angeles, of counsel), for respondents Hadassah American Jewish Congress et al.

Loeb, Walker & Loeb, of Los Angeles (Walter S. Hilborn, of Los Angeles, of counsel), for respondents American Jewish Congress et al.

THOMPSON, Justice.

Joseph L. Murphey, the surviving husband of decedent, as executor and individually as a legatee, appeals from portions of the decree of distribution. In the first instance, there is an appeal from that portion of the decree finding and declaring that the American Jewish Congress is not a charitable organization, and, therefore, was entitled to the full sum bequeathed to it by the decedent instead of being compelled to take a pro-rata portion thereof in order to bring the total bequests to charity to one-third of the distributive value of the estate. The articles of incorporation were introduced in evidence and also oral testimony. Among the purposes for which the corporation was organized are the following:

"(a) To safeguard the civil, political, economic, and religious rights of the Jews in all countries.

"(b) To further the development of the Jewish National Home in Palestine.

"(c) To develop an articulate, intelligent, widespread and compelling public opinion touching Jewish interests and problems.

"(d) To gather and disseminate information concerning such interests and problems, and to foster the free and open discussion of them.

"(e) To secure and maintain equality of opportunity for Jews everywhere, and, in every lawful manner, to secure effective remedies, assistance, and redress in all cases of injustice, hardship, or suffering arising out of discriminatory measures against Jews, or from the violation or denial of their lawful rights."

[1] The oral testimony establishes, without contradiction, that the purposes of the respondent are political. The purposes which we have quoted from the articles confirm the oral testimony and establish beyond question their political character. But that does not conclude the matter. We might have serious doubt of the proper determination of the question were it an open one in this state, particularly in view of Bowditch v. Atty. Gen., 241 Mass. 168, 134 N.E. 796, 798, 28 A.L.R. 713, Habershon v. Vardon, 64 Eng.Rep. 916, Slee v. Com'r of Internal Revenue (C.C.A.) 42 F.(2d) 184, 72 A.L.R. 400; and In re Killen's Will, 124 Misc. 720, 209 N.Y.S. 206, 208; in which latter case it was held that a bequest to an executor of a sum to be spent in furthering the "development of the Irish Republic" was invalid because it was for a political, and not a charitable purpose. In fact, as we understand it, "the development of the Jewish National Home in Palestine" contemplates the resettlement of Palestine under British mandate by the Jewish people and is already the cause of friction with the Arabs. In the Habershon Case a bequest for almost identical purposes was held invalid. However, we think the question is answered by the case of Collier v. Lindley, 203 Cal. 641, 266 P. 526, in which this court held that a trust for the promotion of political purposes was eleemosynary and charitable, and therefore not invalid. See, also, 16 Cal.L.Rev. 478. In the Bowditch Case, which we have cited, it was held that a bequest to promote the cause of "women's rights" was not charitable but political, the court saying: "Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion." While we feel bound by the conclusion in the Collier Case, yet the quoted language is pertinent to the proposition that we cannot distinguish between political purposes, saying one is charitable and another is not, assuming, of course, that the changes sought are not contra bonos mores and are to be brought about by peaceable means, and not by war, riot, or revolution. See Bogert, Trust and Trustees, vol. 2, § 378. Since it cannot be said that the purposes of the legatee bring it within the exceptions, we must hold that it is a charitable organization and its bequest must be reduced accordingly.

Similar appeals were taken from that part of the decree holding that the Council of Jewish Women of Los Angeles was not a charitable organization. And while they were allowed the full sum of the bequest, the decree reveals that the council made no objection to the petition of the executor and expressed its willingness to accept a pro-rata sum calculated upon all the bequests to charity, not exceeding one-third of the distributive value of the estate. In subsequent proceedings in the same estate, it appears that the council has in fact accepted the lesser sum in full satisfaction of its legacy. In order that proper distribution of the excess may be made, this portion of the decree will have to be reversed.

[2] Appeals are also taken from that portion of the decree denying attorney's fees to the lawyer who was employed by the executor, after the filing of the final account and petition for distribution. The executor says that he proceeded upon the theory that various legatees, including the American Jewish Congress and Council of Jewish Women, were charitable organizations; that when he discovered a different contention was being advanced he felt called upon to, and did, employ counsel to assist him. The court so found, but refused to make an allowance, evidently upon the theory that the services so rendered were not in aid of any duty owed by the executor to the estate. And we are in accord with the conclusion. In Re Estate of Friedman, 176 Cal. 226, 168 P. 21, the entire residue of the estate was given to the Hebrew Home for Aged Disabled. Various persons appeared

claiming to be heirs and, among other things, asserted that the home could take only one-third of the estate. Finally, the home brought an action to determine the rights of all parties and the court rendered a decree declaring there were no heirs, and the home, although a charitable institution, was entitled to take the whole. An allowance was made for the attorneys for services rendered in this connection. This court held that the allowance was improper because it was no part of the duty of the executor to participate in a proceeding to determine the succession to the estate. In principle that case cannot be distinguished from the situation here, where it appears that the only services rendered by counsel were in endeavoring to advance the position of appellant as to the manner in which the estate should be distributed. See In re Estate of Ross, 179 Cal. 358, 360, 361, 182 P. 303, and cases cited; also In re Estate of Parsell, 190 Cal. 454, 456, 213 P. 40, 25 A.L.R. 1561.

[3] By the same process of reasoning we arrive at the conclusion that the executor was not a party aggrieved by the decree of distribution, and, therefore, not entitled to prosecute this appeal (In re Estate of Ayers, 175 Cal. 187, 165 P. 528; In re Estate of Morgan, 203 Cal. 569, 265 P. 241, and In re Estate of Babb, 200 Cal. 252, 252 P. 1039), but that does not render the appeal by Joseph L. Murphey ineffective, nor change the outcome hereof.

[4] The respondent asserts that in case of a reversal of those portions of the decree holding the two institutions to be noncharitable, only Murphey should take his share of the bequests deducted, and the next of kin, who have not appealed, should not share therein. The rule laid down in Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898, and Lake v. Superior Court, 187 Cal. 116, 200 P. 1041, is not applicable here. Here the portions of the decree appealed from are interwoven and affect the entire decree. By distributing more to the two organizations than they were entitled to, the share of the others was correspondingly decreased. Here the rule to be applied is found to be stated in Whalen v. Smith, 163 Cal. 360, 125 P. 904, Ann.Cas.1913E, 1319, wherein it is said in effect that where the part appealed from is so interwoven with the whole as to affect it, then the appellate court should do that which justice requires. It needs no argument to demonstrate that here the amount deducted from the two organizations should be distributed among those to whom it should have been decreed in the first instance.

[5] There are also appeals in case L. A. No. 15802, on behalf of a number of the legatees from an order denying their motion to vacate and set aside certain portions of the decree of distribution, particularly that portion which found the sum to be distributed after deducting that given to the charitable organizations was only $13,231.21. In other words, they are contending that they should share in the sums which we have said should be deducted from the two charitable organizations. Inasmuch as that question is already determined in their favor we need not concern ourselves with the assertion that the order is not an appealable one. The exact relief asked for by them in their appeal has been granted by what we have already said in case L. A. No. 15511. Inasmuch as the portions of the decree which the appellants sought to vacate must be reversed in appeal L. A. No. 15511, no justiciable question remains, and this appeal may be dismissed, the appellants, however, to recover their costs. It is so ordered.

In case L. A. No. 15511, the appeal of Joseph L. Murphey as executor is dismissed; that portion of the decree denying an allowance for attorney's fees is affirmed; and those portions of the decree declaring the American Jewish Congress and the Council of Jewish Women of Los Angeles to be noncharitable and decreeing them the full amount of their legacies as fixed by the will and those portions of the decree fixing the distributive shares of the noncharitable legatees are reversed, and the court is instructed to revise its decree in accordance with the views herein expressed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

17 Cal.App.2d 516

HART, SCHAFFNER & MARX v. VAUGHN.

Civ. 10087.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1936.

Rehearing Denied Dec. 16, 1936.

Hearing Denied by Supreme Court Jan. 11, 1937.

1. Guaranty ⚿37

Guaranties are prospective, and may not be broadened or extended retrospectively except by express words or by necessary implication.

2. Guaranty ⚿37

Guarantor *held* not liable for indebtedness of retail clothing corporation to wholesaler, which was incurred prior to guaranty, where there was nothing in guaranty that made it retrospective.

3. Payment ⚿47(1)

Where rights of a third party are jeopardized, creditor may not, even with consent of debtor, charge payment to a debt other than that to which debtor originally directed payment to be charged.

4. Guaranty ⚿60

Creditor who had, at request of debtor, credited payment of indebtedness incurred subsequent to guaranty, could not hold guarantor for such indebtedness by transfer of credit to prior indebtedness.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action on a guaranty by Hart, Schaffner & Marx, a corporation, against C. W. Vaughn. From a judgment for defendant, plaintiff appeals.

Affirmed.

Sloss, Turner & Finney, of San Francisco, for appellant.

Robert W. Macdonald and Robinson, Price & Macdonald, all of Oakland, for respondent.

JAMISON, Justice pro tem.

This action is upon a guaranty executed by defendant in favor of plaintiff. Judgment was given in favor of defendant, from which plaintiff appeals. The case was tried upon an agreed statement of facts and a bill of exceptions.

In 1928 one J. R. Vaughn, a cousin of respondent, established in Berkeley a retail clothing business conducted under the name of "Vaughn-at-Sather Gate." It was agreed between him and appellant that appellant would provide him with the greater part of the merchandise needed in his business. The said merchandise was to be sold him on credit, and to induce appellant to extend such credit respondent executed a guaranty on November 16, 1928, guaranteeing, up to the sum of $6,000, payment to appellant of all indebtedness which J. R. Vaughn should incur for merchandise purchased from appellant. Early in 1930 the indebtedness of J. R. Vaughn for merchandise purchased from appellant amounted to some $19,000. About that time appellant and J. R. Vaughn concluded to form a corporation to conduct said business. A corporation was thereupon formed, known as "Vaughn-at-Sather Gate Ltd.," all of its stock being issued to J. R. Vaughn, who placed it as a pledge with appellant. The said corporation assumed all of the indebtedness of J. R. Vaughn, reducing his indebtedness to appellant to the sum of $18,000, for which the corporation executed its note on March 1, 1930. By reason of this change in the business of J. R. Vaughn the form of the said guaranty became inappropriate, since the said guaranty ran to J. R. Vaughn individually and said business was thereafter conducted by said corporation. It therefore became necessary to execute a new guaranty which would name the corporation as the debtor. Accordingly respondent on June 17, 1930, executed a new guaranty to replace the other, the old guaranty being returned to respondent. By this new guaranty the respondent obligated himself to pay to the extent of $6,000 for all goods thereafter sold by appellant to said corporation. In the fall of 1933 appellant forced the liquidation of said business, and as a result thereof funds were realized which by direction of the corporation were applied to the payment in full of the merchandise account of said corporation, leaving unpaid the $18,000 note.

Appellant's complaint contains three counts. The first count is upon the guaranty executed by respondent on the 17th of June, 1930, this being the guaranty given to replace the first guaranty given appellant by respondent. The second count is upon the first guaranty of respondent. This count was abandoned by appellant. The third count is upon the second guaranty, upon the theory that appellant had the right to credit payments made to it by respondent upon the note for $18,000 leaving the merchandise account of the corporation unsettled.

Appellant cannot recover upon the first count unless it can produce proof that the merchandise account of the corporation was not paid. This it did not do, for we find that on November 27, 1933, the said corporation mailed to appellant a letter which reads as follows: "Enclosed herewith please find our check No. 10989 in the sum of Four Hundred Twenty Five Dollars ($425.00) which, according to our records, clears the merchandise account in full to date." On December 5, 1933, appellant wrote said corporation as follows: "Your check of $425.00 enclosed in your letter of November 27th has been received and as you indicate in your letter this clears your merchandise account in full to date, leaving you owing us only your $18,000 note plus accrued interest." No further indebtedness to appellant for merchandise purchased by said corporation was incurred after the date of said letters, nor was any money advanced or loaned to said corporation by appellant at any time after the execution of the guaranty of June 17, 1930.

[1, 2] A guarantor cannot be held beyond the express terms of the guaranty. Glassell v. Coleman, 94 Cal. 260, 29 P. 508; Murphy v. Hellman Commercial, etc., Bank, 43 Cal.App. 579, 185 P. 485. In the recent case of Bank of America, etc., Ass'n v. Kelsey, 6 Cal.App.(2d) 346, 44 P.(2d) 617, 619, the court held that a guaranty is not to be broadened by implication and also that it cannot be extended retroactively by implication. There the court said: "It is a rule of very general application that all guaranties are prospective and not retrospective in operation, unless the contrary appears by express words or by necessary implication. Brandt on Suretyship and Guaranty (3d Ed.) § 108; National Bank of Commerce v. Rockefeller (C.C.A.) 174 F. 22. There is nothing in the language of the guaranty before us which discloses any purpose either express or implied, to give it a retrospective operation." In the case at bar there is nothing contained in this second guaranty that gives it a retrospective operation.

[3, 4] Appellant contends that it had the right to charge the payments made by the corporation from its merchandise account to the said $18,000 note. The law is well settled that this cannot be done even with the consent of the debtor, where the rights of a third party are jeopardized. Johnston v. Groom, 99 Cal.App. 462, 278 P. 935; Miller v. Montgomery, 31 Ill. 350; United States v. Brent (D.C.) 236 F. 771; Pinney v. French, 67 Kan. 473, 73 P. 94. In the instant case the payments made by the corporation to appellant were made with the direction that they be applied as credits on the merchandise account and were so credited. Neither the corporation nor respondent consented or directed that these payments should be applied on the $18,000 note.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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17 Cal.App.2d 598

HAMMER v. BORING.

Civ. 10066.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

1. Appeal and error 🔑930(1), 931(1), 1002, 1011(1)

Findings of trial court or jury upon conflicting evidence are conclusive, and all reasonable inference must be indulged in to support such findings or verdict.

2. Automobiles 🔑244(6)

Evidence that pedestrian was crossing on crosswalk, that there was nothing to obstruct motorist's view as he approached intersection, that by means of lights on his automobile he could see ahead at least 100 feet, and that there was light from 250 candle-power lamp at corner of intersection, *held* to sustain finding of negligence of motorist.

3. Negligence 🔑136(8)

Negligence, or contributory negligence, becomes matter of law only when facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn.

4. Automobiles 🔑245(72)

Whether pedestrian crossing street at intersection in nighttime was contributorily negligent so as to preclude recovery when struck by automobile *held* for jury.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Sophia Hammer against Frank H. Boring. From an adverse judgment, the defendant appeals.

Affirmed.

Kirkbride & Wilson, of San Mateo, for appellant.

J. E. McCurdy, of San Mateo, and William H. Metson, of San Francisco, for respondent.

JAMISON, Justice pro tem.

This action was brought by plaintiff against defendant to recover damages for injuries suffered when struck by defendant's automobile. The jury returned a verdict for plaintiff; defendant moved for a new trial, and his motion being denied, he prosecutes this appeal.

Appellant urges three grounds for reversal: That the evidence is insufficient to support the verdict; that the evidence fails to show negligence on the part of appellant; and contributory negligence on the part of the respondent.

There is an irreconcilable conflict of the evidence in this case. The accident occurred about 7:15 p. m. on San Mateo drive, which is the principal thoroughfare of the city of San Mateo, at a point where it is intersected by Poplar avenue. At the southeast corner of this intersection there was an electric light of 250 candlepower, which was lighted at the time of the accident. There is a crosswalk or pedestrian lane across San Mateo drive at the intersection of Poplar avenue. Respondent testified that she got off of a bus near said intersection and proceeded to cross said intersection from east to west in said pedestrian lane; that before doing so she looked up and down said drive and saw two automobiles coming north on said drive, one of which was half a block distant, and the other nearer; and she saw the appellant's automobile coming south on said drive some 350 feet away. When she neared the middle of said drive she stopped to permit the nearer of the two automobiles going north to pass her, and then proceeded on across said drive. Suddenly she saw appellant's automobile almost upon her, and was struck by it; she seized the cap of the radiator, was dragged some distance, and then thrown to the pavement; and appellant put her in his automobile and took her to a hospital. While at the hospital he made the statement in the presence of Miss Mary Keneally and Mrs. Helen Price that he did not see respondent until his automobile struck her. There is evidence that the headlights of appellant's automobile were lighted and he could see ahead by these lights for a distance of 100 feet. At the time of the accident the weather was fair, the streets were dry, and there was no fog or rain.

Appellant testified that he approached the said intersection traveling 25 miles per hour, and that after crossing the intersection he slightly increased his speed; that he first saw respondent when she was twelve feet in front of him; that he immediately applied his brakes and attempted to swerve the automobile to the left; that about 9 o'clock p. m., after he had taken respondent to the hospital, he returned to the place of the accident; that due to said accident the right headlight of his automobile had been broken; that he found the glass from the broken headlight on said drive about 30 feet south of said intersection, and he is corroborated as to the point where the broken glass was found by the testimony of A. McIntyre.

[1, 2] The law is well established that the findings of the trial court or jury upon conflicting evidence are conclusive, and that all reasonable inferences are to be indulged in support of such findings or verdict. Wing v. Kishi, 92 Cal.App. 495, 268 P. 483; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Grant v. Ryon, 11 Cal.App.(2d) 101, 53 P.(2d) 170. There is ample evidence to support the verdict of the jury, and, consequently, it cannot be disturbed by this court. There is evidence that respondent was crossing said drive at the intersection of Poplar avenue and at the time she was hit by appellant's automobile was on the crosswalk; that there was nothing to obstruct appellant's view as he approached said intersection; that by means of the lights of his automobile he could see ahead at least 100 feet, and in addition there was the light from the 250 candlepower lamp at the southeast corner of said intersection.

[3, 4] The question of respondent's contributory negligence, like that of appellant's negligence, was a question of fact for the jury to determine from the evidence. It is only when the facts are clear and undisputed and when no other inference than that of negligence or contributory negligence can be drawn, that such negligence or contributory negligence is one of law. Fike v. San Joaquin Light & Power Corp., 73 Cal.App.

712, 720, 239 P. 344, and authorities cited. The jury found upon sufficient evidence that appellant was guilty of negligence which caused the injury to respondent, and that respondent was not guilty of contributory negligence. Such being the case, its verdict must be upheld.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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17 Cal.App.2d 449

PEOPLE v. BACOS et al.

Cr. 408.

District Court of Appeal, Fourth District, California.

Nov. 12, 1936.

Criminal law 🔑1071, 1097(1)

People's appeal was required to be dismissed where people gave oral notice of appeal on day motion of accused for new trial was entered, but filed no statement on appeal and made no request to have transcript prepared (Pen.Code, § 1249; Rules for Supreme Court and District Courts of Appeal, rule 2, § 7).

◆

Appeal from Superior Court, San Diego County.

Proceeding by the People of the State of California against Miguel Romero Bacos and another. From an adverse judgment, the plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Thomas Whelan, Dist. Atty., and William P. Mahedy, Deputy Dist. Atty., both of San Diego, for the People.

A. Fairchild and Herman Allen, both of San Diego, for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss this appeal on the ground that no statement or application was ever filed by the appellant setting forth the grounds of the appeal, the points relied upon, and designating what portions of the phonographic reporter's notes it desired to have transcribed.

From the certificate of the clerk, dated October 9, 1936, it appears that an order granting the defendants' motion for a new trial was entered on August 27, 1936, that on that day the plaintiff gave oral notice of appeal to this court, that no statement on appeal has been filed, and that no request has been made to have a transcript prepared. Under these circumstances the motion should be granted. People v. Riga, 104 Cal.App. 477, 285 P. 1069; Pen. Code, § 1249; rule 2, § 7, of the Rules for the Supreme Court and District Courts of Appeal.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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17 Cal.App.2d 454

COOMBS v. SMITH et al.

Civ. 11089.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1936.

1. Mandamus 🔑3(1)

Extraordinary remedy provided by writ of mandamus will not be permitted where there is other relief afforded by law.

2. Mandamus 🔑3(4)

Mandamus by former director-manager of department of city planning to compel payment of salary did not lie, since there was plain, speedy, and adequate remedy at law to recover salary by suit in municipal court.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus by Thomas Coombs against Ernest R. Smith, and others, as members and officers of the Board of City Planning Commissioners of the City of Los Angeles, and the Comptroller of the City of Los Angeles, and the Treasurer of the City of Los Angeles, to compel payment of salary as director-manager of the Department of City Planning. From a judgment denying writ of mandamus, the plaintiff appeals.

Affirmed.

David Berniker, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal from a judgment denying appellant's petition for a writ of mandamus requiring respondents to pay to appellant the sum of $1,869.02.

The material facts are that appellant entered the employ of the department of city planning of the city of Los Angeles in December, 1926, and served continuously until July 31, 1930, when he was regularly appointed to the position of director-manager of the department of city planning of the city of Los Angeles, under section 79 of the charter of said city. He served continuously in this capacity until the termination of his employment on October 1, 1935. Appellant contends that the salary of the office of director-manager was fixed, in conformity with section 85 of the Charter of the City of Los Angeles, at $5,000 per annum. Appellant received such salary until July 1, 1932, but during the year 1932–33 he received a salary of $4,263.98; in 1933–34, $4,493.60; during 1934–35, up to June 30, $4,500; and from July 1 to October 1, 1935, at which latter date his employment terminated, appellant received $1,137.10. By this proceeding in mandamus appellant seeks to recover the difference between the moneys actually received by him and the sum of $5,000 per annum, which he alleges to be the legal salary for the position he occupied.

[1, 2] Although several points are raised by appellant on this appeal, we are of the opinion that the sole question necessary for us to determine is whether the writ of mandate, where reinstatement is not sought, is a proper remedy for recovery of wages due a municipal employee. It is fundamental, in our opinion, that the extraordinary remedy provided by a writ of mandamus will not be permitted where there is other relief afforded by law. In the recent case of Northrup v. Haynes (Cal.App.) 59 P.(2d) 1056, it was said: "The well-recognized procedure, where a right to recover salary is asserted and denied by respondents, is by ordinary suit at law for the salary." See, also, Butler v. City of Plainfield, 135 A. 669, 5 N.J.Misc. 170; Police Commissioner of City of Boston v. City of Boston, 279 Mass. 577, 181 N.E. 790; Black v. City of Santa Monica, 13 Cal.App.(2d) 4, 56 P.(2d) 256. Therefore, since appellant could have filed suit in the municipal court to recover the amount of salary alleged to be due him, he had a plain, speedy and adequate remedy at law. This is equally convenient, beneficial and effective as a proceeding by mandamus, which, therefore, is not available to him. Black v. City of Santa Monica, supra; Burbank v. Hamilton, 63 Cal. App. 745, 746, 219 P. 1047.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

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17 Cal.App.2d 443

ROSENFELT v. SCHOLTZ.

Civ. 11134.

District Court of Appeal, Second District, Division 2, California.

Nov. 12, 1936.

1. Dismissal and nonsuit ⚷60(1)

Statute relating to dismissal for want of prosecution is mandatory, and in absence of written stipulation, any action not brought to trial within five years after action is filed must be dismissed (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

2. Stipulations ⚷3

Where parties stipulated several times that case might be set for trial at any time after certain stated dates, dismissal of action for want of prosecution where no action was taken to bring case to trial for over five years after action was filed *held* proper, under statute, where none of the stipulations contained agreement for continuance of trial (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Mildred Rosenfelt, by her guardian ad litem, Philip Rosenfelt, against Moses Scholtz. From a judgment dismissing the plaintiff's action, the plaintiff appeals.

Affirmed.

R. E. Parsons and A. Benjamin, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal by plaintiff from a judgment dismissing an action under section 583 of the Code of Civil Procedure (as amended by St.1933, p. 853), which provides (1) that the court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after the action is filed to bring such action to trial, and (2) that "any action * * * shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." The contention of the plaintiff is that the order of the court dismissing the action was erroneous for the reason that the parties had entered into three stipulations in writing that the time might be extended. The stipulations were as follows: (1) "It is stipulated that the above entitled case may be set for trial at any time on or after the 14th day of December, 1932." (2) "It is hereby stipulated by and between counsel for the respective parties that the above entitled case may be reset for trial on any date subsequent to February 20, 1933, convenient to court and counsel. Notice of trial is not waived." (3) "It is stipulated that the above entitled case may be set for trial at any time on or after the 27th day of October, 1933. Plaintiff to serve notice of trial." The words "the time" in the phrase of said section "except where the parties have stipulated in writing that the time may be extended" refers to the five-year limit in which an action must be brought to trial and has been called the "statutory" time. Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, at page 338, 219 P. 1006, 1008. And it has been said that the statute means that a dismissal shall be granted under the proper circumstances "except where, pursuant to a stipulation of the parties, a different limit has been fixed." City of Los Angeles v. Superior Court, 185 Cal. 405, 409, 197 P. 79, 81. "An examination of the cases construing section 583, supra, discloses that no case decided by this court has held that anything short of a written stipulation extending in express terms the time of trial to a date beyond the 5-year period, or expressly waiving the right to a dismissal under that section, will suffice to toll the running of the statutory time. On the contrary, the cases uniformly hold that the provisions of section 583 are mandatory and that, in the absence of a written stipulation, any action not brought to trial within the statutory period must be dismissed." Miller & Lux, Inc., v. Superior Court, supra.

[2] None of the stipulations above set forth contains an agreement for a continuance of trial. They relate solely to the setting of the case for trial. Indeed, they show on their face that they are entered into for the purpose of facilitating the setting of the case for trial. There is nothing in any of the stipulations to deter the plaintiff, if she so desired, from going ahead in the manner provided by statute for bringing the case on for trial. There is no stipulation to continue the case at all—much less to continue it beyond the five-year period.

Somewhat similar stipulations were construed adversely to the contention of the plaintiff in Sedarovich v. Paul (Cal.App.) 60 P.(2d) 871, and City of Los Angeles v. Superior Court, supra.

Furthermore, under the first provision of said section the court was authorized in its discretion to dismiss the action for want of prosecution because of the failure of plaintiff to bring the action to trial within two years. The plaintiff does not contend in her brief that there was an abuse of discretion.

Judgment affirmed.

I concur: WOOD, J.

17 Cal.App.2d 547

PEOPLE v. MONTOYA et al.

Cr. 334.

District Court of Appeal, Fourth District, California.

Nov. 17, 1936.

1. **Riot** 🔑**1**

Act of striking orange pickers armed with clubs, sticks, blackjacks, and metal cables, rushing into orchard, seriously assaulting and injuring one nonstriking picker and driving others out of orchard, dumping oranges out of picking boxes, and throwing oranges and picking boxes at pickers, constituted crime of "riot" (Pen.Code, § 404).

[Ed. Note.—For other definitions of "Riot," see Words & Phrases.]

2. **Riot** 🔑**6**

Evidence in prosecution for crime of riot *held* sufficient to sustain finding that defendants were present at and participated in the riot (Pen.Code, § 404).

3. **Criminal law** 🔑**1186(4)**

In prosecution for riot, giving of instruction attempting to define a trespass *held* unnecessary, but not prejudicial error, since trespass forms no integral part nor necessary element of offense of riot (Pen. Code, § 404; Const. art. 6, § 4½).

4. **Criminal law** 🔑**655(6)**

In riot prosecution, question of trial judge, "You mean the act of one is the act of all?" asked in endeavoring to identify instruction juror desired re-read, *held* not prejudicial.

5. **Criminal law** 🔑**655(5), 723(1)**

Where attorney for defendants in riot prosecution attempted to go outside record in endeavor to play on sympathies of jurors, rulings of court and objections of district attorney made in attempt to restrict argument to facts and issues *held* not prejudicial.

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Apolinar Montoya, Primo Rodriguez, Simon Sarinana, Adolphus Sepulveda, Aliseo Alverez, M. Arias, Domingo Escamilla, Joe Venages, Herlindo Perez, and Francisco Espinosa were convicted of riot, and they appeal.

Affirmed.

Clarence E. Rust, of Oakland, for appellants.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

The appellants, and three others, were charged with the crime of riot alleged to have been committed on the Earl Tucker ranch in Orange county, Cal. The appellants were convicted and judgments pronounced upon them. Their three codefendants were acquitted.

Appellants urge the following grounds for a reversal of the judgments: (1) Insufficiency of the evidence to support the verdicts and judgments; (2) errors in instructions given to the jury; (3) interruptions of their counsel during his arguments to the jury.

[1] The evidence shows that on July 6, 1936, there was a strike among orange pickers in Orange county; that the appellants and their companions (except the defendants acquitted) were strikers; that on July 6, 1936, about twenty-eight nonstrikers were engaged in picking oranges in the Earl Tucker orchard; that at about 2 o'clock in the afternoon of that day between thirty and forty strikers, including the appellants, drove up to the orchard in automobiles; that they were armed with clubs, sticks, blackjacks, and metal cables; that they rushed into the orchard, seriously assaulted and injured one picker, and drove most of the others out of the orchard; that they dumped oranges out of picking boxes and threw oranges and picking boxes at the pickers; that they cursed and threatened the pickers. This constituted the crime of "riot" as defined in section 404 of the Penal Code. People v. Young, 136 Cal.App. 699, 29 P.(2d) 440; People v. Bradley, 137 Cal.App. 225, 30 P.(2d) 438; People v. Dunn, 1 Cal.App.(2d) 556, 36 P.(2d) 1096.

[2] The appellants urge that the evidence is insufficient to prove that they were present at and participated in the riot, or that they committed any unlawful act. Montoya was identified as the one who twice struck a picker over the head with a metal cable and seriously injured him. At least eight of the appellants were personally identified, some of them by several witnesses, as among those who entered the orchard and engaged in

the riot. While the identification of the other two is not so complete, there is evidence that they were in the orchard with the other rioters and were arrested with the other appellants when attempting to leave it. If any further identification of these appellants is necessary it is furnished by their own testimony. They testified that they, with the other appellants, and others, attended a meeting of the strikers shortly before the riot and discussed getting the nonstrikers "not to work, so that the strike could be sustained"; that it was decided to go to the orchard to carry out this purpose; that they, with between thirty and forty others, including their coappellants, went to the Tucker orchard to see if they could not get the pickers to help them with the strike; that they were arrested in the road running along the side of the Tucker orchard where the riot took place. While these appellants denied entering the orchard and taking part in the riot there was a common plan and purpose among all of the thirty or forty strikers who went to the Tucker orchard sufficient to make each one responsible for the acts of the others.

[3] The appellants complain of an instruction attempting to define the offense of trespass. We fail to see the materiality of this instruction. The appellants were charged with the crime of riot, and trespass forms no integral part nor necessary element of that offense. Section 404, Pen.Code. While we regard the instruction unnecessary, we cannot conclude that giving it constituted error so prejudicial as to require reversals of the judgments especially in view of the convincing evidence of the guilt of appellants. Under these circumstances we are prohibited from reversing the judgments by the provisions of section 4½ of article 6 of the Constitution.

[4] The appellants complain of a statement made by the trial judge, which they call an instruction, where he remarked to the jury, "You mean the act of one is the act of all?" This question was not an instruction given to the jury. That body returned to the courtroom to have some of the instructions reread. The trial judge asked the question of a juror in endeavoring to identify which instruction the juror desired reread. No complaint is made of the instruction given and reread. There was nothing prejudicial to the rights of any appellant in the question asked.

[5] The appellants complain of interruptions of their counsel during his argument to the jury. The record shows that the attorney was attempting to go outside the record in an endeavor to play upon the sympathies of the jurors. The trial court by its rulings, and the district attorney by his objections, were properly attempting to restrict the argument to the facts and issues of the case.

Judgments affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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17 Cal.App.2d 601

ROSEN v. ROSEN et al.

Civ. 11166.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

1. Execution 🔑113

Where check reached branch bank on which it was drawn in morning, so that, but for custom of bank to make final postings in evening after regular banking hours, check would have been approved by about 10 a. m. and posting would have been finished by noon, claim of payee of check *held* superior to claim of creditor levying execution on drawer's account at 12:15 on same day (Civ.Code, § 3265e).

2. Husband and wife 🔑269

Character of wife's separate property was not changed by mingling of husband's funds in her bank account, hence husband's creditor levying execution on the account was not entitled to wife's funds (Civ.Code, § 171).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ethel Rosen against Louis Rosen, wherein third-party claims were presented by L. G. Koerner and Elsie E. Traub, also known as Elsie E. Rosen. From judgment in favor of the third party claimant, Ethel Rosen appeals.

Affirmed.

Joe Wapner, of Los Angeles, for appellant.

E. A. Tucker and R. W. Richardson, both of Los Angeles, for respondent L. G. Koerner.

Leo M. Zinner, of Los Angeles, for respondent Elsie Traub.

WOOD, Justice.

Plaintiff obtained a judgment against defendant Louis Rosen and levied upon a bank account standing in the name of Elsie E. Traub, also known as Elsie E. Rosen. Third-party claims were presented by L. G. Koerner and Elsie E. Traub. Proceedings were conducted in accordance with section 689 of the Code of Civil Procedure (as amended by St.1935, p. 1958). The trial court rendered judgment in favor of both third-party claimants, and from this judgment plaintiff prosecutes the appeal.

Respondent Elsie E. Traub is now the wife of Louis Rosen. Approximately nine months before their marriage she opened a bank account at the Brooklyn and Soto branch of Bank of America National Trust & Savings Association. At that time she deposited certain funds of her own and later made further deposits of her own money. She permitted defendant Rosen to deposit receipts of his business in this account and to draw checks thereon in the conduct of his business. On April 29, 1936, Elsie E. Traub drew a check in the sum of $265 in favor of L. G. Koerner. This check was deposited by Koerner on May 6, 1936, in the Sixth and Main branch of Bank of America National Trust & Savings Association. At the close of business on May 6, 1936, the balance on deposit in Elsie E. Traub's account was $533.37. The execution was levied at 12:15 p. m. on the afternoon of May 7, 1936. The trial court found that title to $265 rested in L. G. Koerner and that title to the remainder on deposit rested in Elsie E. Traub and gave judgment accordingly.

[1] The appeal with reference to the Koerner claim turns upon the question whether the bank had accepted the check prior to the levy of the attachment. Civ. Code, § 3265e. The Bank of America National Trust & Savings Association conducts a number of branches in the city of Los Angeles and maintains a private clearing house for its various branches. It is the custom of the bank to make final postings in its accounts in the evening after the regular banking hours. In accordance with the custom of the bank the Koerner check reached the Brooklyn and Soto branch some time between 8:30 and 9:15 a. m. on the morning of May 7, 1936. This check, together with other early morning clearings, was run off on the adding machine, sorted alphabetically and checked for date, indorsement, and genuineness of the signature of the drawer. If the branch bank had done its own posting, the check would have been approved by about 10 a. m. and the posting would have been finished by noon. Under the facts shown in evidence, the court properly held that the bank accepted the check before the levy of the execution. Nothing appears in the Code to require final posting as a prerequisite to fixing the liability of the bank. The evidence was sufficient to sustain the finding as regards the Koerner claim.

[2] Upon the withdrawal of the sum of $265 for the Koerner check, there remained in the Traub account the sum of $268.37. Evidence was introduced before the trial court to sustain a finding that Elsie E. Traub had on deposit in her account of her own separate funds a sum greater than $268.37. Her separate property was not subject to garnishment for a debt of her husband (Civ.Code, § 171). The character of the wife's separate property is not changed by the mingling of the husband's funds in the same account with her own. People v. Kirkpatrick, 77 Cal.App. 104, 246 P. 84.

The judgment is affirmed as to each claimant.

I concur: CRAIL, P. J.

17 Cal.App.2d 456

RILEY v. PRESS-TELEGRAM PUB. CO.

Civ. 10898.

District Court of Appeal, Second District,
Division 1, California.
Nov. 13, 1936.

1. Libel and slander ⟹16, 17

Statement that plaintiff had been succeeded as an inheritance tax appraiser by another had no tendency to expose plaintiff to hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, and therefore, unless published article had tendency to injure plaintiff in his occupation, it did not constitute a libel, even though false (Civ.Code, § 45).

2. Libel and slander ⟹89(3)

Complaint charging publication of false statement that plaintiff had been succeeded as an inheritance tax appraiser by another, that prior to publication plaintiff had acted as private appraiser for compensation, and that since the publication plaintiff lost private employment, did not state cause of action for libel, where complaint did not disclose that loss of work as private appraiser resulted from the publication (Civ.Code, § 45; Gen.Laws 1931, Act 8443, § 14).

3. Pleading ⟹238(1)

Where plaintiff announced his intention of standing on insufficient complaint and declined to amend, court correctly denied right to amend and gave judgment for defendant.

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Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Jack Riley against the Press-Telegram Publishing Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Erwin P. Werner and Edward Linder, both of Los Angeles, for appellant.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

SHINN, Justice pro tem.

Plaintiff appeals from a judgment entered in favor of defendant after an order sustaining a demurrer to the complaint without leave to amend.

Defendant corporation, publisher of a newspaper, is charged with libel in the publication of the following article: "ATTORNEY NAMED LOCAL INHERITANCE LEVY APPRAISER Henry J. Ahrens, Los Angeles, Succeeds Jack Riley in Long Beach. Appointment of Henry J. Ahrens, attorney, of Los Angeles as State Inheritance Tax Appraiser for the Long Beach District was announced here today. Ahrens said he had been expecting the appointment and had been informed that his commission had arrived at his home today although he had not yet seen it. The appointment was made by State Controller Ray L. Riley. Ahrens succeeds Jack Riley."

[1, 2] The complaint alleged that the article was false and unprivileged but did not allege that it was published with malice. In the article itself and in the allegations of the complaint we find nothing to support a charge of libel. The statement that plaintiff had been succeeded as an inheritance tax appraiser by another had no tendency to expose plaintiff to hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, and therefore, unless the published article had a tendency to injure plaintiff in his occupation, it did not constitute a libel as defined by section 45 of the Civil Code. The complaint alleged that prior to the publication of said article, plaintiff "was consulted, retained, hired and employed by attorneys, banks, trust companies, land companies, and individuals as appraiser and adviser for compensation, and that since the publication of said article plaintiff had lost the employment of the persons and firms mentioned." It was not alleged that this circumstance resulted from the publication of the article, nor did it appear from the complaint that the publication of the article interfered in any manner with the performance of plaintiff's duties as an inheritance tax appraiser or with the compensation derived from such services. As an inheritance tax appraiser, plaintiff could not lawfully receive compensation for official services in addition to that allowed him by law (Deering's General Laws 1931, Act 8443, § 14; Pen.Code, § 653½), and it therefore did not appear from the complaint that plaintiff had been injured in his occupation, namely, that of an inheritance tax appraiser. It might have been possible for plaintiff to allege that the article had a tendency to injure him in his incidental occupation of private appraiser notwithstanding the fact that he continued to hold the office of inheritance tax appraiser, but if there was any connection between publication of the article and the loss of private employment, such connec-

tion cannot be discerned from the article, nor from the allegations of the complaint.

[3] Other questions raised by the demurrer need not be decided. The demurrer was properly sustained. Plaintiff announced his intention of standing on the complaint (which had been once amended) and declined to amend. Under these circumstances the court correctly denied the right to amend and gave judgment for defendant.

Judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

17 Cal.App.2d 437

STRASBURGER v. VAN DELINDER, County Treasurer.

Civ. 11076.

District Court of Appeal, Second District, Division 1, California.

Nov. 12, 1936.

Hearing Denied Jan. 11, 1937.

1. Mandamus ⚷176

Mandamus order properly directed that holder of road district improvement bonds who first presented and registered his bonds for payment should be paid in full out of funds in road district improvement sinking fund, instead of ordering money in fund to be pro-rated among all holders of bonds and interest coupons, where act authorizing bonds granted unrestricted taxing power for payment of bonds (Gen.Laws 1931, Act 3276, § 26).

2. Mandamus ⚷174

In mandamus proceeding to compel payment of road district improvement bonds first presented and registered for payment, finding that road district improvement sinking fund contained enough money to pay total amount due on bonds first presented and registered, whereas testimony at trial indicated fund did not contain such amount, *held* immaterial, since amount unpaid after applying money on hand in fund to bonds would be paid out of first moneys thereafter received in fund (Gen.Laws 1931, Act 3276, § 26; St.1935, p. 994, § 1).

3. Mandamus ⚷175

Motion for new trial in mandamus proceeding to compel payment of road district improvement bonds first presented and registered for payment, to permit introduction of statistics relating to financial condition of road district, *held* properly denied where it did not appear that such statistics could not have been obtained at time of trial by reasonable diligence (Gen.Laws 1931, Act 3276, § 26).

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

Mandamus proceeding by Arthur Strasburger against H. R. Van Delinder, Treasurer of Ventura County, state of California. From the judgment, the defendant appeals.

Affirmed.

Albert D. Barnes, Dist. Atty., and William T. Selby, Chief Deputy Dist. Atty., both of Ventura, for appellant.

Loren A. Butts, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Appellant, treasurer of Ventura County, appeals from a judgment upon a mandamus proceeding, by which he was ordered to pay the respondent, Strasburger, petitioner for the writ, "out of any and all money now on deposit or which may be hereafter deposited in his office in the 'Road District Improvement Interest and Sinking Fund No. 3' the total amount due the petitioner on five bonds issued by the Board of Supervisors of the County of Ventura, State of California, under and pursuant to the provisions of an act of the legislature of the State of California, known and designated as the Road District Improvement Act of 1907." It is contended that the judgment is not supported by the evidence.

The cost of the road improvement ordered by the board of supervisors, approximately $110,000, was met by an issue of bonds numbered 1 to 110. Of these Strasburger is the owner of bonds numbered 1, 2, 3, 4, and 5, each in the amount of $1,000. His five bonds fell due as to principal on August 20, 1933, and were registered by appellant on that date, following presentment and request for registration preferred August 8, 1930. The court found on the evidence submitted that they were the first bonds actually presented and registered. Bonds 6 to 10, inclusive, it appeared from the testimony of appellant, were received a few days after August 20th, although with bond No. 11 they were given a registration date of August 20th. On that date there was in the district improvement fund the sum of $3,485.13 and respondent herein claims that from that money the amount due on three of his bonds should have been paid, and that the balance and the first money thereafter paid into the fund should have been utilized to pay the amount due upon his other two bonds. The county treasurer, however, took a contrary view and used money then and later in the fund to pay interest accruing on the bonds of this issue. On the date of trial there was in the fund $2,076.04.

The trial court by its judgment recognized the claim of the petitioner for the writ for priority in payment and, as we have noted, ordered payment "out of any and all money now on deposit or which may be hereafter deposited" in the fund.

[1] The real question at issue is whether the court erred in ordering a payment in full to the petitioner, instead of ordering money in the fund to be pro rated among the various holders of bonds and interest coupons. This question did not arise upon the pleadings, in which the substantial differences to be resolved between the said petitioner and the respondent thereto related to presentation and demand for payment, and which upon the evidence were all decided in favor of the respondent herein. Nor was there intervention by any other bondholder asserting a claim to a pro rata distribution. Appellant presents the question here upon the theory that as trustee of the fund raised by taxation upon property within the district, he is bound, in behalf of all those beneficially interested in the fund, namely, the bond and coupon holders, to resist the order of full payment to one creditor. He recognizes that mandamus is a legal remedy but "contends that the court, in exercising the discretion granted to it in connection with the issuance of writs of mandate must be governed largely by equitable principles"; that "equality is equity"; and that the trial court, by failing to observe this maxim, committed error. In making this argument, appellant relies strongly upon Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051, where a writ of mandate issued directing a pro rata payment to bondholders presenting interest coupons. But the court in that opinion calls attention to another recent California case, Bates v. McHenry, 123 Cal.App. 81, 10 P.(2d) 1038, 1043, where payment was directed under a writ of mandate to be made "in full, of any and all interest coupons, in the order in which they were presented for payment." The bonds in the latter case were issued by an irrigation district; in the former by a reclamation district. "The holder of a bond issued by a reclamation district," says the court, 126 Cal.App. 707, at page 719, 14 P.(2d) 1051, 1057, Rohwer v. Gibson, supra, "has simply one fund raised, as we have stated, out of which he may expect payment, and the taxing power is limited and circumscribed, and cannot constitutionally go beyond the benefits conferred upon the land," while "the moneys raised to pay the indebtedness of an irrigation district depend upon an inexhaustible taxing power which may be continued from year to year until all outstanding obligations are discharged. Under the reclamation laws this is not the case." But it is the case, in our opinion, under the Road District Improvement Act of 1907 (Act 3276, § 26, p. 1589, Deering's Gen.Laws 1931). Appellant does not deny that there is an unrestricted taxing power granted by that act, but contends that even though fully exercised, it does not, or would not result in the present case in an inexhaustible fund; therefore, that the court in an effort to do equity should have refused the writ. In support of this argument, we are cited to the opinion in Morris, Mather & Co. v. Port of Astoria, 141 Or. 251, 15 P.(2d) 385. On examination of that opinion, we find that the court took judicial notice, under the laws of Oregon, of a condition of threatened, if not actual, municipal insolvency, and, further, that an intervener, holding bonds or coupons equal in rank in every way with those of the plaintiff, asked not for payment in full, but for payment pro rata on the ground that "there is no inexhaustible source from which intervener may enforce payment of the principal and interest now due it on bonds and interest coupons of said defendant." 141 Or. 251, 15 P.(2d) 385, at page 386. No such pleading was filed in the instant case, nor was any proof offered upon that subject.

The Road District Improvement Act provides in section 26 thereof that "the board of supervisors may annually, at the time of making the said tax levy, transfer from the general road fund of the county, or from the fund of the road district or districts in which the road improvement district is situated, to the road district improvement interest and sinking fund, such amount as in the judgment of said board should be transferred." Deering's Gen.Laws, 1931, at page 1590. Here the Legislature has provided for an auxiliary system of securing necessary funds for the payment of debts of the road improvement district, if and when the county supervisors decide that such a course is fair and wise. Since these bonds were issued by the county of Ventura for the purpose of constructing roads within that county, and since the supervisors have the power to replenish from the general county road fund a depleted road improvement fund, it may be that proper consideration of the principle of an inexhaustible taxing power or an inexhaustible source of funds would require inquiry not merely into the financial conditions of the district, but also of the county. However that may be, we believe that on the showing before the court, the issuance of the writ was justified. This upon the principle briefly stated in the annotation to State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 900, 150 So. 508, appearing in 90 A.L.R., at page 724. This note calls attention to "a distinction drawn in some cases between a fund which represents the proceeds of an inexhaustible power of taxation, and a fund the sources of which are limited. (Cases.) * * * The idea underlying the distinction is that, where the fund out of which the obligations of the public body are to be paid is collected under an inexhaustible power of taxation, the payment in full of one creditor, though it may exhaust the fund, does not effect a preference in favor of such creditor to the prejudice of creditors unpaid, since, under such inexhaustible power of taxation, such a fund may be replenished until there is sufficient to pay all creditors in full; and that, therefore, in such cases, the creditor who first attempts to assert his claim must be paid in full, although such payment leaves for the time being nothing for the other creditors." (Cases.)

[2] Appellant complains because the trial court found "that there is now on deposit in said special fund sufficient funds to pay the total amount due on said bonds," while the testimony at the date of the trial indicated that the fund was approximately $3,000 short of the necessary amount. The findings were signed some little time after the hearing, and, of course, should reflect the condition shown by the evidence; however, the finding here is really on an immaterial matter. Under the decision of the court, the full amount is to be paid. If it is not on hand, then so much as is available in the fund shall be paid. We note that since this case was tried the Legislature has passed an act providing that: "When any bond or any interest coupon, payable from funds in the custody of the county treasurer, is presented to the treasurer for payment and is not paid for want of funds, the treasurer must indorse thereon 'Not paid for want of funds,' with the date of presentation and a serial number indicating the order of presentation and sign or stamp his name thereon. Such bonds and/or coupons, so indorsed and numbered, are entitled to preference as to payment out of the first moneys received in the treasury properly applicable to the payment thereof, in the order in which they were so presented and registered." Stats.1935, p. 994, § 1, chap. 280.

The bonds belonging to this petitioner were the first of that series to be registered, and we believe observance of the order of the court will not do violence to the rights of others.

[3] A final matter remains for disposition, the request of appellant that we review the action of the trial court denying a motion for a new trial. At the hearing of that motion appellant offered to produce as evidence not available at the date of trial, statistics relating to the financial condition of the road district involved, including assessments and delinquencies for the improvement as well as for general taxes. It does not appear that any of the figures applicable to the situation up to the date of trial could not have been obtained prior to that time by the exercise of reasonable diligence; therefore, as a sufficient ground for a new trial, the offer was bound to fail. No other grounds appearing to support the motion, it was in our opinion properly denied.

The judgment is affirmed.

We concur: **YORK, Acting P. J.; DORAN, J.**

17 Cal.App.2d 446

Ex parte HARPER.

Cr. 1536.

District Court of Appeal, Third District, California.

Nov. 12, 1936.

1. Extradition ⚿32

Allegation in support of extradition, that accused had no account at bank on which he drew check in attempt to obtain automobile, *held* sufficient to charge false pretense, as against contention it was necessary to allege check had been dishonored.

2. Extradition ⚿32

Allegation in support of extradition, that accused delivered check on bank at which he had no account in attempt to obtain automobile, but that he did not take automobile because he could not obtain license, *held* to charge attempt to obtain property by false pretenses, as against contention only preparation to commit crime was charged.

3. Extradition ⚿32

On extradition, it must appear to Governor of asylum state that accused is substantially charged with a crime against the laws of demanding state, by indictment or affidavit certified or authenticated by Governor of the demanding state; and that accused is a fugitive from justice of demanding state.

4. Extradition ⚿39

On application for writ of habeas corpus, question whether accused in extradition proceedings is substantially charged with crime against laws of demanding state is one of law which court must determine from face of demanding papers.

5. Habeas corpus ⚿92(2)

Where court found accused in extradition proceedings was substantially charged with crime of attempting to obtain automobile for check on a fictitious account against laws of demanding state, court was bound to discharge writ of habeas corpus without inquiry as to accused's guilt.

◆

Original habeas corpus proceeding on application of Frank F. Harper.

Writ discharged.

Charles Reagh, of San Francisco, and T. F. Peterson, of Crescent City, for petitioner.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

Petitioner here, in the state of Oregon, was charged with the crime of attempting to obtain property by false pretenses, and in order to avoid prosecution fled from Oregon to California. He was arrested in the county of Del Norte upon the request of the executive authority of Oregon, and the Governor of this state directed that petitioner be delivered into the custody of a representative of the state of Oregon and returned for trial. He now seeks his release by this writ of habeas corpus, and as ground thereof asserts, first, that the allegations in support of the demand for extradition do not state facts sufficient to show the commission of any crime, for the reason that the check which was the basis of the charge was never presented for payment to the bank on which it was drawn; and, secondly, that petitioner was guilty of nothing more than a preparation to commit a crime.

[1, 2] The answer to these contentions is adverse to appellant. It is not necessary in order to prove the fictitious or forged character of the check by evidence that it was presented to the bank and returned unpaid, for the testimony of the officers of the bank that the maker of the check had no account with the bank upon which the check was drawn is prima facie evidence of the fictitious character of the check (People v. Menne, 4 Cal.App.(2d) 91, 41 P.(2d) 383; People v. Sheridan, 136 Cal.App. 675, 29 P.(2d) 464) and as to the second point that the petitioner was guilty of merely a preparation to commit a crime, it appears that petitioner undertook to purchase a car from the complaining witness, gave him in payment thereof the check in question and was prevented from actually driving the car away because owing to the lateness of the hour it was impossible to get a license from the proper authorities to operate the car. This shows more than mere preparation to commit the act. Petitioner had done everything that he was called upon to do,

as far as the complaining witness was concerned, to consummate the crime.

However, a complete answer to the contention of petitioner is that we are not concerned with the question of his guilt or innocence. In re White (C.C.A.) 55 F. 54; In re Bruchman, 28 N.D. 358, 148 N.W. 1052; Ex parte Swearingen, 13 S.C. 74, 80; People ex rel. Carr v. Murray, 357 Ill. 326, 192 N.E. 198, 94 A.L.R. 1487; People ex rel. Hayes v. McLaughlin, 247 N.Y. 238, 160 N.E. 357; Chase v. State, 93 Fla. 963, 113 So. 103, 54 A.L.R. 271; In re Veasey, 196 N.C. 662, 146 S.E. 599; Black v. Miller [C.C.A.Cal.] 59 F. (2d) 687.

Our function is to determine whether or not petitioner is substantially charged with a crime against the laws of the demanding state. In Ex parte Shoemaker, 25 Cal.App. 551, 144 P. 985, 987, the court, quoting with approval from Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544, said:

[3, 4] "It must appear, therefore, to the Governor of the state to whom such a demand is presented, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified or authenticated by the Governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus."

[5] From an examination of the requisition and a copy of the statute attached to the return, with the violation of which petitioner is charged, it is apparent that petitioner is so substantially charged. We do not need to inquire into the facts constituting the guilt or innocence of the petitioner. In re Thurber, 37 Cal.App. 571, 174 P. 112; 12 Cal.Jur. 401.

Finding, therefore, as we do, that petitioner has been legally charged with a crime recognized by the laws of the state of Oregon, the writ must be discharged and the petitioner remanded to the custody of respondent, to be by him delivered to an authorized agent of the demanding state. It is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

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17 Cal.App.2d 510

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 5729.

District Court of Appeal, Third District, California.

Nov. 14, 1936.

As Modified on Denial of Rehearing Dec. 14, 1936.

1. Master and servant ⇨417(7)

In compensation proceeding wherein there was ample evidence to support findings of Industrial Commission and award of damages, appellate court *held* bound by such findings, though there was conflict in evidence regarding cause of injury to employee (St.1917, pp. 874, 875, §§ 65, 67).

2. Master and servant ⇨416

Insurer *held* not entitled to reopen an award of compensation for death of employee from injury sustained in fall while working with logging company, on ground that award was procured by fraud in concealing hospital record of case history not signed by employee which stated that injury had been sustained while employee was repairing an old house (St.1917, pp. 873, 874, 875, §§ 64, 65, 67).

3. Master and servant ⇨416

Insurer *held* not entitled to reopen, on ground of fraud, an award of compensation for death of employee from injury sustained in fall while working with logging company, because of statement of claimant at compensation hearing that she was quite certain that nurse had destroyed hospital record of employee, in absence of evidence that claimant had anything to do with concealment of record, though record which contained adverse statement regarding cause of employee's injury was later discovered (St.1917, pp. 850, 873, 874, 875, §§ 20(d), 64, 65, 67).

4. Master and servant ⚷417(8)

In compensation proceeding against insurer for death of employee from injury sustained in fall while working with logging company, absence of hospital record which stated that employee's injury was sustained while employee was repairing old house *held* harmless, where notes and testimony of agent of insurer concerning contents of hospital record had been admitted (St.1917, pp. 873, 874, 875, §§ 64, 65, 67).

5. Master and servant ⚷417(5)

Conclusions of Industrial Commission on fact questions being conclusive when supported by substantial evidence, order of commission denying rehearing will not be disturbed on certiorari if alleged newly discovered evidence is merely cumulative (St. 1917, p. 875, § 67).

◆

Proceeding under the Workmen's Compensation Law by Mrs. Bessie Herbert and others for the death of her husband and their father, opposed by the Associated Indemnity Corporation, insurer. To review an order of the Industrial Accident Commission refusing to reopen an award of compensation, the insurer brings certiorari.

Affirmed.

R. O. Purvis and Varnum Paul, both of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of certiorari to review an order of the Industrial Accident Commission refusing to reopen an award of compensation for the death of a mechanic as a result of injuries sustained in the course of his employment. The petition to reopen the cause was made under the provisions of section 20 (d) of the Workmen's Compensation Act (Stats. 1917, p. 831, and amendments, Deering's Gen.Laws of 1931, p. 2272, Act 4749).

It is contended the findings are not supported by the evidence; that the commission abused its discretion in denying the petition to reopen the award; that the award was procured by fraud; and that the petitioner is entitled to have the cause reopened to permit the introduction of newly discovered evidence in the character of a statement alleged to have been made by the deceased while he was a patient in the hospital, which report was fraudulently concealed and which the petitioner, after the exercise of due diligence was unable to procure or present at the original hearing of the cause.

September 8, 1933, Ralph Bertren Herbert was employed at Camp Lasco as a mechanic on a caterpillar tractor used in the business of logging, by the Lassen Lumber & Box Company. The petitioner was the insurer of the company. It was a cold morning. The metal guard of the machine was frosted and slippery. In attempting to pour water into the radiator of the tractor on the last-mentioned date, the employee slipped and fell, injuring his left thigh and the calf of his leg adjacent to his left shin. He exhibited the injury and complained of the pain as a result thereof to other persons. He limped about for several days in an effort to perform his duties, apparently suffering greatly on that account. He and his wife consulted Dr. Martin, the company physician at Susanville. Mrs. Herbert testified in that regard: "We both saw Dr. Martin on the 9th. * * * We went first to find him and he wasn't in his office, and we borrowed a conveyance to get into town. * * * He said, oh, it was only discoloration from a bruise. * * * We did what Dr. Martin told us to do up until he took sick on the third day of November. * * * Dr. Martin ordered me to give hot water and epsom salts." March 9, 1934, Mr. Herbert was still suffering from that injury and he visited Dr. Primasing of Courtland, who testified that the deceased came to him with a badly infected limb and told him "that he had been injured while working at the logging camp." The infection developed. The limb became badly swollen and very painful. His temperature was 102 or 103. The calf of the injured limb was inflamed with a granulated appearance down to the ankle. The tissue was a dull red color. There was a discharge from both sides of the knee and from the thigh. A blood count and X-ray pictures were taken. He was conveyed to the Sacramento Hospital. When he was told it was necessary to engraft skin over the impaired area, he left the hospital. He was soon returned to another Sacramento hospital for treatment. The injured limb appeared to have developed virulent streptococcus. It was followed by erysipelas. The germs of disease were apparently conveyed through the medium of the injured leg to the blood stream and impaired the tissue, the bone, and the internal organs. The limb became gangrenous. Blood poisoning followed, and he died as a result thereof on March 28, 1934.

The widow and minor children of the deceased filed a claim for compensation with the Industrial Accident Commission. After an elaborate hearing, the commission found that Ralph Bertren Herbert died as a result of a contused left thigh and calf and from an abrased left shin, received by a fall against the guard of a tractor in the course of his employment with the Lassen Lumber & Box Company, of which corporation the petitioner in this proceeding is the insurer. An award of damages was made to the widow and children of the deceased. The amount of the award is not challenged. This petitioner subsequently moved to reopen the award under the provisions of section 20 (d) of the Workmen's Compensation Act chiefly because of the discovery of new evidence consisting of the hospital record of the patient's statement, which statement, it is alleged, was fraudulently suppressed by those in charge of the hospital. This statement, which was contained in the hospital records of the case, was prepared by an attending physician of the hospital and was not signed by the patient. It contains the statement that the patient "suffered small skin abrasion in region of left knee about 2 weeks ago *while repairing an old house.*" No other cause of injury is stated in that report. In the petition to reopen the cause it was alleged the insurance company was unable, after the exercise of due diligence, to procure this hospital record at the time of the original hearing. It could not be found. It was asserted this record was fraudulently concealed. It was later discovered in the custody of the hospital. Based upon that record and the alleged fraud in concealing it, the petition for a rehearing was made. It was denied. The petitioner now seeks to review that order on the ground that it constituted an abuse of discretion on the part of the commission to deny the rehearing.

[1] While there is a conflict of evidence regarding the cause of the injury which resulted in the death of Ralph Bertren Herbert, there is ample evidence to support the findings of the commission and the award of damages, and this court is bound by those findings. In the case of Ethel D. Co. v. Industrial Accident Comm., 219 Cal. 699, 706, 28 P.(2d) 919, 922, it is said: "The findings themselves are not subject to review except in so far as they may have been made without any evidence whatever in their support. Even then a review of the findings is based upon the theory that the commission had no jurisdiction to make a finding entirely unsupported by evidence rather than upon the theory usually presented upon appeals that findings of a trial court are lacking in sufficient evidentiary support which imposes upon the reviewing tribunal the duty of weighing evidence to arrive at a determination of that proposition."

[2] There is no adequate proof that the award was procured by fraud in concealing the hospital record of the history of the case which contained an adverse statement regarding the cause of the accident which resulted in the death of Mr. Herbert.

It does appear that the hospital statement did recite that the patient "suffered small skin abrasion in region of left knee about 2 weeks ago *while repairing an old house.*" This is in conflict with the finding of the commission to the effect that the injury was sustained by deceased in falling from the tractor while in the course of his employment with the Lassen Lumber & Box Company. It is also true that the hospital statement was not available to this petitioner at the original hearing. The evidence indicates that the record was merely misplaced by the hospital authorities.

[3] Mrs. Herbert testified that her husband was taken to the hospital in an ambulance in a semiconscious condition which rendered him unable to understand or intelligently answer questions. She flatly and repeatedly denied that he was injured while repairing a house. She declared that he did not assist in repairing a house shortly before he was taken to the hospital or at all. She positively asserted that he was injured while he was working on a tractor for the Lassen Lumber & Box Company. She admitted that the hospital statement was shown to her and that she read it, and handed it back to Miss Underhill with the declaration that the statement upon which this petitioner relies regarding the cause of the accident, therein contained, was not true. There is no evidence that the hospital statement re-

mained in the custody of Mrs. Herbert. The record indicates that it was retained by the hospital. It is true that upon cross-examination she did say: "I *think* Miss Underhill destroyed his statement, I am quite certain she did." But she was evidently mistaken in that regard. It was later discovered by the authorities of the hospital in their possession. It had evidently been misplaced. Her mere statement that she was quite certain Miss Underhill destroyed the record, does not furnish satisfactory evidence of fraud on her part. There is no evidence that she had anything to do with its absence or concealment.

Moreover, the statement contained in the hospital record merely creates a conflict of evidence regarding the cause of the accident. The statement of the hospital record regarding the cause of the accident is merely cumulative. That statement regarding the cause of the accident was actually received in evidence at the original hearing. Mr. Fitzwilliam, an agent of the Associated Indemnity Corporation, at its request, made an investigation of the facts surrounding the claim. He personally examined the hospital record in question and took complete notes of its contents, including the statement of the cause of accident relied upon. Those notes of the contents of that hospital record were received in evidence. He was also a witness at that hearing and testified in accordance with his memorandum, to substantially the same statement which was contained in the record, as follows: "As history given by Mr. Herbert, that *he suffered a small abrasion of the left knee while repairing a house.*"

[4] It follows that the absence of the hospital record at the original hearing of the commission was harmless. All of the evidence which it contains regarding the cause of the accident, was adduced before the commission, and we must assume it was duly considered.

An aggrieved party to the proceedings before the Industrial Accident Commission for compensation may petition for a rehearing from the final order, decision, or award under the provisions of section 64 of the act. A rehearing may be granted on the following grounds, that: (1) The commission acted without or in excess of its powers; (2) the order, decision or award was procured by fraud; (3) the evidence does not justify the findings of fact; (4) the discovery of new evidence, material to the petitioner, which he could not with reasonable diligence have discovered and produced at the hearing; and (5) the findings do not support the order, decision, or award. Section 65, Workmen's Compensation Act. The commission has power under the provisions of section 20 (d) of the act to "rescind, alter or amend" any order, decision or award, "upon good cause appearing therefor," and to "review, grant or regrant, diminish, increase or terminate" the award upon a proper showing therefor.

[5] Upon application for a rehearing, the conclusions of the commission on questions of fact are final and conclusive when there is any substantial evidence to support them. Section 67, Workmen's Compensation Act. If the alleged newly discovered evidence is merely cumulative of the evidence which was actually adduced at the original hearing, the order of the commission denying a rehearing will not be disturbed on certiorari. Hart v. Industrial Accident Comm., 71 Cal.App. 542, 549, 235 P. 748.

In the present case there is ample evidence to indicate that the award was not procured by fraud. At least the evidence is not sufficient to warrant a finding that it was procured by fraud. The award is adequately supported by the findings which were adopted, and the alleged newly discovered evidence is merely cumulative.

The order denying a rehearing is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

17 Cal.App.2d 450

CRANCE et al. v. HEMS et al.

Civ. 1189.

District Court of Appeal, Fourth District, California.

Nov. 12, 1936.

1. **Appeal and error** ⟹102

Order sustaining demurrer to amended complaint without leave to amend was not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. **Appeal and error** ⟹864

On appeal from judgment rendered after sustaining general demurrer to complaint to which defendants had not specially demurred, it was unnecessary for appellate court to notice patent uncertainties and ambiguities in pleading.

3. **Trespass** ⟹40(4)

Complaint which alleged that trespassing tree roots killed, strangled, and completely destroyed plaintiffs' pecan trees and destroyed, curtailed, and diminished their farm crops and products *held* sufficiently to allege noxious nature of roots of trees so as to render complaint invulnerable to general demurrer.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Nicholas Crance and wife against Albert R. Hems and others. From a judgment rendered after sustaining of a general demurrer of defendants to plaintiffs' amended complaint without leave to amend, and from the order sustaining the demurrer, the plaintiffs appeal.

Appeal from order dismissed and judgment reversed, with directions.

Harry W. Horton, of El Centro, for appellants.

Hugh S. MacKinnon, of Calexico, for respondents.

MARKS, Justice.

[1] This is an appeal from a judgment rendered after sustaining a general demurrer of Albert R. Hems, Lena Hems, M. Rugg, and Jane Doe Rugg to plaintiffs' amended complaint without leave to amend, and from the order sustaining the demurrer. Such order is not appealable. Code Civ.Proc. § 963, as amended by St.1933, p. 2472.

It is alleged that plaintiffs are husband and wife, and are owners of land in Imperial county; that Mountain View Cemetery, a California corporation, had forfeited its charter; that at one time it had title to real property adjoining the land of plaintiffs; that defendants Albert R. Hems, Lena Hems, and Frank Rallings, during the three years last past before the filing of the amended complaint, were the owners of and in lawful possession and control of the cemetery property; that within the three years prior to the commencement of the action each defendant claimed the title to the property and had actual "possession, use, occupation, control and direction of said cemetery property," and in particular the trees growing thereon; "that all during the three years last past prior to the commencement of this action the defendants herein and each and all of them have been the owners of and in actual possession, occupation, control and direction of the" cemetery property; that defendants had planted, and have growing, a row of athel trees along the south line of five acres of the cemetery property adjoining the property of plaintiffs; that the roots of the athel trees have grown across the boundary line of plaintiffs' property and have extended into its soil; that plaintiffs have planted pecan trees upon their property, and farm crops between the rows of pecan trees; that "the pecan trees planted by these plaintiffs upon their said property have been killed, strangled and completely destroyed by the roots from said athel trees, and the farm crops and products planted by the plaintiffs upon their said property have been destroyed, curtailed and diminished" to plaintiffs' damage in the sum of $3,500. It is further alleged that the nuisance is continuing; that plaintiffs have demanded its abatement; and that defendants have refused to comply with the demand. Damages and an injunction are sought by plaintiffs.

[2] Defendants did not specially demur to the amended complaint. It is therefore unnecessary for us to notice the patent uncertainties and ambiguities in that pleading.

The case of Grandona v. Lovdal, 70 Cal. 161, 11 P. 623, 624, is decisive of the question presented for our decision. In that case the plaintiff alleged damages resulting from trespass of the roots, branches, and leaves, from trees growing on the adjoining property of defendant. In holding that the complaint alleged facts sufficient to constitute a cause of action, the Supreme Court said:

"The court below sustained a demurrer to the complaint. 'Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil.' Wood, Nuis. § 112, citing Commonwealth v. Blaisdell, 107 Mass. 234; Commonwealth v. McDonald, 16 Serg. & R. [Pa.] 390.

"So, it would seem, he may have abated the roots projecting into his soil, at least if he has suffered actual damage thereby.

"The general demurrer should have been overruled."

To the same effect are Stevens v. Moon, 54 Cal.App. 737, 202 P. 961, 963, Shevlin v. Johnston, 56 Cal.App. 563, 205 P. 1087, and Gostina v. Ryland, 116 Wash. 228, 199 P. 298, 18 A.L.R. 650.

Defendants admit the soundness of the rule announced in the Grandona Case, but contend that there is nothing in the amended complaint from which the inference can be drawn that athel trees or their roots are poisonous or noxious, and that such an allegation is necessary to properly plead a cause of action. This argument is answered in the case of Stevens v. Moon, supra, where it is said:

"In opposition to these views, respondent cites Corpus Juris, volume 1, page 1233, section 94, to the effect that: 'One adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature; his remedy in such case is to clip or lop off the branches or cut the roots at the line'—which she claims is supported by Grandona v. Lovdal, 78 Cal. 611, 616, 21 P. 366, 12 Am. St.Rep. 121. What is said in the excerpt from Corpus Juris is restricted to the roots or branches of a tree which is not poisonous or noxious; that is, where no injury results. In the instant case the allegations of the complaint clearly show that the roots of these trees were noxious, in that the fertility of the soil through which the roots permeated was destroyed to an extent that deprived plaintiff of the use of his land. In the Lovdal Case the judgment in favor of defendant therein was affirmed, because it appeared from the bill of exceptions that—'There was a conflict of testimony as to whether either the shade or roots of the trees injured plaintiff's land, and as to whether said roots prevented plaintiff from plowing his lands as near said fence as he otherwise could, and as to whether either the shade or roots of said trees had an injurious effect upon the crops.' In Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am.St.Rep. 30, it is said: 'The rule is general that, where one brings a foreign substance on his land, he must take care of it, and not to permit it to injure his neighbor. The law upon the subject is tersely expressed in the maxim, "Sic utere tuo et alienum non lædas."' See, also, Tuebner v. California St. R. R. Co., 66 Cal. 171, 4 P. 1162; Gardner v. Stroever, 89 Cal. 26, 26 P. 618; Schneider v. Brown, 85 Cal. 205, 24 P. 715; Sullivan v. Royer, 72 Cal. 248, 13 P. 655, 1 Am.St.Rep. 51, and Buckingham v. Elliott, 62 Miss. 296, 52 Am.Rep. 188, upholding the right of action where the roots of a tree on adjoining land invaded plaintiff's well, and wherein the court said: 'It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover the damages sustained from them. The right of action seems clear.'"

[3] In the instant case it is alleged that the trespassing roots "killed, strangled, and completely destroyed" the plaintiffs' pecan trees and "destroyed, curtailed and diminished" their farm crops and products. This allegation should be held to sufficiently allege the noxious nature of the roots to render it invulnerable to a general demurrer.

The appeal from the order is dismissed and the judgment is reversed with directions to the trial court to overrule the demurrer of the appearing defendants and to permit them a reasonable time within which to answer.

We concur: BARNARD, P. J.; JENNINGS, J.

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17 Cal.App.2d 561

PEOPLE v. SUTTON.

Cr. 1909.

District Court of Appeal, First District, Division 1, California.

Nov. 18, 1936.

1. Homicide 🔑18(1)

Statute providing that murder committed in perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem is first degree murder applies to all homicide committed in perpetrating or attempting to perpetrate such felonies, and not merely to such homicide as might be planned as part of execution of such felonies, and hence person killing another in perpetration or attempt to perpetrate such felonies is guilty of first degree murder whether killing is willful, deliberate, and premeditated or merely accidental (Pen.Code, § 189).

2. Homicide 🔑30(1)

Under statute, all persons engaged in perpetrating or attempting to perpetrate arson, rape, robbery, burglary, or mayhem are guilty of first-degree murder if intentional or accidental homicide is committed by one person so engaged, notwithstanding that all persons so engaged did not actually do the killing (Pen.Code, § 189).

3. Homicide 🔑18(3)

Defendant who conspired with drinking companions to burglarize an ark to get a gun *held* guilty of first-degree murder where owner of ark died as result of assault, committed in perpetration of burglary, notwithstanding that defendant may not have struck any of fatal blows (Pen.Code, § 189).

4. Criminal law 🔑739(1)

Whether accused is so intoxicated as to be unable to form specific intent which is element of crime charged is for jury (Pen. Code, § 22).

5. Homicide 🔑270

Degree of intoxication of defendant accused of first-degree murder for death of owner of ark as result of assault committed while defendant and his confederates were burglarizing ark *held* for jury (Pen. Code, §§ 22, 189).

6. Homicide 🔑338(1)

Admission of testimony that defendant stated that he did not remember striking deceased with gun holster or hatchet handle, which confederate had told witness had been used by defendant in striking deceased, *held* not prejudicial, where defendant admitted he was present when deceased was assaulted by one of confederates in perpetration of burglary, since, regardless of who struck blows, defendant was guilty of first-degree murder (Pen.Code, § 189).

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Fallie Sutton convicted for murder, and he appeals.

Affirmed.

E. Walter Lynch, of Pittsburg, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The appellant, Fallie Sutton, was charged jointly with Louis Sly and Le Roy Bussey with the crime of murder. They entered pleas of not guilty, and Sly and Sutton interposed additional pleas of not guilty by reason of insanity. The trio were tried together, and the jury found Bussey not guilty, and Sly and Sutton guilty of first-degree murder and assessed their punishment at life imprisonment. Thereupon Sly and Sutton withdrew their pleas of not guilty by reason of insanity, and, when arraigned for judgment, Sutton alone made a motion for new trial. The motion was denied, and each was sentenced to life imprisonment in conformity with the verdict of the jury. From said judgment of conviction and the order denying his motion for new trial Sutton alone prosecutes this appeal.

The victim of the killing, A. W. Knight, was eighty-five years old and quite feeble. For a number of years he had been living alone in a small ark on the waterfront bordering the town of Antioch, Contra Costa county, and Bussey lived in an ark next to and a few feet distant from Knight's ark. About 11 o'clock on the morning of February 15, 1936, a neighbor, while passing Knight's ark, noticed the front door thereof had been broken, and, fearing something might have happened to the aged man, she entered and found him in a dazed, stuporous condition and unable to speak, as the result of having been beaten about the face and head. She summoned the police, and he was removed to a hospital, where the extent of his injuries was ascertained. His face and head were a mass of swollen bruises and abrasions. His eyes were blackened, and swollen nearly shut; his ears were bruised, lacerated, and swollen, and there was a cut over one of them. His jaw was badly broken in several places, his skull was fractured, and he was bleeding at the mouth, nose, and ears. About a week later he succumbed to his injuries without having regained consciousness.

The evidence shows that, on the afternoon preceding the finding of Knight in the battered condition above described, the three defendants spent most of the afternoon and evening in Bussey's ark drinking claret wine; and at the outset of appellant's brief he admits that "as an aftermath of that party" he and his two companions entered Knight's ark and that Knight "was killed by one or more of said three people." He contends, however, that there is no legal proof that he personally struck any of the blows which caused Knight's death, and that therefore his conviction is not legally supported; and he further contends that in any event the evidence against him establishes no greater crime than manslaughter and that the judgment of conviction as to him should be reduced accordingly. There is no merit in either of the foregoing contentions.

After having established by ample evidence, direct and circumstantial, that the deceased met his death through criminal agency, the prosecution introduced its testimony to connect the three defendants with the commission of the crime. It consisted in part of the declarations and admissions made by them to the officers on the day following the assault and within a day or two thereafter; and, as the testimony was being received the trial court properly admonished the jury, repeatedly, that the declarations of one defendant made out of the presence of the others, subsequent to the assault, could be considered only as against the one making the declarations and must not for any purpose be taken as evidence against the other two. The final statements made by the respective defendants as to what happened that afternoon and evening were substantially alike, except as will be hereafter noted; and the following are the facts as they appear therefrom: The defendants met at Bussey's ark about noon, and, after consuming the first supply of wine which Sly had purchased, the defendants went up town and purchased more wine with money obtained from the sale of a gold-crowned tooth belonging to appellant which had been recently extracted. Returning to Bussey's ark, they continued to drink and ate some sandwiches which Bussey had purchased. When the second supply of wine was about gone, they talked about buying more, but evidently were without funds; whereupon Bussey suggested that Knight had a gun in his ark which he had no use for; and shortly after the suggestion was made they proceeded to get it. Sly went over to Knight's ark first, but was unable to gain entrance, and he talked with Knight through the closed door. That was before dark. Later on, during the evening, Sly again went over there for the same purpose. Appellant accompanied him, and they took an axe along with them; and when Knight refused to let them in or give them the gun they broke down the door with the axe and entered. Knight still refused to let them have the gun or tell them where he kept it, whereupon he was beaten about the head and face. He fell or was knocked down, but the beating continued until he could hardly speak. All he could do was to mumble his words. There is a conflict between the statements made by Bussey and appellant as to whether Bussey was with Sly and appellant when they entered Knight's ark. Appellant said he was, but Bussey claimed that he fell asleep in his ark while the drinking was going on and was awakened by the hollering over at Knight's ark; that he went over there, and found Knight lying partly on the floor and partly on the bed, wounded and bleeding; that appellant was standing beside Knight saying, "Come on and tell me where it is"; and the only reply the old man made was, "Go away, go away." Bussey then said, according to his statement, "What in hell is the matter," and, after lighting a match, he and appellant lifted Knight on the bed. About this time, so Bussey claimed, Sly, who was standing at the door of the ark, came in and said: "Didn't the old son-of-a-bitch tell you where it is yet?" and he told Bussey to look around for the gun, which he proceeded to do, but while he was doing so appellant and Sly began striking Knight about the head and face with their hands and with a hard leather gun holster about a foot long, and, according to Bussey, appellant also used a hatchet handle. Finally Bussey told them to let Knight alone, and to "get the hell out of there"; whereupon all of them left. Sly went home; but Bussey and appellant went uptown, and, after loitering around a liquor tavern for a while, they also went to their homes.

Appellant's final version of the affair as told to the officers did not differ materially from the foregoing except he claimed he did not strike Knight at all. He admitted breaking into the ark with Sly for the avowed purpose of getting the gun, and he also admitted being present when Knight was beaten for refusing to give up the gun or to reveal its whereabouts; but he claimed that Sly committed all of the violence.

In corroboration of the facts and circumstances thus established by the declarations of the defendants, the prosecution introduced the testimony of a number of disinterested witnesses. A man named Worrell who dropped in during the afternoon and drank some wine with the defendants, but who left about 5 o'clock, testified that just before he left Sly went over to Knight's ark, stating he was going to get the gun; and Worrell and two other witnesses testified that they saw Sly trying to get into Knight's ark and heard him talking to Knight through the closed door; and one of them heard him say as he returned to Bussey's ark, "You can't even scare the old fool." Another witness saw appellant and Sly smashing the door with the axe. Another heard appellant's voice inside Knight's ark saying, "Hurry up, hurry up"; and another heard some one inside say, "Where is that gun you old son-of-a-bitch, or I'll throw you in the river."

The evidence further shows that on the morning following the assault Bussey went up to appellant's house and told him "the old man was in a bad way"; and thereupon they proceeded to concoct an alibi. They were overheard doing so by an occupant of the house who was in an adjoining room and who testified at the trial. In this regard appellant and Bussey agreed to tell the officers, if questioned, that, while the three of them were walking down the railroad track, they met a stranger who inquired where Knight lived, and they pointed out the ark to him; that later on that night they happened to be passing Knight's ark and, hearing someone inside groaning, they went in and found Knight on the floor badly beaten; that they picked him up and put him on the bed, and then left. Later on that same morning the chief of police responded to the call to go to Knight's ark, and on the way back to his office he picked up Bussey and questioned him as to his whereabouts the night before, and Bussey related the story he and appellant had fabricated. Appellant was then sent for, and he told the chief of police substantially the same story. Both denied knowing who had assaulted Knight. Sly was then brought in and questioned, but he told an entirely different story. It coincided substantially with the facts afterwards established at the trial. After hearing Sly's story, the officers again interrogated Bussey and appellant, and when they were informed of Sly's confession they admitted that the previous story they had told was false and was concocted by them under the circumstances above stated. Thereupon they changed their stories to conform substantially with Sly's; but it was not until the next day or two that most of the truth of the affair was ascertained.

The defendants did not take the witness stand, nor did they offer any testimony to contradict the prosecution's evidence relating to the circumstances of the assault. Bussey and appellant introduced a number of character witnesses; and appellant offered the testimony of a dentist as to the possible effect of the excessive use of alcoholic liquors upon the mental condition of a person suffering from infected teeth. Sly introduced no evidence whatever.

[1-3] By statute it has long since been the declared law of this state that all murder committed in the perpetration or attempt to perpetrate arson, rape, robbery,

burglary, or mayhem is murder of the first degree (Pen.Code, § 189); and therefore, in conformity with the terms of the statute, it has been held repeatedly that, if in the perpetration or attempt to perpetrate one or more of the felonies above named a person kills another, he is guilty of first-degree murder by force of the statute whether the killing be willful, deliberate, and premeditated, or even accidental, because the statute applies to all homicides so committed and not merely to such as might be planned as part of the execution of the felony intended. See cases cited in 13 Cal.Jur. pp. 600–602. As will be seen, the evidence in the present case shows that the assault which resulted in Knight's death was committed in perpetrating a burglary; that is, by forcibly entering Knight's ark with the burglarious intent either to steal his gun or take it from him unlawfully by the use of force and fear. Therefore the evidence was of such a nature as to support no other conclusion than that the crime was murder of the first degree. Furthermore, it is well established that where two or more persons conspire to commit any one of the felonies designated in said section 189, and in furtherance of the common purpose a homicide is committed by one of the confederates, all persons so engaged in the criminal enterprise, whether or not they actually do the killing, are as accountable to the law as though their hands had intentionally given the fatal blow or fire the fatal shot; and under such circumstances the jury has no option but to render a verdict of murder in the first degree whether the killing was intentional or accidental. People v. Perry, 195 Cal. 623, 234 P. 890; People v. DiDonato, 90 Cal.App. 366, 265 P. 978. In the present case there is ample evidence to sustain the conclusion that appellant actually participated in the violence which resulted in Knight's death; but, even assuming he did not personally strike any of the fatal blows, he is nevertheless equally as guilty as the one who did, because, as shown, he conspired to burglarize Knight's ark for the purpose of getting the gun, and therefore the moment he entered into the criminal enterprise the law fastened on him the intent which made any killing in the perpetration of the burglary or immediately connected therewith, or which resulted therefrom as a natural and probable consequence of the unlawful enterprise, murder of the first degree.

[4, 5] Nor is any act committed by a person while in a state of voluntary intoxication less criminal by reason of his having been in such condition. Pen.Code, § 22. As provided in said section 22, when a specific intent is an element of a crime, it is a matter for the jury to determine whether the accused was so intoxicated as to be unable to form that intent. People v. Sainz, 162 Cal. 242, 121 P. 922; People v. Murphy, 1 Cal.(2d) 37, 32 P.(2d) 635. Here the people concede appellant was drinking excessively on the afternoon in question, but the evidence is conflicting as to the state of his intoxication. Witnesses who saw him in the liquor tavern shortly after the assault was committed testified that, although it was apparent he had been drinking, he was not drunk; furthermore, the next morning his recollection as to what happened the afternoon and evening before was sufficiently clear to permit him to concoct an alibi, and afterwards to give a corrected, detailed account of what occurred. Therefore, in view of the conflict, the question of the degree of appellant's intoxication at the time of the assault was one of fact for the jury to pass upon; and by its verdict it resolved the conflict against appellant.

[6] The assistant district attorney in relating the declarations made to him by the defendants testified over appellant's objection that during his last interview with appellant and Sly, which was had in the presence of Bussey, he informed them that Bussey had told him that they struck Knight with the gun holster, and that appellant had also used a hatchet handle; and he asked them if "that was right." Sly admitted using the holster, but appellant replied that he did not remember striking Knight with the holster or hatchet. Appellant assigns the testimony as error. It is evident, however, that it cannot be deemed prejudicial, for the reason that the evidence proves beyond question that appellant entered into a criminal conspiracy to commit a burglary, and he admits being present when Knight was assaulted by Sly in the perpetration of that crime. Therefore, as already pointed out, regardless of whether appellant personally struck any of the fatal blows, he was equally as guilty of first-degree murder as the one who committed the violent acts.

After an examination of the entire record, including the evidence, it is our conclusion that appellant was fairly tried, and that the verdict as to him has not resulted in a miscarriage of justice. The judgment of conviction and order denying the motion for new trial are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

McCANN et al. v. HOFFMAN et al. *

Civ. 10178.

District Court of Appeal, First District, Division 2, California.

Nov. 13, 1936.

Hearing Granted by Supreme Court Jan. 11, 1937.

1. Automobiles 🔑244(20)

Evidence which allegedly showed that parties had agreed to share expenses of operating defendants' automobile as well as other expenses of pleasure trip *held* insufficient to support finding that parties were not "guests" of defendants while riding in their automobile, as respects liability for injuries sustained in automobile collision (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

2. Automobiles 🔑245(24)

In action for injuries sustained when automobile in which plaintiffs were riding as guests collided with another automobile at street intersection, evidence disclosing that host was driving at rate of 60 miles per hour at time of accident, that guests failed to warn driver of danger, and that driver had seen other automobile in time to have avoided collision, *held* insufficient for jury on issue of willful misconduct (St.1931, p. 1693, § 141¾, p. 2120, § 113).

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Audrey McCann and another against Clifford P. Hoffman and another, doing business under the firm name and style of Valley Electric Company. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Sloss, Turner & Finney, of San Francisco, and Jensen & Holstein, of San Jose, for appellants.

Bronson, Bronson & Slaven, of San Francisco, Maurice J. Rankin, of San Jose, and John H. Painter, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs, who are husband and wife, sought to recover damages arising out of personal injuries sustained by plaintiff Audrey McCann on August 4, 1934. At the close of plaintiff's case, a motion for nonsuit was made by defendants Clifford P. Hoffman and Claire Hoffman upon the ground that the evidence affirmatively showed that plaintiffs were riding as guests of said defendants and that there was no evidence to show any willful misconduct in the operation of the automobile of said defendants. The trial court made its order granting said motion for nonsuit and from the judgment entered thereon, plaintiffs appeal.

[1] Appellants contend that the trial court erred in granting said motion for nonsuit, but in our opinion this contention is without merit. It is first argued that there was substantial evidence to show that appellants were not guests within the meaning of the guest statute (California Vehicle Act, § 141¾; Stats. 1931, p. 1693). The uncontradicted evidence shows that the two couples were on a pleasure trip intending to spend a few days at Rio Del Mar. Assuming, without deciding, that there was sufficient evidence to show that the parties had agreed to share the expenses of operating respondent's automobile, as well as other expenses of the trip, such evidence was insufficient to support a finding that appellants were not the guests of respondents while riding in respondent's automobile. Rogers v. Vreeland (Cal.App.) 60 P.(2d) 585. Appellants concede that the cited case is contrary to the position taken by them, but they argue that "the decision is an incorrect application and interpretation of the statute." They criticize the decision for its failure to refer to other decisions of the courts of this state, which decisions are cited in support of appellants' argument. Lerma v. Flores (Cal.App.) 60 P.(2d) 546; State Compensation Insurance Fund v. Dalton, 13 Cal.App.(2d) 284, 56 P.(2d) 962; Piercy v. Zeiss, 8 Cal.App.(2d) 595, 47 P.(2d) 818; Haney v. Takakura, 2 Cal.App.(2d) 1, 37 P.(2d) 170; Riley v. Berkeley Motors Inc., 1 Cal.App.(2d) 217, 36 P.(2d) 398; Woodman v. Hemet Union High School Dist., 136 Cal.App. 544, 29 P.(2d)

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*For subsequent opinion see 70 P.2d 909.

257; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.(2d) 159; Sullivan v. Richardson, 119 Cal.App. 367, 6 P.(2d) 567; Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 5 P.(2d) 930; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841. We are of the opinion that the holding in Rogers v. Vreeland, supra, is sound and that all of the above-mentioned cases are clearly distinguishable. The Rogers Case, like the case before us, involved facts showing that the injured party was riding in the automobile on a trip taken by the parties solely for their pleasure. It is sufficient to point out that the cases cited by appellants involved either facts showing that the injured party was riding in connection with some business transaction or facts showing that the injured party was riding more as a matter of right rather than as a matter of hospitality. In the present case, appellants were not riding with respondents in connection with any business transaction, nor were they riding with respondents as a matter of right. Appellants were invited by respondents to accompany them on this pleasure trip, and the mere fact that appellants may have agreed, expressly or impliedly, to pay a portion of the operating costs of the car, was insufficient to destroy their status as guests of respondents. Rogers v. Vreeland, supra, and cases cited therein.

Appellants further argue that even assuming that they were guests of respondents, there was sufficient evidence to go to the jury on the issue of alleged willful misconduct of respondent Clifford P. Hoffman. The parties left San Mateo for Rio Del Mar, and said respondent drove at less than 45 miles per hour until he turned off the main highway onto Fremont avenue. He then gradually increased his speed, and there was evidence to show that he was driving 60 miles per hour at the time of the accident. Said accident occurred at the intersection of Fremont avenue and Grant road, which intersection is completely surrounded by orchards. Despite the alleged speed, no objection was made thereto or to the manner in which the car was being driven. The testimony showed that said respondent was driving in a straight line on the right-hand side of the road and appellant John McCann testified that said respondent was "looking straight ahead as he was driving toward the intersection." The collision occurred at said intersection when respondents' car struck another automobile which was traveling at about 40 or 50 miles per hour along Grant road. Appellant John McCann further testified that there was no diminution of the speed of either car until just before the collision when said respondent applied the brakes hard and swerved slightly to the left. Said appellant also claimed that he saw the other car through the trees when respondents' car was about 75 yards from the intersection. On the taking of his deposition, he testified that this distance was only 100 feet, but, in any event, he did not warn said respondent of the danger. There was no evidence to show that said respondent even knew of the presence of the other car until just before entering the intersection. Appellants lay stress upon the pleadings to show that said respondent admitted seeing the other car "as he approached said intersection." This admission, however, is of no consequence, as said respondent was approaching said intersection up to the time he entered it, and there is no indication as to the exact time or place to which the pleadings relate. It was stipulated upon the trial that the intersection was one at which the driver's view was obstructed within the meaning of section 113 of the California Vehicle Act (St.1923, p. 553, § 113, as amended by St.1931, p. 2120), and that there was a sign on Fremont avenue, approximately 275 feet west of the intersection, indicating a speed limit of 15 miles per hour. There is nothing in the record, however, to show that said respondent saw said sign or that he even knew of the presence of the crossroad until just before entering the intersection.

[2] While the foregoing evidence would have been sufficient to sustain a finding of negligence, we are of the opinion that said evidence was wholly insufficient to go to the jury on the issue of willful misconduct. McLeod v. Dutton, 13 Cal.App.(2d) 545, 57 P.(2d) 189; Horn v. Volko, 13 Cal.App. (2d) 582, 57 P.(2d) 175; Hall v. Mazzei (Cal.App.) 157 P.(2d) 948; Weir v. Lukes, 13 Cal.App.(2d) 312, 56 P.(2d) 987; Halter v. Malone, 11 Cal.App.(2d) 79, 53 P.(2d) 374; Parrett v. Carothers, 11 Cal.App.(2d) 222, 53 P.(2d) 1023; Newman v. Solt, 8 Cal.App.(2d) 50, 47 P.(2d) 289; Ceikin v. Goldman, 5 Cal.App.(2d) 162, 42 P.(2d) 719; Lennon v. Woodbury, 3 Cal.App.(2d) 595, 40 P.(2d) 292. It would serve no useful purpose to review the facts in the cited cases or other cases on the subject, as it has been frequently stated that each case must stand upon the particular facts involved therein. We may state, however, that the showing made here was not as strong as

that made in McLeod v. Dutton, supra, in which this court reversed a judgment in favor of plaintiff. In their reply brief appellants indicate that they do not agree with the decisions in some of the cases above cited, but, be that as it may, we are satisfied that both reason and authority support the trial court's ruling that the evidence in the present case was insufficient to show willful misconduct on the part of said respondent.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

17 Cal.App.2d 520

BRAINARD v. BRAINARD et al.

Civ. 10106.

District Court of Appeal, First District, Division 2, California.

Nov. 16, 1936.

1. Principal and agent 🔑119(5)

Whoever insists that he has discharged an admitted debt by paying it to some one other than the creditor ordinarily has burden of proving that person to whom payment was made was authorized by creditor to receive such payment.

2. Principal and agent 🔑119(5)

Rule that party claiming to have discharged admitted debt by paying some one other than creditor has burden of proving authority of person to whom payment was made to receive payment is applicable to discharge of liability of insurer under life policy.

3. Insane persons 🔑40

Payment of money due under life policy to guardian of the person of insane beneficiary did not discharge insurer's liability, and evidence of such payment was properly excluded in action on policy (Probate Code, §§ 1480, 1500, 1501).

4. Statutes 🔑206

In construing statute, court must give some force and effect to every word.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Gertrude Blair Brainard, an insane person, by Herman Benedix, her guardian, against Richmond A. Brainard, the Metropolitan Life Insurance Company, and others. From an adverse judgment, the Metropolitan Life Insurance Company appeals.

Affirmed.

Knight, Boland & Riordan, F. Eldred Boland, J. W. Radil, and Richard M. Sims, Jr., all of San Francisco, for appellant.

Lloyd C. White, of Salinas, for respondent.

STURTEVANT, Justice.

As guardian of Mrs. Brainard, an insane person, the plaintiff recovered a judgment against the defendant on a life insurance policy, and from that judgment the defendant has appealed. The defendant makes just one point. It complains because the trial court refused to receive certain evidence which it claims constituted a complete defense, to wit, payment of the claim sued on by the plaintiff.

Prior to May 29, 1932, Raymond L. Brainard and Gertrude B. Brainard were husband and wife, residing at Santa Cruz. On the date last mentioned Mr. Brainard died. For some years he had been an employee of the Southern Pacific Company, and as such he was insured under a group policy by the defendant insurance company. At the time of his death and for some period prior thereto Mrs. Brainard was an invalid suffering from some mental disorder. She had been adjudged an incompetent person and from time to time she was committed to Agnew State Hospital. Mr. and Mrs. Brainard, the record discloses, had at least one child, Richmond A. Brainard. As recited above, Mr. Brainard, Sr., died May 29, 1932. On June 3, 1932, Richmond A. Brainard, the son, filed a petition alleging that Gertrude B. Brainard had been adjudged an insane person and committed to Agnew, but was out on probation. He further alleged that she did not on said date own any property and he asked to be appointed guardian of her person. On June 24, after notice given and hearing had, said petition was granted and thereafter an order was signed appointing Richmond A. Brainard such guardian and later he duly qualified and commenced to act as such. In the month of June, 1932, Richmond A. Brainard commenced to take steps looking toward the collection of the amount due on his father's insurance policy. The policy specified the sum of $2,400 and provided: "If death occur while the employee is in the employ of the employer or prior to the monthly due date of the group policy next following the date the employee actually left the employ of the employer, and while the group policy is in force, the amount of insurance, if any, then in force thereunder on said employee shall be paid to Gertrude Blair Brainard beneficiary." Such steps were taken that on the 14th day of July, 1932, $2,401.68 was paid by the defendant company to "Richmond A. Brainard guardian of Gertrude Blair Brainard an insane person."

After receiving payment from the defendant, Richmond paid to his mother $1.69 and no more. He then absconded, and at the time of the trial his residence was unknown.

[1-3] The plaintiff contends that the evidence of payment to Richmond was properly excluded. Whether it was or was not is the sole question presented by this record. The general rule applicable to payments to a third person is well settled. In 1 Mechem on Agency (2d Ed.) p. 667, the author states: "Whoever insists that he has discharged an admitted debt, by paying it to some one other than the creditor himself, has ordinarily the burden of proving that the person to whom he paid it was authorized by the creditor to receive such payment." In 48 C.J. 685, it is said: "Where payment is made to a person other than the creditor, the debtor has the burden of showing that the person to whom payment was made was authorized to receive payment, or that the creditor has so acted as to be estopped to deny the existence of such authority." The rule is stated more completely in Whalen v. Vallier, 46 Idaho, 181, 266 P. 1089, at page 1092. The rule as stated by Mechem was cited and followed in Schomaker v. Petersen, 103 Cal.App. 558, 285 P. 342. Furthermore, the defendant has cited nothing to the contrary and another general rule is that: "The rules applicable generally to the discharge of obligations for the payment of money by payment control as to the discharge by payment of the liability of the company under a policy of insurance." 33 C.J. 42.

The defendant does not question the rules just stated. However, it asks us to hold that under our statutes it was authorized to make the payment to Richmond A. Brainard in complete discharge of its liability on its policy. It quotes and italicizes section 1501 of the Probate Code as follows: *"Every guardian* must pay the ward's just debts out of the ward's personal estate and the income of his real estate, if sufficient; if not, then out of his real estate upon selling or mortgaging or giving a deed of trust upon any of his real property as hereinafter provided. *He must demand, sue for, and collect all debts due to the ward,* or, with the approval of the court, he may compromise the same and give discharges to the debtor, on receiving a fair and just settlement; and he must appear for and represent his ward in all actions and proceedings, unless another person is appointed for that purpose." (Italics ours.) It argues that *"Every guardian"* means every guardian of the person, of the estate, or of both. It also argues that the expression *"He must demand, sue for, and collect all debts due to the ward,"* applies to all guardians of each of said classes. Those arguments we think are too broad, and under well-settled rules of statutory construction may not be sustained. Apparently copying from chapter 79 of the Revised Statutes of Massachusetts (1836), our Legislature in 1850 adopted "An act to provide for the appointment and prescribe the duties of guardians." Stats.1850, p. 268. That statute was very full and complete. In section 1 it provided for the appointment of guardians of minors, and in section 13 it provided for the appointment of guardians of incompetent persons. As to the latter appointments section 13 provided that the appointment should be of the person and estate. No provision was made for the appointment separately of the person or estate of either a minor or an incompetent person. Under section 14 every person so appointed was required to furnish a bond. Prior to any amendments it is clear that a guardian of the person only was not provided for and that such person would have had no rights. However, the act of 1850 was codified. Code Civ.Proc.(1872) part 3, title 11, c. 14. Sections 13 and 14 of the act of 1850 became respectively sections 1764 and 1765 of the Code of Civil Procedure. No material change was made. In 1911 both sections were amended (St. 1911, pp. 1190, 1191). Section 1765 was amended to read as follows: "Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward and the management of all his estate, or the care and custody of the person of his ward or the management of all his estate, *according to the order of appointment, until such guardian is legally discharged,* and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor." The expression which we have italicized was added. It but expressly provides what was before implied. However, it contains nothing to the effect that a guardian of the person has any authority over the property of his ward. As to the use of the word *"Every"* at the beginning of section 1765, the arguments in the briefs are not at all convincing. The Legislature might have written, "Every guardian appointed of the person and estate has the care and custody of the person of his ward and the management of all his estate; and every guardian appointed of the estate has the care and management of all his estate; and every guardian appointed of the person has the care and custody of his ward, until such guardian is legally discharged." We submit such expressions would have been more prolix, but the meaning would have been the same. Furthermore, the word "Every" has been the initial word of that portion of the statute since its enactment in 1850. As we have shown above, prior to 1911 it could have no application to the guardian of only the person of an incompetent, for there could not be such a position.

Again, defendant quotes from section 1501 of the Probate Code the words "He must demand, sue for, and collect all debts due to the ward," and argues such expression means that Richmond A. Brainard had such rights. We think not. That clause was in section 16 of the act of 1850 and did not then have, and has not since been given, the meaning claimed by the defendant.

[4] Finally, if the contention of the defendant is sustained, it is in effect to hold that section 1500 of the Probate Code is to be read as though it were worded as follows: "Every guardian has the care and custody of the person of his ward and the management of his estate until legally discharged. * * *" Such construction violates the statutory rule which requires us to give some force and effect to every word. It gives no force or effect to the omitted words. Moreover, it annihilates the amendments of 1861 and 1911.

As recited above, Richmond A. Brainard's appointment was that of guardian of the person of his mother. By the order of appointment he was not required to give a bond and did not do so. The defendant asserts the omission was mere error. In re Chin Mee Ho, 140 Cal. 263, 73 P. 1002. We think it was not error. It was in compliance with the amended statute. When section 1765 of the Code of Civil Procedure was transferred to the Probate Code, the first part of the first sentence was made the first part of section 1500 of that Code. All reference to the giving of a bond by such a guardian was omitted. As to other guardians, provision was made in section 1480 showing the amount of the bond is to be measured by the value of the personal property, etc. The change in the statute is important. As to a guardian of the person, a bond is of little, if any, importance, and many statutes do not require one. Woerner's Guardianship, p. 120. As to a guardian of the estate, the giving of the requisite bond is a condition precedent. Murphy v. Superior Court, 84 Cal. 592, 24 P. 310. As said by the Court of Appeals of New York in Wuesthoff v. Germania Life Ins. Co., 107 N.Y. 580, 14 N.E. 811, at page 813: "Obviously, the object of the legislature, in requiring the guardian to give security, was the protection of the ward. The legislature was dealing with the interests of a class especially entitled to the protection of the law. It was a wise safe-guard to require that a guardian, before intermeddling with the estate of the ward, should give security for its faithful administration, unless the parent dispensed with this precaution." But to uphold the contention of this defendant is to hold that the Legislature repealed the provision for a bond and expressly provided that plaintiff's ward could legally be wronged by her guardian as shown by this record. We think the Legislature did not do so.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

17 Cal.App.2d 551

FELKER v. REDLANDS WEST COAST CORPORATION et al.

Civ. 1631.

District Court of Appeal, Fourth District, California.

Nov. 17, 1936.

Hearing Denied by Supreme Court Jan. 14, 1937.

1. Appeal and error ⚷1008(1)

Whether theater corporation and its employees were negligent in failing to provide adequate safeguards for public, while design on sidewalk was being repainted in same colors, where light barriers were placed opposite each side of theater across sidewalk compelling pedestrians to step out on street, and hence were liable for injuries sustained by pedestrian who stepped around barrier and slipped on paint, *held* for trier of facts.

2. Appeal and error ⚷1008(1)

Whether 72 year old pedestrian who stepped around light barrier across sidewalk, erected by theater corporation and its employees while it was having design on sidewalk repainted in same colors, was contributorily negligent on ground that he did not look to see where he was going, and that he must be presumed to have seen what was in range of his sight, *held* for trier of facts.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Charles Felker against the Redlands West Coast Corporation and others. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissent.

Sidney A. Moss, of Los Angeles, for appellants.

R. Bruce Findlay, of San Bernardino, and Jay C. Sexton, of Redlands, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. The plaintiff was injured when he slipped and fell as a result of stepping upon some wet paint which had been recently applied to a sidewalk in front of a theater operated by the corporate defendant in the city of Redlands. From a judgment in favor of the plaintiff, the defendants have appealed.

The court found that the individual defendants, while acting as employees of the corporate defendant, applied paint to a portion of the sidewalk on Cajon street in front of the theater; that a city ordinance required that a permit to so paint a sidewalk be first obtained; that no such permit was obtained in this instance; that while said defendants were painting the sidewalk and while the paint was still wet, they negligently failed to erect proper barriers and safeguards around the same to protect the public from the dangers thereof; that they did stretch an "electric wire" across the sidewalk at the south line of the theater building and another thirty-six feet to the north thereof at the north line of the theater building; that a pedestrian lane eight feet in width extends across Cajon street from the center of the front of the theater building; that the outer edge of the sidewalk was not protected by any barrier of any kind; that a large marquee extended about nine feet over the sidewalk the entire width of the theater building; that the paint which was being applied to the sidewalk consisted merely of new paint being applied to a design which had been painted there prevously and of the same color, the purpose being merely to brighten up the design and not to change the color or character thereof; that it was difficult in the light under the marquee at the time of the accident to distinguish between those portions of the sidewalk where fresh paint had been applied and those portions to which it had not been applied; that at the time in question the plaintiff, a man 72 years of age, lawfully attempted to walk over and across that portion of the sidewalk in front of the theater building which had not been properly barricaded and stepped upon a portion thereof which had been freshly painted and which was not easily distinguishable from the other portion, and slipped and fell upon said wet paint; that as a direct result of the negligence of the defendants the plaintiff sustained certain named injuries; that at the time the plaintiff attempted to walk across said portion of said sidewalk the individual defendants were applying paint to the floor of the foyer at a point about two feet back from the inside line of the sidewalk; that the plaintiff was not aware that a portion of the sidewalk had been painted and there was nothing which would have called the same to his attention; that the plaintiff, because of a hip ailment in his youth, had for 40 years been compelled to walk with a cane and was using his cane at that time; that when the plaintiff was walking over that portion of the sidewalk in front of the theater building the individual defendants saw him in time to have warned him of the danger; that they knew or should have known that he was unaware of the danger; that they neglected to warn him until he had stepped upon the paint and was falling; and that it is not true, as alleged in the answer, that the plaintiff's injuries were sustained as a result of his failure to exercise ordinary care or caution for his own safety.

[1] The first point raised is that the evidence is not sufficient to show negligence on the part of the appellants, the only argument being that they were merely required to give reasonable notice to the public that the work was being carried on and that such notice was given in this case. The street side of the sidewalk was left unprotected, although a marked pedestrian lane opposite the center of the building constituted an invitation to pedestrians to come upon the sidewalk between the light barriers which had been placed opposite each side of the building. A pedestrian, seeing the sidewalk thus open along the street side, might reasonably have thought that some object was to be moved out of or into the building and might reasonably have considered it safer to pass around the two barriers separately than to take a chance on walking along that part of the street reserved for vehicular traffic. The paint, applied only to certain portions of the sidewalk, without changing the color or the design previously painted thereon, created a special hazard which called for adequate safeguards. The question presented was one of fact. The findings in this regard are fully supported by the evidence and it cannot be said, as a matter of law, that the appellants were not negligent.

[2] It is next argued that the respondent was guilty of contributory negligence as a matter of law. It is contended that the respondent must be presumed to have seen what was in the range of his sight and that he admitted that he did not look to see where he was going. When asked, "You could see beyond this barricade, there was nothing to obstruct your view, was there?" he replied: "No. If I had looked I could have seen." Again, he was asked: "When you reached this barricade, if you had looked you could have seen beyond it?" He replied: "I could see beyond it if I had looked, yes, but I stated I was concerned more where I was walking." When asked what he thought the barricade was there for, he replied: "It might have been there for any purpose. There wasn't anything there to indicate the sidewalk was not safe to walk on. If I thought anything, I might have thought they were moving in or moving out something." He further testified that he saw the first barricade when he came to it but did not see the other until after he had fallen, and that as he came to the first barricade "I was concerned with my immediate surroundings there. I did not look very far ahead, I couldn't do that." When asked why he could not do that, he replied: "From the fact I had to look where I put my cane and where I stepped." He also testified that after he went around the first barricade and stepped back on the sidewalk the light was deficient and he could not see the paint. One of the individual appellants testified: "It was light enough for an ordinary person to see fairly well." Whether or not the respondent was guilty of contributory negligence is purely a question of fact, and the trial court's finding thereon is controlling.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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17 Cal.App.2d 331

MASTRO v. CITY OF SAN DIEGO.

Civ. 1946.

District Court of Appeal, Fourth District, California.

Nov. 4, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

1. Automobiles ⚿175(5)

Operator of authorized emergency vehicle, who is given special right of way privileges when responding to an emergency call if sounding a siren, waives special privileges unless he gives audible warning (St. 1923, p. 563, § 144; St.1931, p. 2101, § 8½; St.1929, p. 542, § 132).

2. Automobiles ⚿245(19)

In pedestrian's action against city for injuries sustained when struck by automobile which was forced over curb and on sidewalk by city police ambulance, which was answering emergency call, whether ambulance sounded siren near point of accident to warn other vehicles of its approach *held* for jury (St.1923, p. 563, § 144; St.1931, p. 2101, § 8½; St.1929, p. 542, § 132).

3. Trial ⚷82

Permitting rebuttal testimony by four of plaintiff's witnesses *held* proper, where only general objection to testimony of one rebuttal witness was made on ground witness should have been called in case in chief and no objection was made to any specific testimony, as against contention court permitted plaintiff to introduce greater part of her evidence in chief under guise of rebuttal testimony.

4. Trial ⚷67

Court has power on request of a party to permit further testimony after plaintiff's case in chief is closed, although such testimony is not strictly rebuttal.

5. Trial ⚷116

In pedestrian's action against city for injuries sustained when struck by automobile which was forced over curb and on sidewalk by city's police ambulance, which was answering emergency call, permitting plaintiff's counsel in argument to jury to place on blackboard mathematical calculations with respect to rates of speed of automobiles in terms of feet per second *held* not abuse of discretion (St.1923, p. 563, § 144; St.1931, p. 2101, § 8½; St.1929, p. 542, § 132).

6. Damages ⚷132(7)

$5,500 for woman 53 years old, who suffered broken right leg, badly bruised left leg, and impaired function of finger, and who was required to remain in bed for eight weeks and at time of trial, one year and eight months after injury, was unable to walk without crutches, and whose loss of earning capacity would, according to some evidence, be between $7,000 and $17,000, *held* not excessive.

7. Trial ⚷260(1)

Refusal of requested instruction which was covered by given instruction *held* proper.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Sara Mastro against the City of San Diego. From an adverse judgment, the defendant appeals.

Affirmed.

C. L. Byers and D. L. Ault, City Attys., and James J. Breckenridge, Deputy City Atty., all of San Diego, for appellant.

A. T. Procopio and John Coker, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries. The plaintiff was injured about 6 o'clock p. m. on November 24, 1933, as she was standing on the sidewalk at or near the intersection of Market street and Thirty-Third street, in the city of San Diego. The accident occurred when a police ambulance, which was being driven north on Thirty-Third street, collided with an automobile which was being driven east on Market street, as a result of which the private automobile ran over the curb and struck the plaintiff. Shortly before the accident the ambulance was driven out Market street in an easterly direction and turned south on Thirty-Third street. The driver found Thirty-Third street closed at a point two blocks south of Market street and, turning around, returned to Market with the intention of proceeding thereon to another street which was open. Market street was protected with boulevard stop signs and the intersection in question was an obstructed corner within the meaning of the California Vehicle Act. There is evidence that the driver of the ambulance, as he turned into Market street from Thirty-Third street, failed to stop at the stop sign, that he cut the corner, that he was traveling at a speed of thirty-five miles an hour, that the other car was just entering the intersection, and that the collision occurred in such a manner as to force the other car over the curb and upon the sidewalk. A jury awarded the plaintiff $5,500 as against the city, and this appeal was taken from the judgment.

This action is based upon section 1714½ of the Civil Code and section 144 of the California Vehicle Act (St.1923, p. 563, § 144) as in force at the time of the accident. It is conceded that the police ambulance was being used at the time in answering an emergency call, and the main contention of the appellant is that the sections just referred to have no application in such a situation. It is argued that this case comes within the exception arising from the provisions of section 8½ (St.1923, p. 517, § 8½, as added by St.1929, p. 509, as amended by St.1931, p. 2101) and section 132 (St.1923, p. 560, § 132, as amended by St.1929, p. 542) of the California Vehicle

Act, as these sections then stood. The first of these sections included in its definition of an authorized emergency vehicle an automobile operated by a police department in responding to an emergency call. The second gave the right of way to an authorized emergency vehicle when operated upon official business and when the driver thereof sounded an audible signal by siren. It further provided that the driver thereof should not be relieved from the duty to drive with due regard for the safety of others using the highway, nor from the consequences of an arbitrary exercise of the right of way thus given.

[1] The appellant relies particularly on the case of Armas v. City of Oakland, 135 Cal.App. 411, 27 P.(2d) 666, 28 P.(2d) 422. While there is a conflict between some of the views expressed in the opinion in that case and those set forth in Lossman v. City of Stockton, 6 Cal.App.(2d) 324, 44 P.(2d) 397, we are not concerned with that conflict under the circumstances here appearing. In the Armas Case not only was the plaintiff guilty of contributory negligence, but it appeared, without conflict, that a siren was sounded by the emergency vehicle in question. Even under the doctrine laid down in that case a city would be liable under section 1714½ of the Civil Code where the negligence of the officer or employee of the city was not excused by some provision of the Vehicle Act. The only provisions of the California Vehicle Act which might furnish such an excuse in the intant case are sections 8½ and 132, above referred to. Under these sections the operator of an authorized emergency vehicle who is responding to an emergency call is given special privileges only when he sounds a siren. The officer or employee may waive this privilege and he may not claim a special right of way unless such an audible warning is given. Russell v. Smith, 12 Cal. App.(2d) 399, 55 P.(2d) 562.

In Rogers v. City of Los Angeles, 6 Cal. App.(2d) 294, 44 P.(2d) 465, 466, the court said: "In support of their contention relating to the insufficiency of the case against them, appellants place their reliance upon section 132 (b) of the California Vehicle Act (Deering's Gen.Laws 1931, vol. 2, Act 5128, p. 2515, Stats.1929, p. 542), which reads: 'The driver of a vehicle upon a public highway shall yield the right of way to any authorized emergency vehicle when the latter are operated upon official business and the drivers thereof sound audible signal by siren. This provision shall not relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an aribitrary exercise of such right of way.' The jury, at the request of defendants, was instructed upon the law contained in this section, including definition of the word 'arbitrary.' It is admitted that the ambulance was an authorized emergency vehicle and that it was being operated on official business. California Vehicle Act, §§ 8½ and 120, Deering's Gen.Laws, 1931, vol. 2, Act 5128, pp. 2455, 2511. The extent to which the siren was being audibly sounded was the subject of testimony which was somewhat in conflict. Nearly all witnesses heard the siren, many of them declaring that it sounded at Twenty-Ninth street, three or four blocks north of Jefferson, and then did not sound again until it entered the intersection not far from the point of impact. One westbound motorist on Jefferson declared he did not hear it at all until just as the ambulance was entering the intersection. 'The weight to be given negative testimony, where it is claimed that signals were not given, is a question for the jury; and such evidence is sufficient to sustain a verdict even though it conflict with other evidence that a warning was actually given. (Citing cases.)' As above indicated, the traffic signal was closed to north and south bound traffic when defendants' vehicle undertook to cross the intersection, which was a busy one, against the signal, and the speed at which it was being driven was variously stated to be from 30 to 55 miles per hour."

[2] A similar situation is here involved. The driver of this emergency vehicle failed to stop at a boulevard stop and cut the corner at an excessive rate of speed. If no siren was sounded the city was not relieved from liability under any view of the various statutes referred to. The issues as to whether an audible warning by sounding a siren was given and as to whether the driver attempted to take and exercise the right of way in an arbitrary manner were submitted to the jury under appropriate instructions.

While the appellant concedes that there is some conflict in the evidence as to whether or not a siren was sounded on this occasion, it is argued that the conflict is not substantial since the evidence, as a whole, shows that most of the people on this corner at the time had come from nearby buildings for the very reason that they had heard such a siren. It does appear that the siren was sounded as the police ambulance proceeded east on Market street and turned south on Thirty-Third street, and that certain people were attracted to the scene by hearing the same. There is a substantial conflict, however, as to whether the siren was sounded as the ambulance reentered Market street after it was turned around on Thirty-Third street. The police officer who operated the ambulance and another officer who accompanied him testified that the siren was sounded continuously. Another witness testified that the siren was sounded as the ambulance turned around two blocks south of Market and "that the ambulance was making that sound all the way up 33d street," although she did not specifically say that the siren was sounded as the ambulance reentered Market street and turned the corner. On the other hand, the two occupants of the other car involved in the accident testified that they heard no sound of a siren, and the respondent and two other witnesses testified that no siren was sounded as the ambulance traversed the last block and as it reentered Market street. The question was one of fact for the jury and the evidence is sufficient to sustain its finding thereon.

[3-5] The appellant contends that the court committed error in permitting the respondent "to introduce the greater part of her evidence in chief under the guise of rebuttal testimony; and likewise erred in permitting plaintiff to introduce entirely new matter in her closing argument under the guise of rebuttal with no opportunity on the part of defendant to reply." Four witnesses in rebuttal were called by the respondent. When the first of these was called, a general objection was made to the effect that the witness was the respondent's son and should have been called in her case in chief. The court informed counsel that he could not sustain an objection to a particular witness but suggested that, if desired, an objection could be made to any particular subject-matter sought to be brought out. Throughout the examination of the four witnesses no objection was made to any question on the ground that it was not proper in rebuttal, with one exception, and then the objection was properly overruled on the ground that the matter objected to was merely preliminary. It should be further observed that the court had power, on the request of a party, to permit further evidence which was not strictly rebuttal. With respect to the attack on the closing argument the appellant admits that the matter does not appear in the record and the only claim made is that counsel placed on a blackboard before the jury a number of mathematical calculations with respect to rates of speed of automobiles in terms of feet per second. Nothing appears to indicate any abuse of discretion on the part of the court and the point is entirely without merit.

[6] It is next contended that the amount of the damages awarded is excessive. With respect to the injuries suffered by respondent there is evidence that her right leg was broken below the knee, that her left leg was badly bruised, that her face struck against a fire hydrant, that her right middle finger was permanently impaired in function, that her right leg was in a plaster cast for seven weeks, and that she was in bed for eight weeks. At the time of the trial, a year and eight months after the injury, she was unable to get about without crutches, her leg was still swollen and painful about the knee and ankle, she had frequent headaches, and she was still suffering from pain in the right hip and side, resulting from the leg injury. There was evidence justifying the inference that some of her disabilities would be permanent. She was 53 years of age at the time of the trial and there was evidence that her loss of earning capacity would be between $7,000 and $17,000. Under the circumstances, the verdict cannot be held so grossly excessive as to immediately suggest passion and prejudice, or corruption on the part of the jury. Loeb v. Kimmerle, 215 Cal. 143, 9 P.(2d) 199.

[7] Some contention is made that the court erred in failing to give two instructions requested by the appellant. The first concluded with a statement that in no event would the evidence justify a verdict against the appellant. For the reasons heretofore stated this instruction was properly refused. The other instruction was refused as already covered. It is not contended that the substance of this instruction was not otherwise covered, the only complaint being that the instruction covering the matter was so long that apparently the jury was unable to properly digest it. The objection thus raised is more novel than convincing.

It is finally urged that the court erred in denying a motion for a new trial. The argument on this point is confined to the matters already referred to, which require no further discussion.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

17 Cal.App.2d 485

DOWDS v. ARMSTRONG et al.*

Civ. 1619.

District Court of Appeal, Fourth District, California.

Nov. 13, 1936.

Rehearing Denied Dec. 11, 1936.
Hearing Denied by Supreme Court
Jan. 11, 1937.

1. Brokers 🔑40

Realty broker could not recover commission for procuring agreement for exchange of properties on ground that instrument was an agency agreement, where instrument was purely an option to purchase property on certain terms, and not an agreement to pay commission or to turn over amount received over named price, instrument contained no agency agreement or authorization to sell property, and ran to broker or his nominee, and it was alleged that acceptance of offer was made by broker's nominees, and terms of option were not complied with.

2. Brokers 🔑60

Broker *held* not entitled to commission on ground that written instruments constituted an agreement for exchange of properties between two sets of parties, and that such contracts contained agreements for broker's benefit to turn over to him excess over purchase price, where entire contract under which broker claimed was rescinded before he attempted to collect commission.

3. Brokers 🔑60

Broker *held* not entitled to commission for procuring agreement for exchange of properties on ground that parties conspired to bring about rescission of agreement to damage of broker, where under contract parties had right to rescind, and broker not having a separate contract of employment with any of parties was dependent on consummation of exchange agreement for his commission.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by C. G. Dowds against William W. Armstrong and others. From a judgment for defendants, after sustaining demurrers filed by defendants, plaintiff appeals.

Affirmed.

W. L. Pollard and S. L. Kurland, both of Los Angeles, for appellant.

R. Y. Williams and West & McKinney, all of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiff brought this action to recover for his services as a real estate broker in procuring an agreement for exchange of properties between the defendants Armstrong and the defendants Adams, although the prayer is for $13,000 "as actual damages, and for the sum of $15,000 as exemplary damages." Demurrers filed by all defendants were sustained without leave to amend, and from the ensuing judgment the plaintiff has appealed.

This action is based upon three written instruments all dated May 13, 1933, copies of which are attached to the complaint as exhibits. In Exhibit A it is provided that the Armstrongs, in consideration of $1 paid them by the appellant, "do hereby give and grant unto the said C. G. Dowds, his heirs or assigns, the option at any time within thirty-three days from date hereof, to purchase the hereinafter described property for the amount and upon the terms herein stated." After describing the property, the option provided that the property should include the crop of fruit then growing thereon; that the purchase price should be $65,000; that a trust deed for $29,000 should be assumed by the appellant or his "nominee"; that a contract between the respondent Adams and certain other parties should be assigned to the respondents Armstrong and taken as a payment of $34,000 on the purchase price; that the balance of $2,000 was to be paid in cash in escrow; that the purchase price named was to be net and no commission out of the same was to be paid; and that the agreement was to be void if the $2,000 was not paid or deposited in escrow within thirty-three days.

Exhibit B purports to be an agreement between the respondents Adams as first party and the respondents Armstrong as second party, although it was signed only by the first party. It provides for the conveyance by the second party to the first party of the real property described in Exhibit A on terms considerably different from those set forth in Exhibit A. Among other things, it is provided that the purchase price is $78,000; that the second party is also to receive from the first party another piece of real property located in Newport Beach, taking the same at a value of $10,000; that the first party is to pay a cash difference of $5,000; that the Newport Beach property is to be deeded to one Mary L. Stream; that neither party is to pay any commission for procuring this exchange; and that the agreement is to constitute escrow instructions to a named title company when signed by both parties. Exhibit C purports to be an agreement between the respondents Adams as first party and the respondents Armstrong as second party, and was signed by the Armstrongs only. With certain exceptions it follows the language of Exhibit B. However, it contains a paragraph stating that neither party assumes any personal liability for the payment of encumbrances on the properties received. The place for the name of the party to whom the Newport Beach property was to be deeded is left blank. In one paragraph the first party "agrees to pay nothing as a commission for procuring this exchange" and in another the second party "agrees to pay $3,000 and the" Newport Beach property, there being no statement as to whom these are to be paid or for what purpose. It also contains the provision that it is to constitute escrow instructions when signed by both parties thereto.

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*Hearing denied by Supreme Court 63 P.(2d) 1114.

The complaint contains five causes of action. In the first it is alleged that the respondents Armstrong gave the appellant, a licensed real estate broker, or his nominee, an option to purchase certain property as set forth in Exhibit A; that the appellant through his nominees, the respondents Adams, accepted the offer contained in the option and agreed to pay the amount therein specified and further agreed to pay an additional $13,000 for the property; that the appellant informed the respondents Armstrong of the acceptance of the offer; that all of the respondents thereupon executed an agreement of sale of the property mentioned in the option upon the terms therein stated; that thereafter the respondents Armstrong encumbered the property with a crop mortgage and failed to remove it upon demand; that on August 2, 1933, the respondents Adams served notice of their rescission of the exchange agreement; that on August 3, 1933, the respondents Armstrong served notice of their "acceptance of rescission"; that upon the acceptance of the offer contained in the option by the respondents Adams the appellant became entitled to the sum of $13,000; and that the respondents conspired to cheat and defraud the appellant by agreeing upon a rescission of the exchange agreement. The second cause of action is similar to the first with the exception that it refers to Exhibit A as a commission agreement or agency agreement given to the appellant as a real estate broker in order to secure a sale of the property, and alleges the procuring of a purchaser upon the terms of the offer to sell and the purported rescission in order to defraud the appellant out of the $13,000 to which he was entitled. The third cause of action seeks to hold the respondents Armstrong alone upon the ground that they had breached the terms of Exhibit A to the appellant's damage in the sum of $13,000 by refusing to comply with the terms of the option after the appellant had informed them that he had procured a purchaser at a price of $13,000 above the price named in the option, and after executing a written acceptance of the purchaser's offer. The fourth cause of action alleges that the respondents Armstrong gave the appellant a written agency agreement to sell the property in question, that the appellant procured a purchaser and earned a commission of $13,000, and that these respondents willfully and without cause failed and refused to consummate the transaction. The fifth cause of action alleges that the appellant procured a purchaser for the property at the request of the respondents Armstrong, that the reasonable value of the appellant's services is $13,000, and that these respondents have willfully and without cause refused to pay for the services. It is further alleged in the complaint that after the execution of the agreements the appellant wrote his name between the word "pay" and the figures "$3,000" in that part of Exhibit C which is above quoted.

[1] The appellant argues that he is entitled to the amount which the respondents Adams agreed to give for the property described in Exhibit A in excess of the amount named therein since Exhibit A was both an option to buy and an agency agreement. He relies particularly on Ruess v. Baron, 217 Cal. 83, 17 P.(2d) 119; Hiss v. Sutton, 203 Cal. 459, 264 P. 748; Sill v. Ceschi, 167 Cal. 698, 140 P. 949. None of these cases is of any assistance to the appellant. Exhibit A is purely an option to purchase cer-

tain property on certain terms, there is no agreement to pay a commission or to turn over all received over a named price, and it contains no agency agreement or authorization to sell the property. Moreover, it runs to the appellant or his nominee and it is alleged that the acceptance of the offer contained in the option was made by the respondents Adams as the nominees of the appellant. No reason appears why these nominees did not succeed to every right which the appellant might have had under the option. It would further appear that the terms of the option were not complied with in that the cash payment was not made or deposited in escrow within the time named in the option.

[2] The appellant's right to a commission must rest upon the claim that Exhibits B and C constitute an agreement for the exchange of properties between the two sets of respondents and that this contract contains an agreement for his benefit, namely, to turn over to him the excess over the purchase price demanded by the respondents Armstrong, as set forth in Exhibit A. It is doubtful whether the minds of the parties to the purported final agreement ever met since there are so many things in Exhibit C which are not contained in Exhibit B. The appellant was not named in either of these instruments and neither contains any express agreement for his benefit. Apparently under Exhibit C the respondents Armstrong were to "pay" $3,000 and the Newport Beach property to the same person. If the minds of the parties met, it would seem that this person was Mary L. Stream, as Exhibit B provided that the Newport Beach property was to be deeded to her. The appellant, without the authority of any one, after the execution of Exhibit C by the respondents Armstrong, inserted his name between the word "pay" and the figures "$3,000.00" which followed. As thus changed, the clause provided that the respondents Armstrong were to "pay" $3,000 and the Newport Beach property to the appellant. This was not only a material alteration of the instrument, but created a more definite conflict between it and Exhibit B with respect to what should be done with the Newport Beach property.

If there ever was any agreement between the two sets of respondents for the benefit of the appellant, the entire contract under which he claims was rescinded before he attempted to collect his commission, and his right was thereby terminated. Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576; Brion v. Cahill, 34 Cal.App. 258, 165 P. 704; K. Lundeen Corporation v. Barlow, 120 Cal. App. 391, 7 P.(2d) 1102, 1103. In the last of these cases the court said:

"Plaintiff cites a number of cases holding that a real estate broker employed to sell real property has earned his compensation when he has produced a purchaser able and willing to take the property on the terms proposed, or who has been accepted by his principal. In these cases it will be found that the broker's rights are saved to him under a contract existing between the broker and the party defendant. Here no such contract existed, and the contract under which plaintiff claims was terminated and extinguished before plaintiff attempted to enforce his alleged rights. Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576; Brion v. Cahill, 34 Cal.App. 258, 165 P. 704; Stewart v. Bowie, 43 Cal.App. 751, 185 P. 868; Houghton v. Kuehnrich, 46 Cal.App. 469, 189 P. 457. In the case of Lind v. Huene, 205 Cal. 569, at page 571, 271 P. 1087, 1088, the court, after citing the above cases, says: 'And more recently in Houghton v. Kuehnrich, 46 Cal. App. 469, 189 P. 457, wherein it is said that, when there is no separate enforceable contract of employment with the broker, and the owner's promise to pay the broker a commission is found only in the contract entered into between the owner and the prospective purchaser, if the purchaser should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker a commission. In such a case, if the wrongful abandonment of the contract is consented to, the whole contract falls, the provision relating to the agent's commission with the rest.' The court found, in the case above referred to, there was such an authorization in separate contract. In the case at bar there was no such separate agreement and the contract had been terminated prior to plaintiff's attempt to enforce it."

[3] The allegations in the complaint to the effect that the respondents conspired to bring about a rescission of their agreement to the damage of the appellant will avail him nothing. Not only did these parties have the right to rescind, but, under the authorities referred to, the appellant broker, not having a separate contract of employment with any of the respondents, was dependent upon a consummation of the exchange agreement. Brion v. Cahill, supra. The appellant contends throughout that Exhibit A must be interpreted as containing an

authorization to sell or a contract of employment. In the last analysis his entire case depends upon this contention which, in our opinion, cannot be sustained.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

17 Cal.App.2d 477

PEOPLE v. SPIERS.

Cr. 1526.

District Court of Appeal, Third District, California.

Nov. 13, 1936.

Rehearing Denied Nov. 28, 1936.

Hearing Denied by Supreme Court Dec. 10, 1936.

1. Process 🔑145

Where opportunity is given for service of summons and nothing further appears, it will be presumed that service of summons has been had according to statutes providing therefor.

2. Infants 🔑19

Where probation officer filed petition for order declaring minor child ward of juvenile court, and court entered order on same day so that child's mother could not have received required 24 hours' notice, it would not be presumed that mother appeared and waived service of notice (St.1915, p. 1227, § 4).

3. Infants 🔑19

Section of juvenile court law requiring that, upon filing of petition asking that minor be adjudged ward of juvenile court, citation giving 24 hours' notice must be given to parents, guardians, or other person with whom minor may reside is jurisdictional (St.1915, p. 1227, § 4).

4. Infants 🔑19

Order declaring minor to be a ward of juvenile court and amendatory orders entered later *held* void for want of jurisdiction, where first order was entered on day when probation officer filed petition for order so that child's mother could not have received required 24 hours' notice (St.1915, p. 1225, § 1, subds. 10, 11; p. 1226, § 2; p. 1227, §§ 3b, 4; St.1929, p. 1061, § 3; St.1933, p. 2207, § 3a).

5. Infants 🔑19

Want of jurisdiction to enter order declaring minor child to be a ward of juvenile court for failure to give mother required notice *held* not obviated, even if mother was present in court room when amended orders were attempted to be made (St.1915, p. 1225, § 1, subds. 10, 11; p. 1226, § 2; p. 1227, §§ 3b, 4; St.1929, p. 1061, § 3; St.1933, p. 2207, § 3a).

6. Kidnapping 🔑3

Mother of minor child could not be convicted of stealing child from probation officer, where order declaring child to be a ward of juvenile court was void for want of jurisdiction, since mother had not been divested of legal custody of child (St.1915, p. 1225, § 1, subds. 10, 11; p. 1226, § 2; p. 1227, §§ 3b, 4; St.1929, p. 1061, § 3; St.1933, p. 2207, § 3a).

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Estelle Spiers was convicted of taking away a minor child with intent to detain and conceal such child from the probation officer who had lawful charge of such child, without the consent and against the will of the probation officer, and she appeals.

Reversed.

See, also (Cal.App.) 59 P.(2d) 838.

H. B. Churchill, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PLUMMER, Justice, delivered the opinion of the court.

The appellant was convicted upon an information filed on or about June 23, 1936, the charging part of which is as follows: "Said defendant, on or about the 10th day of May, 1936, in the county of Lake, state of California, did then and there wilfully, unlawfully and maliciously take away a minor child, to-wit, Mary Spiers, who was then and there of the age of thirteen years, with intent then and there to detain and conceal such child from J. C. Anton, who was then and there the probation officer of said Lake county, and who was then and there the person having the lawful charge of such child; that said taking away was without the consent and against the will of said J. C. Anton."

The defendant's motion for a new trial being denied, the defendant prosecutes this appeal from both the order denying her motion for new trial, and from the judgment based upon the verdict of conviction.

Mary Spiers, the minor mentioned in the information just set forth, is the child of the defendant, and was living with the defendant at or near Kelseyville, in the county of Lake, prior to the beginning of any proceedings seeking to have Mary Spiers adjudged a ward of the juvenile court.

The record shows that on or about the 18th day of June, 1935, D. F. McIntire, the then probation officer of the county of Lake, state of California, filed a petition with the clerk of the juvenile court, seeking an order of said court declaring Mary Spiers a ward thereof; that thereupon, and on the same day, a hearing was had on said petition, and Mary Spiers, through a purported order of the juvenile court, was adjudged a ward thereof, and placed on probation in the care, custody, and control of D. F. McIntire; that thereafter, and on or about the 18th day of April, 1936, J. C. Anton, the successor of D. F. McIntire, as probation officer, filed a petition seeking a modification of the aforesaid order, and thereupon, on the 2d day of May, 1936, the juvenile court made its purported order modifying the order of June 18, 1935, and placing said minor in the care, custody, and control of the probation officer, to be by him placed in the Ursuline Academy, at St. Helena, Cal., or to be by him placed in some other school or proper home he should determine to be fit and proper. On the last date a further order was made again modifying the first order, to the effect that the welfare of said Mary Spiers required that her custody be taken away from her mother, Estelle Spiers; that on the 2d day of May, 1936, the probation officer placed Mary Spiers in the Ursuline Academy at St. Helena; on the 3d day of May, 1936, Mary Spiers ran away from the academy, and arrived first at the town of St. Helena, at which place she visited an aunt's home, and thereafter was picked up by another aunt and brought to the town of Middletown, in Lake county; that Mary Spiers arrived at Middletown with her aunt at the hour of about 11 o'clock at night, and her mother, in company with the defendant Straud Deck, met her; Mary, the mother, and Deck started from Middletown to Kelseyville, the home of the mother; on the way they stopped to see one Tom Smith. The record then shows that the defendant, Deck, and Smith, went with the minor to the home of one James Buchanan, where Mary was living for the period of about one week; that thereafter, Deck, the defendant, Tom Smith, and Mary Spiers left Lake county, went to Santa Rosa, where Mary bade goodbye to her mother, and in company with Tom Smith, went to the town of Chowchilla in the county of Madera, where Mary remained for the period of about one and one-half weeks, at the home of a family by the name of Hooper, of whom Tom Smith rented a room. There is evidence in the record to the effect that the defendant knew of Mary Spiers accompanying Tom Smith to the home of the Hoopers near Chowchilla, and talked the matter over with Smith.

While many questions have been presented for our consideration by counsel for the respective parties, and have all been considered, we deem it unnecessary to discuss many of them by reason of what is hereafter said.

Section 1 of the Juvenile Court Law (St. 1915, p. 1225, as amended), Appendix to the California Penal Code, page 496, as compiled by A. V. Lake & Co., sets forth fourteen subdivisions for adjudging minors wards of the juvenile court. Section 2 specifies that any one under the age of twenty-one years, coming within any of the subdivisions of section 1, may be adjudged a ward of the juvenile court. Section 3 (as amended by St.1929, p. 1061) provides for an investigation being made by the probation officer of the county in which the minor resides, and also for the filing of petitions, either by the probation officer or by any other person. Section 3a (as amended by St.1933, p. 2207) is to the effect that no fees shall be chargeable therefor. Section 3b sets forth that if a petition is filed by any other person than the probation officer, the clerk of the juvenile court shall immediately notify the probation officer. Section 4 makes it mandatory to give notice of the filing of the petition, at least twenty-four hours before the hearing, to the parent or parents of the minor, or to any person with whom the minor is residing, and also further provides that service of citation may be waived by any person by a voluntary appearance, such fact being entered upon the minutes of the juvenile court. Section 4, supra, is in the following words, to wit: "Upon the filing of the petition provided for in section 3 hereof, a citation shall issue, requiring the person or persons having the custody or control of the person alleged to come within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, to appear with said person so alleged at the time and place stated in the citation. Service of said citation must be made at least twenty-four hours before the time stated therein for such appearance. The parents or guardian of said person so alleged, if residing within the county in which the court sits, and if their places of residence be known to the petitioner, or if there be neither parents nor guardian so residing, or if their places of residence be not known to the petitioner, then some relative of said person so alleged, if any there be residing within said county, and if his residence and relationship to said person so alleged be known to the petitioner, shall be notified of the proceeding by service of citation requiring him or them to appear at the time and place stated in said citation. Service of citation may be waived by any person by a voluntary apearance entered in the minutes of the court or by a written waiver of service of citation filed with the clerk of the court at or prior to the hearing. In any case, the judge presiding in the juvenile court may appoint some suitable person to act in behalf of said person so alleged, and may order such further notice of the proceedings to be given as he may deem proper."

The petition filed by D. F. McIntire on the 18th day of June, 1935, leading to the first order of the juvenile court, is as follows:

"Your petitioner, D. F. McIntire, respectfully represents: That there is now within the county of Lake, state of California, a person named Mary Spiers; that said person is under the age of twenty-one years, to-wit, of the age of twelve (12) years; that said person comes within the provisions of subdivisions 10 and 11 of section 1 of the Juvenile Court Law of the State of California, in this, that said Mary Spiers has been kept out of school for the better part of two years by her mother, Estelle Spiers; that the said Estelle Spiers has permitted the said Mary Spiers to attend public dances alone and to roam the streets of Kelseyville unattended at late hours of the night; that the said Mary Spiers has attended school not over one week during the last two school years, and has habitually absented herself from school during said two-year period of time without cause or justification; and that she is a person in danger of leading an idle and dissolute life, in that she has frequently attended public dances unattended by her mother or any other proper person, without a proper chaperon, and often in the company of young men who have taken her home from such dances at late hours of the night. And that Mary Spiers is said person, residing within said county, whose place of residence is known to your petitioner to be at Kelseyville, Lake county, California;

"Wherefore, your petitioner prays that this honorable court set a time and place for the hearing of this petition; that Estelle Spiers be cited to appear at said time and place, and to bring said person, and to show cause, if any have, why said person should not be adjudged a ward of the above entitled juvenile court; that ...... be subpoenaed to be present as witness at said time and place; that a warrant do issue for the arrest and detention of said person; and that this honorable court, at said time inquire into the truth of the matters herein alleged, and, in pursuance of the statute in such case made and provided, make such order in the premises as to this honorable court may seem meet and proper.

"D. F. McIntire, Petitioner."

(The foregoing petition is set forth as it appears in the transcript.)

The order of the juvenile court set forth in the transcript, based upon said petition, is as follows:

"The petition of D. F. McIntire heretofore filed herein praying the above entitled court adjudge the said Mary Spiers to be a ward of the juvenile court, and deal with said person as provided in that certain act of the legislature of the state of California, known as the Juvenile Court Law, approved June 5, 1915, and amendment thereto, this day coming on regularly to be heard, the said Mary Spiers being personally present in court, and represented by her counsel, Lovett K. Fraser, Esq., and due proof being made to the satisfaction of the court, it is the judgment of the court;

"That the said Mary Spiers is a person under the age of majority, to-wit, of the age of twelve years; that she is a person coming within the provisions of subdivisions 2, 10 and 11 of section 1 of the Juvenile Court Law of the state of California; that the permanent home and residence of the said Mary Spiers and of her mother, Estelle Spiers, is at Kelseyville, Lake county, California; that the said Mary Spiers is hereby adjudged a ward of the juvenile court of the state of California, in and for the county of Lake, and placed on probation in the care, custody and control of D. F. McIntire, probation officer of the county, and to remain in the home of her mother, the said Estelle Spiers, subject to visitation by the said D. F. McIntire, probation officer, at all reasonable times, and within his discretion and subject to being returned to this court for further proceedings whenever such action may appear necessary or desirable to the court; that the said Mary Spiers shall not be removed from the said county of Lake, without the consent of the probation officer of said county having been first obtained; and in case of such removal without the consent of the probation officer, such action will be deemed in contempt of this court.

"Dated, this 18th day of June, 1935.

"Benjamin C. Jones,
"Judge of said Court."

Thereafter, upon petition of J. C. Anton, the juvenile court on the 2d day of May, 1936, made what purports to be an amendatory order of the order theretofore made on the 18th day of June, 1935, reciting, among other things, as follows: "That Mary Spiers, by order of the juvenile court of the state of California, in and for the county of Lake, on the 18th day of June, 1935, was adjudged a ward of the juvenile court, and placed on probation in the custody and control of the probation officer of Lake county," etc. And further: "Now, therefore, the said Mary Spiers is here, now adjudged and decreed to be a ward of the juvenile court, and the order heretofore made in this court on the 18th day of June, 1935, is hereby modified, and it is hereby ordered that the said ward be committed, until the further order of the court, to the care, custody and control of the probation officer of the said county of Lake, to be by him placed in the Ursuline Academy, at St. Helena, Napa county, state of California, or some other school or proper home he should determine to be fit and proper, subject to the visitation of the said probation officer. And it is hereby further ordered that Estelle Spiers, mother of said ward, pay to the auditor of the county of Lake, state of California, the sum of twenty-five dollars per month toward the support and maintenance of said ward."

This order, on the same day, was further modified to the effect that the court found that the welfare of the minor necessitated taking of her custody from her mother Estelle Spiers.

On the part of the appellant it is contended that the record so presented shows that the juvenile court had no jurisdiction on the 18th day of June, 1935, to adjudge Mary Spiers a ward of the juvenile court, and that the amendatory orders thereafter made did not give life and vitality to the order made on the 18th day of June, 1935.

[1-6] On the part of the respondent it is contended that while the order of June 18, 1935, does not contain any mention of service of notice upon the mother of the ward, or upon any one having her custody, under the decision of the court in the case of Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742, everything necessary to give the court jurisdiction will be presumed to have been taken or done unless the contrary appears on the face of the record. While this is true a general proposition, section 4 of the Juvenile Court Law, supra, includes certain steps necessary to invest a juvenile court with jurisdiction. Section 4 of the Juvenile Court Law makes it mandatory, as we have shown by setting it forth herein, upon the filing of a petition asking that a minor be adjudged a ward of the juvenile court, that citation giving twenty-four hours' notice must be given to the parents, guardians, or other person with whom the minor may reside. The record in this case shows that the McIntire petition was filed on the 18th day of June, 1935. The record also shows that the hearing was had and the order of the court was made and entered on the same day, to wit, the 18th day of June, 1935, showing conclusively the impossibility of twenty-four hours' notice being given to the mother of the minor. True, there is nothing in the record to the effect that the mother appeared and waived service of citation, or that anything of the kind was entered in the minutes of the juvenile court. Where opportunity is given for the service of summons, and nothing further appears, it will be presumed that service of summons has been had according to the statutes providing therefor. This statement is based upon the opinion in Hahn v. Kelly, supra, but our attention has not been called to any case, nor in our search of the authorities have we found any case where the record shows the impossibility of serving a citation as required by the statutes, that it will be presumed

that the person to whom the citation should have been issued voluntarily appeared in the action and waived service. In other words, where it appears from the record that the statutes providing for the service of notice could not have been followed, it will not be presumed that the person to whom the citation should have issued, and to whom notice required by the statute should have been given, appeared and waived service of notice. The original order purporting to adjudge Mary Spiers a ward of the juvenile court being void for want of jurisdiction, as shown, by failure to comply with section 4 of the Juvenile Court Law, supra, which we hold to be jurisdictional, the orders thereafter made purporting to amend the void order, likewise fall therewith. The presence of the defendant in the courtroom, if such be the case, at the time the amended orders were attempted to be made, would not obviate the want of jurisdiction as hereinbefore shown. As the mother of Mary Spiers, a minor at the time mentioned in the information, the appellant had the legal custody of her child, and could not legally be convicted of stealing her child so long as she had not been divested of her legal custody of such child.

The order and judgment are reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.App.2d 604

CLIPPINGER v. REISS.

Civ. 1989.

District Court of Appeal, Fourth District, California.

Nov. 20, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

1. Appeal and error 🔑979(2)

Reviewing court is precluded from disturbing an order granting a new trial on ground of insufficiency of evidence to justify verdict, in absence of clear showing that trial court abused its wide discretion.

2. Appeal and error 🔑979(2)
New trial 🔑70

Trial court is authorized and under duty to grant new trial whenever in its opinion evidence on which former decision rests is insufficient to justify decision, and its action in granting new trial on such ground is discretionary to extent that, if any appreciable conflict exists in evidence, court's action may not be disturbed.

3. New trial 🔑70

Where pedestrian, without seeing automobile, which was in center of intersection when traffic lights changed, walked into side of automobile, granting motorist new trial *held* not error, where there were discrepancies in evidence in reference to distance and speed of motorist when she first saw pedestrian and within what distance motorist could have stopped automobile.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Harvey J. Clippinger against Alta M. Reiss. From an order granting the defendant a new trial, the plaintiff appeals.

Order affirmed.

Glen H. Munkelt, of San Diego, for appellant.

Stearns, Luce, Forward & Swing, of San Diego, for respondent.

JENNINGS, Justice.

Plaintiff brought this action to recover damages for personal injuries sustained by him as a result of a collision between himself, a pedestrian, and an automobile which was being operated by defendant. Trial of the action before a jury resulted in the return of a verdict in plaintiff's favor in the amount of $7,500. Judgment was entered in conformity with the verdict. Defendant then moved for a new trial. The motion was granted on the sole ground that the evidence was insufficient to justify the verdict. Plaintiff appeals from the order granting a new trial.

Appellant contends that application of the doctrine of last clear chance to the facts developed by the evidence demonstrates that the evidence is ample to support the verdict in his favor and would not warrant a contrary verdict and that therefore the order from which the appeal is presented must be reversed.

[1] In making this contention appellant properly concedes the existence of the well-settled rule which precludes a reviewing court from disturbing an order grant-

ing a new trial on the ground of insufficiency of the evidence to justify a verdict in the absence of a clear showing that the trial court abused the very wide discretion reposed in such a tribunal with respect to granting or refusing motions for new trial. It is, however, urged that the evidence taken as a whole would not support a verdict contrary to that which was returned, and that therefore an abuse of discretion is presented which requires reversal of the order. Intelligent consideration of this contention renders necessary some reference to the evidence which was produced during the trial.

The accident in which appellant received the injuries for which he sought to be compensated occurred in an intersection of Fourth avenue with Broadway in the city of San Diego. The former street extends north and south and the latter in an east-west direction. This particular intersection is equipped with electric traffic signals consisting of semaphores, electric lights, and electric bells. A change in the direction of traffic is indicated in the following manner: There is first the sound of a single stroke bell. Within a fraction of a second there is a second sound of the bell, and simultaneously the semaphore indicating change in direction of traffic comes up and a green light replaces the red light which had theretofore been displayed. The traffic ordinance of the city of San Diego prohibits vehicular traffic from entering the intersection until the green light and the "Go" signal are displayed, but permits the entrance of pedestrian traffic at the sound of the first bell, "provided they do not interfere with the movement of vehicles already in the intersection."

At approximately 11:45 a. m. of September 4, 1935, respondent was driving a Buick automobile in a northerly direction on Fourth avenue and had arrived in the above-mentioned intersection. One or more automobiles had preceded her into the intersection and had turned east into Broadway. As she came into the intersection, her automobile was in second gear and was traveling at a speed of approximately 5 miles per hour. After the vehicles which were ahead of her had turned into Broadway, she shifted to high gear and proceeded at a speed which she estimated was between 6 and 10 miles per hour. When she had arrived at a point which was approximately opposite the center of the intersection, the first bell, which indicated that the intersection was about to be closed to north and south bound traffic on Fourth avenue, was sounded. At this moment pedestrian traffic commenced to move in an east-west direction on Broadway. Appellant was on the northeast corner of the intersection awaiting the signal to proceed west across Fourth avenue. At the sound of the first bell he stepped into Fourth avenue, gave one glance to the south, and walked rapidly west without again looking either to his right or left. When he had thus advanced several paces, he came in contact with the right-hand running board of respondent's automobile, which by this time had arrived in the pedestrian crosswalk extending across Fourth avenue, and as a result of the collision he was thrown to the pavement and received painful and serious injuries. Respondent testified that she first observed appellant when she had arrived at a point on the east side of Fourth avenue which was about in line with the center of the intersection; that appellant was then proceeding west in the pedestrian crosswalk ahead of other pedestrians; that she continued to observe him as she proceeded north and noted that he did not look in the direction from which she was approaching him but held his head down; that she did not sound the horn of her automobile or apply the brakes or swerve the vehicle.

As above noted, it is appellant's contention that a verdict in respondent's favor could not be sustained on the above-stated facts, for the reason that it must be declared that respondent had the last clear chance to avoid the accident. We think that it is at least doubtful whether or not the last clear chance rule is applicable to the facts. We are not here called upon to announce that it must or must not be applied, and we are therefore unwilling to declare that a verdict contrary to that returned by the jury could not be sustained. Examination of the record discloses that in some respects the evidence which presented the factual background of the accident was conflicting and that there was a failure of proof and uncertainty in the evidence with regard to certain matters which would have a bearing on the applicability of the last clear chance rule. It may not, for example, be declared with certainty at just what point in the intersection respondent had arrived when she first saw appellant. In one part of respondent's testimony as a witness called by appellant under section 2055 of the Code of Civil Procedure she designated a point on the map of the intersection which would lend support to appellant's contention that when she first saw appellant she was 60 feet distant from the point where the collision occurred. She, however, expressly stated that this was a mere approximation, and in another part of her testimony she declared that she had passed the center line of Broadway. If the latter statement was correct, she was not more than 44 feet from the point where the collision occurred. No evidence was produced which tended to show at what rate of speed appellant was walking as he proceeded across Fourth avenue. The rate of speed at which respondent was driving her automobile at the moment of impact and immediately prior thereto is not established with certainty, since she testified that she was operating her car at a speed between 6 and 10 miles per hour and another witness testified that she was proceeding at a speed between 5 and 6 miles per hour. Not a scintilla of evidence was produced which tended to show in what distance respondent could have brought her car to a stop.

[2] The rule is established that a trial court is not only authorized, but is under a duty, to grant a new trial whenever in its opinion the evidence upon which the former decision rests is insufficient to justify the decision, and that its action in granting a new trial on this ground is discretionary to the extent that, if any appreciable conflict exists in the evidence, the court's action may not be disturbed on appeal. Lewis v. Southern California Edison Co., 116 Cal.App. 44, 53, 2 P.(2d) 419. As was said in Green v. Soule, 145 Cal. 96, 103, 78 P. 337, 340: "The parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

[3] Having in mind the various discrepancies and uncertainties which appear in the evidence, we are not prepared to state that, on the present state of the record, a verdict in respondent's favor would have lacked evidentiary support. Arrival at this determination necessarily acquits the trial court of the charge that it acted capriciously in granting the motion and prohibits reversal of the order. The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

17 Cal.App.2d 529

MASON v. CRAWFORD.

Civ. 5668.

District Court of Appeal, Third District, California.

Nov. 16, 1936.

Hearing Denied by Supreme Court Jan. 14, 1937.

1. Automobiles 🔑173(4)

Presence of parked automobile on street was not an "emergency" justifying motorist's violation of statute prohibiting motorist from stopping on roadway side of parked automobile to permit his wife to alight from automobile, as respects motorist's liability for injuries sustained by guest in following automobile which collided with motorist's stopped automobile (St.1931, p. 2129, § 138).

An "emergency" includes an unforeseen and ordinarily unusual occurrence.

[Ed. Note.—For other definitions of "Emergency," see Words & Phrases.]

2. Automobiles 🔑173(4)

Under statute prohibiting motorist from stopping on roadway side of parked automobiles, motorist could not stop automobile at side of automobiles parked in city street to permit wife to alight therefrom, as respects motorist's liability for injuries sustained by guest in following automobile which collided with motorist's stopped automobile (St.1931, p. 2129, § 138).

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Vivian Mason, by Harry W. Mason, her guardian ad litem, against Charles D. Crawford. From an order granting the plaintiff a new trial, the defendant appeals.

Order affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissents.

Griffin & Boone, of Modesto, and Redman, Alexander & Bacon and Herbert

Chamberlin, all of San Francisco, for appellant.

C. Ray Robinson, of Merced, and Wade H. Coffill, of Oakdale, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the defendant from the order of the superior court granting the plaintiff a new trial. The cause of action arises out of a collision alleged to have been caused by double parking, near the intersection of Tenth and H streets in the city of Modesto, county of Stanislaus.

The record shows that on or about March 1, 1935, at approximately 8 p. m., the defendant, accompanied by his wife, stopped an automobile on the roadway side of parked automobiles in the city of Modesto; that the plaintiff was riding as a guest in a car driven by one Gerald Mashek, following the car driven by the defendant. Upon the stopping of the car driven by the defendant, as just stated, the car driven by Mashek collided with the defendant's car, causing the plaintiff to be thrown through the windshield of the Mashek car in which she was riding as a guest.

On the part of the defendant it is claimed that his car had been stopped for a considerable length of time sufficient to permit the car driven by Mashek to turn to the left and pass without danger of collision. There is some testimony in the record to the effect that the car driven by the defendant stopped suddenly, and that the car driven by Mashek was thereby caused to collide with the car driven by the defendant.

The defendant's testimony is to the effect that he was driving along Tenth street looking for a place to park his car, with the intent and purpose of thereafter entering Odd Fellows Hall; that not finding any place to park his car, he stopped for the purpose of permitting his wife to alight therefrom, and that it was his purpose to seek elsewhere an available place for the parking of his car; that a car preceding him had stopped for a like purpose. It is admitted in the testimony that the defendant's car was not stopped on account of interfering with any traffic, but for the purpose solely of allowing the defendant's wife to alight from his car.

We pass by the question of the assumed negligence of Mashek, as it is admitted that if he were negligent, his negligence is not imputed to the plaintiff in this action.

Practically the sole question for us to consider is the effect and application to be given to section 138 of the California Vehicle Act (St.1923, p. 562, § 138, as amended by St.1931, p. 2129) (now section 586 of the Vehicle Code). Section 138, supra, reads as follows:

"It shall be unlawful for the driver of a vehicle to stop, stand or park such vehicle, whether attended or unattended, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control signal, in any of the following places: * * * On the roadway side of any vehicle stopped or parked at the edge or curb of a highway." Section 34 of Ordinance 345 (N.S.) of the city of Modesto is substantially to the same effect, but, as the general law controls, we need give no consideration to the local ordinance. As just stated, the defendant's automobile was stopped on the roadway side of parked cars, not for the purpose of avoiding conflict with the traffic, and not in compliance with the directions of any police officer or traffic control signal, but for the sole purpose of allowing his wife to alight therefrom.

Prior to the year 1931, the provision specifying that it was unlawful to stop on the roadway side of a parked car was no part of section 138, supra, but by an amendment of the Legislature of that year the prohibition just stated was incorporated and became a part of the section.

Section 145½ of the California Vehicle Act (St.1923, p. 517, § 145½, as added by St. 1931, p. 2132) provided further designation of stopping places for the alighting of passengers. The record in this case, however, is silent as to whether such markings had been made upon the curbing of any of the streets mentioned in this action for the purpose of allowing passengers to be discharged from automobiles.

In considering the interpretation to be given to the provision of the statute prohibiting the stopping on the roadway side of parked automobiles, the fact that the Legislature saw fit to insert such a prohibition in section 138, supra, must be kept in mind, and we may reasonably conclude that the Legislature had in view the liability of a collision occurring between the stopping car and a following car.

[1, 2] On the part of the respondent it is urged that the defendant was guilty of negligence as a matter of law. On the part of the appellant it is contended that the rule of reason must be followed, and that the defendant had a right to stop his car under the circumstances, for the purpose of permitting his wife to alight therefrom, claiming also that the presence of parked cars created an emergency. We find no definition of emergency applicable to the circumstances here presented. An emergency includes an unforeseen, and ordinarily an unusual occurrence. Parked cars along the side of a street cannot be said to be either an unforeseen or an unusual occurrence.

There is language in the case of Collins v. Marsh, 176 Cal. 639, 169 P. 389, where the opinion speaks of a buggy being so parked that the rear wheels were slightly more than two feet from the curbing, as being an emergency. The language in the opinion does not seem to us necessary to support the decision, and it may be also added that in the same opinion we find language to the effect that the defendant in that case had a right to stop anywhere that he so desired, or words to that effect. Since the date of that decision, however, section 138 of the California Vehicle Act has been amended so as to take away the alleged right of one to stop anywhere for the purpose of alighting from a vehicle. The question presented, while argued on the part of the appellant as one calling for the application of the rule of reason, really presents the question of: Shall the rule of convenience be allowed to bend the plain words of the statute in order to permit the driver of an automobile to stop where he desires, irrespective of whether traffic on the highway or streets of a city is thereby interfered with, or the hazard either to person or property increased? In other words, the contention of the appellant may be said to be an argument in favor of the rule of evasion rather than the application of the rule of reason. Casualties running up into the hundreds of thousands and fatalities mounting to proportions rivaling World War conditions, leads to the conclusion that the Legislature intended just what it said, that the safety of persons and property required obedience to rules and regulations intended to safeguard person and property, rather than to be set aside under any so-called rule of reason to suit the personal convenience of automobile drivers.

The appellant calls our attention to the case of Fleming v. Flick, 140 Cal.App. 14, 35 P.(2d) 210, in which this court did apply what may appropriately be called the rule of reason to the circumstances which are there presented, which are so readily distinguishable from the circumstances we are considering here as to render the case of Fleming v. Flick, supra, wholly inapplicable. In that case the driver of a truck with a trailer was confronted with the breakdown of the trailer, and in attempting to remove the obstruction from the highway, the trailer did encroach upon one side of the highway, but left at least 15 feet of the highway clear from passing vehicles. A towcar was summoned, and the towcar took a position which left at least 15 feet clear for the passing of vehicles. Other vehicles had passed by. While the driver of the truck and trailer and the driver of the towcar were at work in attempting to remove the obstruction from the highway, a car driven by the defendant Flick came up the opposite side of the hill and over the brow thereof, and started down the hill toward the truck and trailer, at a speed of between 50 and 60 miles per hour, the testimony also showing that the driver of the car, coming at that speed, was looking to one side and paid no attention to the obstruction in front of him. A collision occurred. An action for damages was brought by Fleming, who was injured in the collision, and this court sustained the judgment, awarding damages for the injuries there incurred. This statement shows just what we have said, the inapplicability of the case of Fleming v. Flick, supra, relied upon by the appellant.

The case of Moss v. Stubbs, 111 Cal. App. 359, 295 P. 572, 296 P. 86, cited only to the point that where there is no substantial conflict in the evidence as to any of the essential facts relating to the manner in which the accident happened, and that if such facts are not sufficient to support a verdict in favor of the plaintiff, an order granting the plaintiff a new trial will be reversed. We take no exception to the correctness of the rules of law there stated, but what we have said, and shall hereafter add, that case does not appear to us to be determinative of the issues here involved.

The facts presented in the case of Mounts v. Tzugares et al., 9 Cal.App.(2d) 327, 49 P.(2d) 883, may likewise be readily distinguished from the conditions we are considering. In that case a truck and trailer had stopped on one side of the highway, leaving ample room for the passage of vehicles. It appears that while a truck was passing the stopped truck and trailer, an automobile coming in the opposite direction collided with the truck so attempting to pass the stopped truck. The driver of the automobile had a clear vision of over 240 feet. A collision occurred between the automobile and the passing truck. An attempt was made to hold the driver and owner of the truck that had stopped on the highway. The court held that the act of stopping the truck, by the driver thereof, was not the proximate cause of the collision between the passing truck and the automobile coming in the opposite direction, but was caused by the negligence of the automobile driver in not stopping after having a clear vision of the conditions for at least 240 feet.

In McMillan v. Thompson, 140 Cal.App. 437, 35 P.(2d) 419, the facts are so dissimilar from the case at bar as not to support the contentions of the appellant. The opinion sets forth that a loaded truck and trailer belonging to the defendant Zimmer, was proceeding south on the paved highway; that shortly after leaving a service station the engine began to sputter, but the driver thereof, pulling out the choke, the engine appeared to take on new life, but in a few seconds thereafter suddenly stopped and left the truck and trailer on the extreme right-hand side of the paved portion of the highway. The highway consisted of a concrete roadway 20 feet wide, with dirt shoulders on either side, which were from 7 to 10 feet wide, and that the road was straight for a considerable distance. When the truck stopped, attention was given to the taillights, and it was shown that they were burning brightly and could be seen for at least 450 feet distant. At this instant a Ford truck driven by one McMillan, in which his brother McMillan was a passenger, came along, driving to the south. The driver of this car observed the taillight on the stalled truck when it was at least 450 feet away, and when about 150 feet away he could see the entire body of the truck. The left half of the highway was entirely clear, and no car was approaching from the south. The driver of the Ford car turned to the left and started to pass the stalled truck. As he reached a point about opposite the rear of the trailer, another car driven by defendant named Deaver, also proceeding south, crashed into the rear of the Ford truck, as a result of which the Ford truck crashed into the stalled trailer, causing injuries to John McMillan which resulted in his death. An attempt was made to hold, as well as other defendants, the owner of the stalled truck. The court held the owner of the stalled truck free from liability. The foregoing recital of the facts of that case shows that appellant's contention in this case can find no support therein. If the rule of reason applied in the case of Fleming v. Flick, supra, where an emergency arises such as the breaking down of an automobile and the stopping of a towcar to remove the obstruction from the highway, or of the stopping of an ambulance to remove an injured person from the highway, applies also to prohibited stopping on a street or highway as a matter of pleasure or for mere convenience in discharging passengers, then the prohibitory provisions of section 138 of the California Vehicle Act (now section 586 of the Vehicle Code) are to all intents and purposes eliminated. Such reasoning seems to us illogical, and would lead to the conclusion that the Legislature, in amending section 138, supra, in 1931, by adding the several prohibitory regulations therein, was an idle gesture, and that the Legislature did not have in mind the safeguarding of either person or property. We think the Legislature had in view, in amending section 138, supra, the lessening of casualties that were increasing by reason of the rapid increase in the number of automobiles using city streets or public highways. The length of time which a stopped car remains in a prohibited area is only a matter of continuing liability, as the danger from such action starts with the stopping of the car, and ends with its continuing forward motion. The fact of illegal stopping does not depend upon the continuation of the liability.

That the stopping of a car in a prohibited area, followed by a rear-end collision, is a proximate cause of injury to a guest or third person, is supported by the following cases heretofore decided by this court:

In Keiper v. Pacific Gas & Electric Co., 36 Cal.App. 362, 172 P. 180, a car was left stopped negligently, and negligently left standing upon a street car line. A collision followed, a third person was injured, and this court held the owner of the car liable. The questions here considered are very carefully set forth in the opinion written by Mr. Justice Hart in that case.

In Flynn v. Bledsoe Co., 92 Cal.App. 145, 267 P. 887, where the violation of an ordinance in parking a car was under consideration, and a projecting sill on a delivery car was allowed to reach out upon a highway by reason of imperfect parking, and a guest in a passing car was injured thereby, this court held the continuing negligence of the company was a proximate cause of the injury. This case likewise goes into the question very carefully.

In Rauch v. Southern California Gas Co., 96 Cal.App. 250, 273 P. 1111, the question of proximate cause is again considered, and the principles enunciated in the Keiper Case and in the Flynn Case are approved. These cases support the contention of the respondent that the negligence of the defendant is a proximate cause of her injury.

And it therefore follows from what we have said that the order of the trial court granting the plaintiff a new trial should be, and the same is hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.App.2d 492

ROBINSON, on behalf of C. & R. TRANSFER, v. BOULEVARD EXPRESS, Inc., et al.

Civ. 1937.

District Court of Appeal, Fourth District, California.

Nov. 13, 1936.

Rehearing Denied Dec. 11, 1936.

Hearing Denied by Supreme Court Jan. 11, 1937.

1. Contracts 🔑278(1)

Party cannot recover damages for breach of contract, where he is in default under contract, and default has not been waived by other party.

2. Contracts 🔑202(2)

Contract by which copartners agreed not to pick up or distribute freight for any other transportation company, or for any person, firm, or corporation engaged in transportation of freight in competition with trucking company, *held* breached by act of one copartner in collecting and delivering freight for company engaged in shipping freight by rail between same cities as trucking company.

3. Partnership 🔑284

Partner could not maintain action against trucking company for breach of contract between partnership and trucking company, where copartner, after dissolution of partnership, had breached contract with trucking company by dealing with competitor of trucking company, since partner was bound by acts of copartner.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by E. H. Robinson, for and on behalf of the C. & R. Transfer, against the Boulevard Express, Incorporated, and William Case. From a judgment in favor of the plaintiff, the Boulevard Express, Incorporated, appeals.

Reversed.

Wallace K. Downey, of Los Angeles, and Gray, Cary, Ames & Driscoll and E. A. Walters, all of San Diego, for appellant.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for breach of a contract. For some time prior to August, 1929, the plaintiff Robinson and the defendant Case, as copartners operating under the fictitious name of "C. & R. Transfer," had been engaged in a local transfer and trucking business in the city of San Diego, and the Boulevard Express, Inc., which will be referred to as the appellant, had been operating a common carrier transportation service by truck between Los Angeles and San Diego. On August 31, 1929, these parties entered into a contract under the terms of which the copartners were to pick up and deliver to or from appellant's depot all freight, either going out of or coming into San Diego over its lines, at an agreed compensation. The term of the contract was to be ten years, with the provision that either party should have the right to renew the same for a further period of ten years. By one paragraph of the contract the copartners agreed "not to enter into any contract or agreement to, nor to, pick up or distribute freight or express matter for any other truck transportation company, person, firm, or corporation engaged in the transportation of freight or express matter in competition with" the appellant.

On September 1, 1931, the copartnership was dissolved and Case continued business in San Diego under the old name of C. & R. Transfer, while Robinson began a similar business under the name of "Arrow Transfer." Under the terms of the dissolution agreement, Robinson assumed the contract with the appellant. About the middle of October, 1931, Case, operating under the old name of C. & R. Transfer, entered into an agreement to collect and deliver freight for a corporation named California Merchants Association, Limited, which was also engaged in the business of transporting freight between Los Angeles and San Diego in competition with the appellant. The first freight thus collected and delivered by Case was shipped on October 27, 1931. On November 1, 1931, the appellant sold its assets and business to the Motor Freight Terminal Company and for four months thereafter that company used the services of Robinson in delivering and collecting freight in San Diego, paying the same compensation which he had theretofore received.

On March 1, 1932, the Motor Freight Terminal Company notified Robinson that his services would no longer be required and this action followed. Case, refusing to join as a plaintiff, was made a defendant. The complaint alleged, among other things, that the plaintiff for and on behalf of the copartnership had, since September 1, 1931, up to February 29, 1932, performed each and all of the obligations to be performed by Case and Robinson under the terms of the contract. The answer denied this allegation and affirmatively alleged that since September 1, 1931, Case had conducted a business under the name of C. & R. Transfer Company and had performed for a competitor of the appellant services of a like nature to those to be performed for the appellant under the terms of the contract.

Among other things, the court found that on September 1, 1931, the partnership agreement between Case and Robinson was dissolved, except as to the contract which is here involved; that the partnership remained in effect for the purpose of carrying out each and all of the obligations and duties imposed upon the copartners by the terms of the contract that the rights, duties, and obligations of the partners under the contract were, on September 1, 1931, on behalf of the partnership taken over and assumed by Robinson; that the defendant had notice of this dissolution on or about September 1, 1931; that subsequent to the dissolution of the partnership and up to February 29, 1932, Robinson performed each and all of the obligations to be performed by Case or himself under the terms of the agreement; that during the same period the defendant performed each and all of the obligations imposed upon it by the terms of the contract; that on March 1, 1932, the defendant wrongfully, without cause, and in violation of the agreement, repudiated and breached the same by notifying Robinson that it would no longer permit him to pick up or deliver freight; that Case at all times since September 1, 1931, conducted a business under the fictitious name of C. & R. Transfer and "that it is not true that said Case has performed services of a like nature to those to be performed by C. & R. Transfer in violation of the terms of said agreement, for a competitor of this defendant"; that it is not true that on August 31, 1929, the defendant had a right to and did rely upon the responsibility, integrity, and business ability of both Case and Robinson; and that it is not true that said Robinson or said Case did not perform each and all of the obligations to be performed by them under the terms of the contract.

[1] This appeal is from a judgment in favor of the plaintiff for $12,372.03. The main points raised are that certain findings are not supported by the evidence and that the respondent is not entitled to judgment for the reason that the copartnership was itself guilty of a breach of the contract at the time of the alleged breach on the part of the appellant. In Rathbun v. Security Manufacturing Co., 82 Cal.App. 793, 256 P. 296, 297, the court said: "It is elementary that one party cannot compel another to perform while he himself is in default under the contract." In Los Angeles Gas & Electric Corporation v. Amalgamated Oil Co., 168 Cal. 140, 142 P. 46, 47, it is said: "Without regard to the finding that the action was barred by limitation, it is, in effect conceded, as it necessarily must be, that judgment in favor of the defendant necessarily followed from the findings that the

plaintiff had violated the contract in material respects before any breach had been committed by the defendant, and that such violations by the plaintiff had not been waived by the defendant. A party cannot recover damages for the breach of an entire contract if he himself has failed, without lawful cause, to perform the covenants, upon compliance with which the obligations of the defendant were dependent. Thus, in this case, a failure by the Gas Company to take from the Oil Company all of the oil agreed to be taken (or, which is the same thing, the taking of such oil from others) would deprive the plaintiff of the right to complain of the subsequent refusal of the defendant to furnish oil agreed to be delivered. This is the statement of an elementary rule, which requires, for present purposes, no citation of authority beyond the decision, already referred to, in the former litigation between the same parties."

It may be assumed for the purposes of this decision that the Motor Freight Terminal Company assumed the obligations of the appellant under the contract in question and that the breach, if any, occurred when notice was given on March 1, 1932, that the services of respondent would no longer be required. If the copartners were then in default in performing their part of the contract, this action could not be maintained unless such default had been waived by the appellant. While the court found that the appellant had notice of the dissolution of the partnership, there is no finding, and we are pointed to no evidence which would support a finding, to the effect that the appellant had waived the provision that neither of the partners would pick up or distribute freight for any other company, person, firm, or corporation engaged in the transportation of freight in competition with the appellant.

[2] The respondent argues that the picking up of freight by Case for the California Merchants Association, Limited, was not a breach of the contract for the reason that that company was then engaged in shipping its freight by rail, and that the freight was taken or delivered by Case in connection with shipments by rail while the contract in question refers only to truck transportation. Apparently this view was adopted by the trial court and is reflected in the findings to the effect that Case was not engaged in picking up and distributing freight for a competitor of the appellant in violation of the terms of the agreement, and that the copartners were not in default. In our opinion this interpretation is not justified by the language of the contract. The agreement plainly states that the copartners agreed not to pick up or distribute freight for any other truck transportation company or for any person, firm, or corporation engaged in the transportation of freight in competition with the appellant. It clearly appears from the evidence that the California Merchants Association, Limited, was engaged in the transportation of freight between Los Angeles and San Diego in competition with the appellant and that the respondent, from about the middle of October, 1931, to the date of the trial, was picking up and distributing freight for that competitor while operating under the original name of C. & R. Transfer.

The manager of California Merchants Association, Limited, testified that that company operated between Los Angeles and San Diego; that it had operated its own trucks from April to July, 1931, when it stopped on receiving a cease and desist order from the Railroad Commission; that it then began to forward freight over other carriers; that it used other truck transportation companies until it could arrange with the Santa Fe Railroad for a "pool car"; that it started pool car shipments on the 27th or 28th of September, 1931; that he met Case about the middle of October, 1931; that Case was then operating under the name of C. & R. Transfer; that "We just had a verbal conversation and told him that the bigger the business was, the more money we would make and as he knew quite a number of people in San Diego as he had been here for years hauling freight, that he should give us all the assistance he could to secure that freight and he said yes he would"; that he then entered into a contract with Case; that Case then took the shipments that were sent down in pool cars and distributed them in San Diego territory and collected freight for this company to ship to Los Angeles; and that the first shipment handled by Case went through on October 27, 1931. The respondent himself testified that Case had continued the business under the name of C. & R. Transfer up to the time of the trial, that Case commenced picking up and delivering freight for the California Merchants Association, Limited, that that company was engaged in the transportation of freight between Los Angeles and

San Diego, and that it was in competition with the appellant. This evidence is uncontradicted, and it follows that the findings, to the effect that everything to be done by either Case or Robinson under the terms of the contract had been performed up to February 29, 1932, and that Case had not performed services of a similar nature for a competitor of the appellant, are not sustained by the evidence.

[3] The record shows without conflict that one of the copartners was performing services for a competitor of the appellant in violation of the contract up to the date of the trial. The respondent was bound by the acts of his copartner (Asbestos, etc., Co. v. Lennig-Rapple Co., 26 Cal.App. 177, 146 P. 188), and, being in default, was in no position to maintain this action. Some contention is made that even if the respondent was in default he was entitled to ten days after notice within which to cure the breach, by virtue of a certain provision of the contract. That provision set forth one of the ways in which the contract might be terminated but has no bearing on the right of the respondent to maintain an action for damages for breach of the contract at a time when he was himself in default.

The views above expressed make it unnecessary to consider the other points raised.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

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17 Cal.App.2d 458

BONNER v. LOS ANGELES EXAMINER.

Civ. 10995.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1936.

1. Appeal and error 🔑979(2)

Where motion for new trial is granted for insufficiency of evidence, appellate court will not find that there has been an abuse of discretion until it has considered the entire record.

2. Appeal and error 🔑977(3)
New trial 🔑6

Granting of new trial is matter resting so largely in discretion of trial court that its action will not be disturbed upon appeal except upon manifest and unmistakable abuse.

3. Appeal and error 🔑933(1)

On appeal from order granting new trial, every presumption is in favor of the order, and the opposing party must show affirmatively that it was erroneous.

4. Appeal and error 🔑977(3)

Only in rare instances and upon very strong grounds will reviewing court set aside order granting new trial.

5. New trial 🔑70

Insufficiency of evidence to justify verdict is ground for new trial within discretion of trial court.

6. Appeal and error 🔑979(2)

Where there is any appreciable conflict in evidence, action of trial court in granting new trial because of insufficiency of evidence is conclusive on appellate court.

7. New trial 🔑77(2)

Trial court may not grant new trial for excessive damages merely because verdict seems large, but only if it appears that it was given under influence of passion or prejudice.

8. Appeal and error 🔑979(5)

On appeal from order granting new trial for excessive damages appearing to have been given under influence of passion or prejudice, reviewing court will not disturb order if there is reasonable or fairly debatable justification for it.

9. Appeal and error 🔑933(4)

Order granting new trial for excessive damages implies motion was granted upon consideration of insufficiency of evidence to support verdict.

10. Libel and slander 🔑107(2)

In action for slander, facts that there was no evidence showing that newspaper in which alleged slander was published had any circulation in county or place of residence of plaintiff prior to or at time of publication of alleged slander and that there was no evidence that plaintiff suffered any injury to his business or occupation were required to be considered in determining amount of damages recoverable.

11. New trial ⚷76(6)

Where plaintiff in slander action who was not shown to have lost his position or earnings was granted $30,000 compensatory damages and $45,000 exemplary damages against owner of newspaper in which alleged slander was published, grant of new trial for excessive damages *held* proper.

12. New trial ⚷70

Grant of new trial to owner of newspaper in which alleged slander was published on ground of insufficiency of evidence *held* not abuse of discretion in view of debatable contention of owner that it met burden of proving justification of alleged slanderous article which was published.

13. New trial ⚷76(6)

Grant of new trial to owner of newspaper in which alleged slanderous article was published, on ground of excessive damages based upon absence of evidence of malice necessary to authorize award of exemplary damages, *held* not abuse of discretion.

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Appeal from Superior Court, Los Angeles County; W. J. Palmer, Judge.

Action by Frank E. Bonner against the Los Angeles Examiner. From an order granting the defendant a new trial, the plaintiff appeals.

Affirmed.

Joseph L. Lewinson and Morris E. Cohn, both of Los Angeles, for appellant.

Oscar Lawler and John M. Hall, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal from an order granting defendant's motion for a new trial in an action for damages for libel. The jury awarded $30,000 as compensatory damages, and $45,000 as exemplary damages. The order for new trial was granted upon the following grounds: "(1) Excessive damages, appearing to have been given under the influence of passion or prejudice; (2) Insufficiency of the evidence to justify the verdict; (3) That the verdict is against the law; (4) Error in law, occurring at the trial and excepted to by the defendant." Where such a motion is granted for insufficiency of evidence to justify the verdict, an appellate court will not find that there has been an abuse of discretion until it has considered the entire record. Gaster v. Hinkley, 85 Cal.App. 55, 60, 258 P. 988.

[2-4] The granting of a new trial is a matter resting so largely in the discretion of the trial court that its action will not be disturbed upon appeal except upon a manifest and unmistakable abuse. On appeal, every presumption is in favor of the order, and the plaintiff must show affirmatively that the order was erroneous. Rosenberg v. George A. Moore & Co., 194 Cal. 392, 396, 229 P. 34. It has been said and quoted over and over again that "it is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial." 2 Cal.Jur. 905, and cases cited. This rule arises largely from the fact that the order granting a new trial does not finally dispose of the case, but leaves it for retrial upon the merits.

[5, 6] "Insufficiency of the evidence to justify the verdict" is a ground for new trial appealing peculiarly to the discretion of the trial court. The rule which is applicable on an appeal from an order granting a new trial on such ground is upside down to the rule applicable on an appeal from a judgment on the ground of insufficiency of the evidence. In the latter situation the verdict of a jury will not be disturbed unless it appears without substantial conflict that there is no evidence to sustain the verdict. In the former situation, if there is any appreciable conflict in the evidence, the action of the trial court in granting a new trial is conclusive on the appellate court. See cases collected in 2 Cal.Jur. 940, note 15. And the same is true where the evidence, though not conflicting, is such that different inferences may reasonably be drawn therefrom. Harrison v. Sutter, etc., 116 Cal. 156, 47 P. 1019. In this connection it has been said that "so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law for the action taken, such action will not be set aside, even if, as a question of first impression, the appellate court might feel inclined to take a different view from that of the trial court as to the propriety of its action." 2 Cal. Jur. 906, and cases cited. One of the rea-

sons for the rule is that the province of the appellate court is to decide questions of law; it will assume none of the functions of the fact finder; it will not weigh the evidence nor substitute its judgment thereon for that of the trial court. The opportunity of the trial court to draw proper deductions from the evidence and for reaching just conclusions in such matters is generally superior to that of the appellate court.

[7-9] With regard to the granting of a new trial for "excessive damages appearing to have been given under the influence of passion or prejudice," the rule in the trial court is that it may not grant such an order merely because the verdict seems large or because it is larger than the court sitting as a jury would have given but only when it appears that it was given under the influence of passion or prejudice. On appeal from such an order, however, an appellate court will not disturb the order if there is a reasonable or fairly debatable justification for it. It has been said and often quoted "that the trial court should be vigilant to set aside verdicts where there is reason to believe that passion, prejudice or sympathy has influenced the jury to give more than the facts reasonably warrant. No definite rule can be announced as to when a verdict is or is not so excessive within these rules, but it is settled that an order granting a new trial for excessive damages will not be disturbed if there is a reasonable or fairly debatable justification therefor. Such an order implies that the motion was granted upon a consideration of the insufficiency of the evidence to support the verdict." 20 Cal.Jur. 100. In the same connection it has been said that "practically, the trial court must bear the whole responsibility in every case." Bond v. United Railroads, 159 Cal. 270, 286, 113 P. 366, 373, 48 L. R.A.(N.S.) 687, Ann.Cas.1912C, 50; Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234. In all the above we have not been stating new law. We have followed the language of former decisions in setting forth rules which are time-tried and experience-tested—rules which must govern in the determination of this case.

[10, 11] The trial lasted for approximately five weeks, and the record is voluminous. There are 4,177 pages in the transcripts and briefs. The following facts and deductions may be reasonably drawn from the record: At the time the alleged libelous article was published, the plaintiff was the executive secretary of the federal power commission. The article was in the form of a full-page editorial and accused the plaintiff, among other things, of having plundered from the files of the federal power commission letters from the so-called "Power Trust" recommending him for the position as executive secretary, and accusing him in effect of being a tool of the "Power Trust" in his administration of his office. The plaintiff has been in the government service continuously since 1909. From a minor position he had advanced through the various civil service classifications to the highest rating in the engineering service. During the seven years preceding his appointment as executive secretary of the federal power commission, he was assigned to San Francisco as district engineer. He was appointed executive secretary of the commission on July 1, 1929. The editorial was published April 22, 1930. His position with the commission ended on December 22, 1930, by act of congress; and his service with the government continued thereafter until about June 30, 1931. Plaintiff never resided in Los Angeles county where the defendant's newspaper had its major circulation. Plaintiff's home for thirteen years prior to the trial had been at Piedmont in Alameda county. There was no evidence showing that defendant's newspaper had any circulation whatever in Alameda county or in San Francisco where plaintiff had his headquarters for several years prior to 1929, or in Washington, D. C., where plaintiff had his headquarters at the time of the publication of the article, and there was no evidence that plaintiff had suffered any injury to his business or occupation. These are all circumstances bearing upon the question of amount of damages. Stevens v. Snow, 191 Cal. 58, 214 P. 968. There was no showing that the article in question caused the loss of plaintiff's position, or caused any diminution in the plaintiff's earnings, or affected adversely plaintiff's standing in the government service. Aside from temporary attendance in Los Angeles at certain commission hearings, there was no evidence that plaintiff had ever sojourned in Los Angeles county or that he had ever formed any business, social, or religious connections therein or in any other county in which defendant's newspaper circulated.

Such circumstances, lacking herein, are elements which usually have been found to exist in libel cases where any attempt has been made to justify large damages. Their absence in this case may reasonably be considered in justification of the trial court's order granting a new trial on the ground of excessive damages given under the influence of passion or prejudice.

[12] The contention of the defendant in the briefs, among others, is that it fully met the burden of proving justification of the alleged libelous article. It is sufficient for us to say, following the rules heretofore stated, that defendant's contention is a fairly debatable one, and that in this sense there was justification for the trial court's order upon the ground of insufficiency of the evidence.

[13] Furthermore, the plaintiff in the trial court had the burden of proving express malice as a basis for the awarding of exemplary damages amounting to $45,000. There was no direct evidence of express malice, but plaintiff claims (1) as a circumstance proving malice that the vice president of the defendant corporation verified an answer reasserting the truth of the article and that he did so despite knowledge on his part which should have indicated to him that the article was untrue, and (2) that from the tenor of the article itself malice might be inferred. Defendant contends that no inferences of express malice could be drawn from the reaffirmance in the answer of the truth of the article unless no attempt was made at the trial in good faith to establish the truth of the article (Westerfield v. Scripps, 119 Cal. 607, 611, 51 P. 958; Dauphiny v. Buhne, 153 Cal. 757, 764, 96 P. 880, 126 Am.St.Rep. 136; Davis v. Hearst, 160 Cal. 143, 181, 116 P. 530), and that the defendant made far more than a bona fide effort to establish the truth of the article—that it introduced evidence which would have supported a finding that the article was true. At the least, it can be said that it was within the province of the trial court to determine in ruling on the motion for a new trial whether there was or was not an inference of malice arising from this circumstance. Whether the tenor of the article itself proved express malice depended entirely upon the inferences to be drawn therefrom. It was the privilege of the trial court in ruling upon the motion to draw a reasonable inference from the evidence that there was no express malice even though such inference was opposed to the inference which the jury adopted. In any event, there is a fairly debatable justification in the record for the trial court's order on this ground.

What we have already said makes it unnecessary to discuss the other grounds upon which the trial court may have based its order for a new trial.

Order affirmed.

I concur: WOOD, J.

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17 Cal.App.2d 536

JENSEN v. FINDLEY.

Civ. 1927.

District Court of Appeal, Fourth District, California.

Nov. 16, 1936.

Hearing Denied by Supreme Court Jan. 14, 1937.

1. Trial 🔑139(1), 142

Before trial judge may direct a verdict for defendant, it must appear that there is no substantial evidence, no inferences to be fairly drawn therefrom, nor favorable presumptions fairly arising therefrom, which would support judgment for plaintiff.

2. Evidence 🔑591

Plaintiff who called defendant as a witness for cross-examination under statute was not bound by evidence so given (Code Civ.Proc. § 2055).

3. Physicians and surgeons 🔑14(4)

One holding himself out as specialist in treatment of certain organ, injury, or disease is bound to bring to aid of one employing him for such treatment degree of skill and knowledge ordinarily possessed by such specialists in same general locality, considering state of scientific knowledge at time.

4. Physicians and surgeons 🔑15

That eye specialist, sued for loss of eye which he treated, might have employed other medicines or used other methods of treatment, was insufficient to fasten charge of negligence upon him.

5. Physicians and surgeons ⚷18(8)

In malpractice suit, physician's failure to use skill and care required of him cannot be established by lay witnesses.

6. Physicians and surgeons ⚷15

In action against eye specialist for loss of left eye which was infected with gonorrheal ophthalmia, physician's failure to cap patient's right eye did not authorize recovery where right eye was not infected and was not injured, and failure to cap it was neither proximate nor contributing cause of injury suffered by patient.

7. Physicians and surgeons ⚷15

Eye specialist *held* not liable for loss of eye which he treated for gonorrheal ophthalmia, because of failure to take a smear from eye and have it tested, where purposes of smear and examination were to determine nature of infection and nature of treatment, and spcialist recognized nature of infection at first examination and administered proper treatment.

8. Physicians and surgeons ⚷15

Eye specialist *held* not liable for loss of eye which he treated for gonorrheal ophthalmia, because of failure to hospitalize patient, where there was no evidence that hospitalization was a necessary part of treatment of disease required by standards of good practice of an eye specialist in locality where specialist lived.

9. Physicians and surgeons ⚷15

Eye specialist *held* not liable for loss of eye which he treated for gonorrheal ophthalmia, because of failure to use more energetic treatment on the eye, where patient's expert testified that, if he were treating such case, he would want to have more energetic treatment, that in such serious disease outcome might be grave in any event, that there was great difference in opinion about use of drugs, and that each step in treatment administered by specialist was proper.

10. Evidence ⚷553(2)

In action against eye specialist for loss of eye which was treated for gonorrheal ophthalmia, hypothetical question put to plaintiff's expert, which failed to consider testimony of plaintiff that during each of 12 treatments given him by specialist some drug was placed in his eye, and that plaintiff did not know name of drug used, should not have been permitted, where expert testified that he considered nitrate of silver a specific for the infection, and specialist testified that drug used was nitrate of silver.

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Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by John Jensen against Harry P. Findley, also know as H. P. Findley. From a judgment for defendant upon instructed verdict, and from other orders, plaintiff appeals.

Judgment affirmed, and appeals from order granting motion for instructed verdict, from order denying motion for new trial, and from other orders and rulings, dismissed.

Edw. L. Johnson and Frank Birkhauser, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

MARKS, Justice.

This is an action to recover damages suffered by plaintiff in the loss of his left eye which was treated by defendant, a duly licensed physician who specialized in the treatment of diseases of the eye, ear, nose, and throat in the city of El Centro in Imperial county. At the close of plaintiff's evidence the trial court granted defendant's motion for an instructed verdict, and under such an instruction the jury brought in a verdict for the defendant. This appeal is from the judgment entered upon the verdict and from several unappealable orders.

[1] In California there is a well-settled rule that before a trial judge may direct a jury to bring in a verdict for a defendant it must appear that there is no substantial evidence nor inferences to be fairly drawn from the evidence, nor favorable presumptions fairly arising from the evidence, which would support a judgment for the plaintiff. With this rule in mind it becomes necessary to detail the evidence in order to determine if there is any such evidence, inference, or presumption shown by the record.

[2] Defendant was called by plaintiff as a witness for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. Plaintiff is not bound by the evidence so given. This evidence of defendant may be thus summarized: He maintained offices in the city of El

Centro and for twenty-five years had specialized in the treatment of diseases of the eye, ear, nose and throat, and so held himself out to the public. On or about May 22, 1933, plaintiff came to him for the treatment of a badly swollen and infected eye and defendant accepted him as a patient. Defendant immediately examined the eye and diagnosed the malady as gonorrheal ophthalmia. He irrigated the eye and otherwise cleaned it and painted the lids with a 1 per cent. solution of silver nitrate. He informed plaintiff of the infected condition and warned him regarding it, advised the application of ice compresses continuously changed and also placed two drops of atropin solution in the eye. He told plaintiff to keep the eye clean with frequent irrigations of a salt or a boric acid solution. He also gave him a prescription for a one-half of 1 per cent. solution of zinc sulphate with directions to place two or three drops in the eye every two hours. The use of this solution was changed after one day to a 15 to 20 per cent. solution of neo silval, with like directions to those given with the first. Plaintiff returned to the doctor for treatment every day until June 1, 1933, and received the same treatment with the addition of painting the eye with a 4 per cent. solution of mercurochrome on May 31, 1933, as examination on that day showed the first appearance of a corneal ulcer. Defendant did not inform plaintiff of the exact nature of the infection, but did warn him of the danger of infecting other organs. He did not cap or otherwise protect the other eye against infection. He did not take a smear from the pus and make a laboratory test of it, as he regarded such procedure unnecessary as he was convinced of the exact nature of the infection from the time of his first examination. He did not order the hospitalization of plaintiff, as plaintiff told him he had no money for hospitalization and as there was no free hospital available. On May 31, 1933, he gave plaintiff another prescription for a 15 per cent. solution of neo silval with directions to place two or three drops in the eye every two hours. Plaintiff paid defendant only for the first three treatments.

The testimony of plaintiff may be thus summarized: While he was in a moving picture theater on Saturday night, May 20, 1933, his left eye began to pain him. The pain continued on Sunday and he obtained some argyrol which he used as an eye lotion. On Monday the pain continued and as considerable pus was forming in the eye he went to defendant for treatment. Defendant told plaintiff that the eye was badly infected but gave him no warning. Defendant washed out the eye and put some medicine in it, the nature of which was unknown to plaintiff. Defendant gave plaintiff a prescription for medicine to be put in the eye every two or three hours, told him to keep it clean with irrigations of boric acid or salt water solutions every two or three hours, and to keep ice packs on it. These treatments were continued daily until the following Sunday (May 28, 1933), and no new directions were given. Defendant told plaintiff that hospitalization was unnecessary and that at first the infection extended only to the lids of the eye and not the eyeball. On Friday the eye commenced to bleed. This was called to defendant's attention on the following day, and plaintiff was informed that he was doing all right. On Sunday the new prescription (for neo silval) was given and that medication used in the eye. (This prescription was not produced, and is evidently the same prescription mentioned in the testimony of defendant as given on the second day of the treatment, or May 23, 1933). Plaintiff tipped over the bottle of medicine and obtained a duplicate prescription on Wednesday, May 31, 1933. He called at defendant's office once each day, twice on one day, from May 22, to June 1, inclusive, and received the treatment already described and faithfully carried out the directions for home treatment. On June 1, 1933, defendant told plaintiff "I am afraid your eye won't do you any good any more." On the next day plaintiff went to San Diego and consulted Dr. C. S. Marsden, who also was a specialist in the treatment of diseases of the eye. Dr. Marsden removed the eyeball the following day. Plaintiff testified that he had sufficient funds with which to pay for hospitalization had it been advised by defendant. He also testified that defendant did not recommend the capping of the right eye.

Dr. Marsden testified that he specialized in the treatment of the eye, ear, nose, and throat and had treated numerous cases of gonorrheal ophthalmia, none of which had resulted in the patient losing the infected eye; that he had practiced in El

Centro for about a year in 1924 and knew the accepted methods of treatment of that disease used by eye specialists in that locality. He testified that on June 2, 1933, when he first saw plaintiff, the eye was full of pus, was badly swollen; that there was a perforation of the cornea and prolapsus of the iris. He took a smear from the eye, which smear was examined in a laboratory, the result showing that the infection was gonorrheal in nature. As sight from the eye was destroyed and could not be restored, he removed the eyeball the next day. It required hospitalization for about one week and treatment for several weeks to cure the infection in the socket of the eye. Dr. Marsden testified that, when an eye specialist saw a painfully swollen and infected eye exuding pus, the first thought that would occur to him would be the presence of a gonorrheal infection, and good practice in El Centro and elsewhere required that a smear should be taken and examined in order to determine the nature of the infection and the treatment to be used, for "certainly gonorrheal ophthalmia is more severe and dangerous than a purulent conjunctiva non-specific. That is why in my opinion I recommend a smear to be done."

In answer to a question on the necessity for hospitalization in cases of this kind, he testified as follows: "I would like to answer that question in this way. I believe that every man would preferably like to have his patient in a hospital for the treatment of this disease no matter where he is. Sometimes we cannot always put our patients where we want them. I do not see how any individual can take care of their own eye with this disease."

Dr. Marsden testified that there is a well-recognized treatment among eye specialists for the disease. The main thing is to keep the pus out of the eye and away from the lids. Irrigation is used for this purpose and a solution of boric acid is valuable for this purpose. The frequency of the irrigations "are left to the discretion of the doctor and nurse according to the amount of pus that is being formed there, all the way from every fifteen minutes to every hour." There is also a well-recognized drug used as a specific in the treatment of the disease. It is a salt of silver, and among such silver salts are silver nitrate and neo silval, which should be applied to the eye after it is irrigated.

Dr. Marsden also testified that sulphate of zinc is not a specific for the disease. On the use of this drug the record shows his testimony as follows:

"Q. Doctor, I will call your attention to this zinc sulphate, or sulphate of zinc, whatever you call it. This zinc sulphate, doctor, has that any particular value in the treatment of gonorrheal ophthalmia? A. There is a great difference in the opinion about the use of drugs.

"Q. I understand that, but in your judgment has it any particular value in the treatment of gonorrheal ophthalmia or is it merely an astringent? * * * A. My judgment is that all of these things are the collections of things that have been done by doctors in the practice of medicine. My judgment in the matter is simply that I would not use it. Some other man might find it of value."

But one hypothetical question was propounded to Dr. Marsden. That question contained no reference to an important part of the treatment administered by defendant. The answer to the question was as follows: "If I were treating such a case, I would want to have more energetic treatment. In this serious disease the outcome might be grave in any event."

On cross-examination Dr. Marsden testified that one of the objects to be attained in the treatment of the diseased eye in question here is to reduce the inflammation and congestion as much as possible; that "there is a difference of opinion in the use of ice," but that "the use of ice is a recognized treatment"; that "an astringent is useful in the matter of reducing inflammation"; that zinc sulphate is an astringent and could be used for that purpose; that boric acid is a proper, suitable, and standard prescription to be used to irrigate the eye and remove the pus; that a 1 per cent. solution of silver nitrate is looked upon as "par excellent" for use as a specific, but that there are other silver salts, among them, neo silval, which are recognized and used in its stead. His testimony on cross-examination is summed up in the following quotation:

"Q. When you start out with the treatment, it is proper to use an astringent and wash to reduce the inflammation and swelling? A. Yes, sir.

"Q. And use boric acid as a washing solution? A. Yes, sir.

"Q. When you start in to treat the germ itself, the use of neo silval would be proper? A. It is used by a good many.

"Q. It is a recognized, standard, proper treatment, is it not? A. Well, it is used.

"Q. You would not say its use was improper in any way, shape or form? A. No, sir.

"Q. You would not say that any person using that was not using the proper ingredient? A. It might be used. * * *

"Q. Now doctor, you made the statement on the stand with respect to the nature of the disease that existed with respect to this eye, if I understood it correctly, it was that regardless of the treatment that might be given to a person, it would be perfectly possible to lose the sight of the eye if he had the disease in question? A. Yes, sir."

[3] The degree of skill and care required of defendant as a specialist is clearly set forth in the case of Hopkins v. Heller, 59 Cal.App. 447, at page 452, 210 P. 975, 976, as follows: "The rule concerning the degree of care required of the defendant as a specialist in his branch of dentistry is correctly set forth by counsel for respondent in their quotation from Ann.Cas.1915D, 1124, where it is said: 'One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.'"

[4] We must measure the negligence, if any, of defendant by this rule. That he might have employed other medicines or used other methods of treatment is not sufficient to fasten the charge of negligence upon him. As was said in McLennan v. Holder, 1 Cal.App.(2d) 305, at page 316, 36 P.(2d) 448, 453: "In Hesler v. California Hospital Co., supra [178 Cal. 764, 174 P. 654], quoting from Leighton v. Sargent, 27 N.H. [460] 474, 59 Am. Dec. 388, it is said: 'It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.'"

[5] The failure of defendant to use the skill and care required of him cannot be established by lay witnesses. In Hiraide v. Cochran, 109 Cal.App. 377, 293 P. 165, 167, it was said: "Respondents urge that in cases of this kind proof of negligence or lack of care or lack of skill on the part of a physician can only be made by the testimony of experts, viz., physicians familiar with the practice in the locality. Unless there is such testimony showing negligence, no judgment can be sustained. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128; Linn v. Piersol, 37 Cal.App. 171, 173 P. 763. With such contention the appellants do not take issue and, of course, could not because it is the recognized rule in this state."

After a careful study of the several briefs filed by counsel for plaintiff, we have concluded that they rely upon the following omissions to establish the negligence of defendant: (1) Failure to cap plaintiff's right eye; (2) failure to take a smear from the left eye and have it tested; (3) failure to hospitalize plaintiff; (4) failure to use more energetic treatment on the eye. We will consider the several specifications in the order stated.

[6] If we assume, without holding, that good practice required defendant to cap plaintiff's right eye, the failure to do so furnishes no ground for a reversal of the judgment. That eye was not infected and was not injured in any way. The failure to cap it was neither a proximate nor a contributing cause of any injury suffered by plaintiff.

[7] Dr. Marsden was of the opinion that good practice required defendant to take a smear from the infected eye. It is admitted that one was not taken. According to this witness, the purposes of the smear and its examination are (1) to determine the nature of the infection, and (2) the nature of the treatment, the nature of the treatment being dependent on the nature of the infection and its virulency. Defendant recognized the nature of the infection at his first examination and Dr. Marsden admitted that this could

be done. Therefore the only merit in this contention would depend upon the propriety and efficacy of the treatment administered by defendant which must be considered under the last ground urged for reversal.

[8] There is no evidence to support the argument that hospitalization was a necessary part of the treatment of the disease required by the standards of good practice of an eye specialist in and around El Centro. The testimony of Dr. Marsden on this question, which we have quoted, does not support any such conclusion. The only conclusion to be drawn from his evidence is that hospitalization is desirable and that the doctor himself did not see how a patient could properly irrigate his own infected eye. This falls far short of establishing that the standard treatment in El Centro required hospitalization of patients suffering from gonorrheal ophthalmia.

[9] When we analyze the evidence of Dr. Marsden on the question of the propriety of the treatment administered by defendant, we find that his ultimate conclusion was contained in his statement that, "If I were treating such a case, I would want to have more energetic treatment. In this serious disease the outcome might be grave in any event." He testified that "there is a great difference in the opinion about the use of drugs." He specially said that each step in the treatment administered by defendant was proper. This did not establish that defendant did not bring to the case, and did not use in his treatment of plaintiff "that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time." Hopkins v. Heller, supra. It only tended to prove that in the opinion of Dr. Marsden a method or mode of treatment, or measures used, other than those employed by defendant, might have had a better result. This is not sufficient to make out a case for plaintiff. McLennan v. Holder, supra.

[10] The hypothetical question propounded to Dr. Marsden did not set forth and include all of the treatment administered by defendant, and the objection made to it should have been sustained. It failed to take into consideration the testimony of plaintiff that during each of the twelve treatments given him by defendant some drug was placed in his eye. Plaintiff did not know the name of the drug used. Defendant testified that it was nitrate of silver. Of course, plaintiff was not bound by defendant's testimony, but, without adopting it, he could not form an intelligent hypothetical question to put to his expert. The importance of the omission is shown by the statement of Dr. Marsden that he considered nitrate of silver a specific for the infection and par excellent in the treatment of the disease. With plaintiff admitting that defendant placed some drug in his eye during each treatment, and his expert believing that nitrate of silver was the best specific for the disease, the answer of the expert to the hypothetical question was of no value as the drug used was not named in the question asked and that part of the treatment administered by defendant was not referred to in it.

The judgment is affirmed. The appeals from the order granting the motion for an instructed verdict, from the order denying the motion for new trial, from all other orders and rulings made, and from the verdict rendered, are dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

17 Cal.App.2d 468

PEOPLE v. SMITH.

Cr. 1520.

District Court of Appeal, Third District, California.

Nov. 13, 1936.

1. Kidnapping 🔑5

Evidence that defendant consented to take minor to a place 225 miles from her home for purpose of aiding in concealing her whereabouts from probation officer, who had lawful charge of child, sustained conviction for child stealing (Pen.Code, § 278).

2. Kidnapping 🔑1

Actual concealment and detention are not essential to constitute offense of child stealing (Pen.Code, § 278).

3. Kidnapping 🔑5

In child stealing prosecution against defendant who had aided in concealing minor's whereabouts from probation officer, all acts and relations of defendant with minor from time they left town in which her mother resided to time of defendant's arrest, and also facts regarding inaccessibility of place and difficulty attending on minor's leaving there and returning to her home, could be considered by jury.

4. Kidnapping 🔑1

Element of "detaining" specified in child stealing statute does not necessarily include idea of force (Pen.Code, § 278).

> The word "detain" is defined as to arrest, to check, to delay, to hinder, to hold, or keep in custody, to retard, to restrain from proceeding, to stay, to stop. The term is susceptible of many shades of meaning. The idea of force, or even duress, threat, or menace can all be easily excluded and the word still be pregnant of meaning.
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> [Ed. Note.—For other definitions of "Detain," see Words & Phrases.]

5. Criminal law 🔑1144(5)

Contention that prosecution for child stealing against defendant, who aided in concealing minor from probation officer, was barred by appellate court's decision in habeas corpus proceeding that juvenile court had no jurisdiction over minor, could not be determined, where record upon which minor was adjudged a ward of juvenile court was not before Appellate Court on appeal from conviction for child stealing, since presumption existed that everything necessary to acquire jurisdiction had been done (Pen.Code, § 278).

6. Criminal law 🔑1186(4)

In child stealing prosecution against defendant who aided in concealing minor from probation officer, who had been granted custody of minor, error, if any, in admitting in evidence certain preventive exhibits in absence of testimony that they were used on the person of the minor, *held* not reversible (Pen.Code, § 278; Const. art. 6, § 4½).

7. Kidnapping 🔑1

Willingness of minor *held* immaterial in considering guilt or innocence of defendant charged with offense of child stealing as to minor who had been awarded to custody of probation officer (Pen.Code, § 278).

8. Criminal law 🔑1159(4)

Fact that perjured testimony was given at time of trial *held* not to afford basis for reversal of judgment, such matters being confined to trial court's discretion, which will not be interfered with on appeal, in absence of abuse.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Tom Smith was convicted of child stealing, and he appeals.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 27th day of May, 1936, the district attorney of the county of Lake filed an information in which he accused the defendant of a felony, to wit, child stealing, based on section 278 of the Penal Code. The information alleges that the defendant, on or about the 10th day of May, 1936, in the county of Lake, state of California, did then and there willfully, unlawfully, and maliciously take away a minor child, to wit, Mary Spiers, then and there of the age of 13 years, with the intent then and there to retain and conceal such child from J. C. Anton who was then and there the probation officer of Lake county, and who was then and there the person having the lawful charge of such child, etc. To this information the defendant pleaded not guilty.

The trial resulted in the conviction of the defendant, and his motion for new trial being denied, an appeal is taken to this court both from the judgment based upon the verdict of the jury and the order denying his motion for a new trial.

The record shows the following facts:

That one D. F. McIntire, the then probation officer of the county of Lake, filed a petition with the clerk of the juvenile court, asking an order of said court declaring Mary Spiers a ward thereof; that thereupon, a hearing was had upon said petition and Mary Spiers, through a purported order of said juvenile court, was adjudged a ward thereof. The order further declared that said ward be placed on probation in the care, custody and control of D. F. McIntire, and to remain in the home of her mother, Estelle Spiers, subject to visitation by D. F. McIntire; thereafter, and on or about the 18th day of April, 1936, J. C. Anton, the successor to D. F. McIntire, as probation officer of the county of Lake, filed a petition seeking modification of the aforesaid order, and thereafter, on the 2d day of May, 1936, the juvenile court made another order modifying said order of June 18, 1935, to the effect that said ward be committed to the care, custody, and control of the probation officer, to be by him placed in the Ursuline Academy at St. Helena, or to be by him placed in some other school or proper home he should determine to be fit and proper; and on the same date a further order was made modifying the order just referred to, to the effect that the welfare of said Mary Spiers required that her custody be taken from her parent, Estelle Spiers; that on the 2d day of May, 1936, the probation officer delivered said Mary Spiers to the Ursuline Academy at St. Helena. On the 3d day of May, 1936, Mary Spiers ran away from the academy, and arrived, first, at the town of St. Helena at which place she visited her aunt's home, and thereafter was picked up by another aunt and brought to the town of Middletown, Lake county; that while at St. Helena she sent a telegram to her mother requesting her mother to meet her at St. Helena, and immediately thereafter sent another message to her mother countermanding this telegram. Mary Spiers arrived at Middletown with her aunt at about the hour of 11 o'clock at night, and her mother, in company with a man by the name of Deck, met her; that the mother, Deck, and Mary left Middletown and came to Kelseyville, the home of the mother, arriving about midnight; that immediately after arriving in Kelseyville, Mary came up to Findley, a distance of about four miles, where the defendant Tom Smith lived; Mary Spiers got Tom Smith out of bed and asked him to take her away, which he refused to do, but he did go back with her to her home in Kelseyville. The mother, after the arrival of Smith and Mary, said she was going to take Mary down to Buchanan's cabin, four or five miles from her home, to hide Mary out; that on the same evening Mary Spiers' mother got blankets and took Mary down to James Buchanan's cabin, where Mary stayed for one week. It appears that Tom Smith had for several years, along about the first or second week in May, gone down to the town of Chowchilla and worked in the cotton fields, and was contemplating going down there again on or about the 12th day of May, 1936; that Mary Spiers and her mother asked the defendant Smith to take Mary Spiers with him. The record shows that the defendant, with knowledge of the court's action, and Mary Spiers, left the residence of Estelle Spiers in Kelseyville on the evening of May 10, 1936, Mary Spiers driving Smith's car, Estelle Spiers and Stroud Deck going in Mr. Deck's car. They went to Santa Rosa that night and stopped at the home of Estelle Spiers early on the morning of the next day. It appears that they left the home of Estelle Spiers in Kelseyville at about 9:30 p. m. At Santa Rosa Mary kissed her mother goodbye, and she and Tom Smith proceeded in Smith's car to Chowchilla, Mary driving the car. Smith rented a room from a family with which he was acquainted by the name of Hooper, where Mary stayed for about a week and a half. Before leaving Kelseyville Mary had dyed her hair black and had changed her name to Jennette Martin. There is some testimony in the record to the effect that Smith told Mary that she would have to change her name and dye her hair. This testimony is controverted by the defendant, who states that Mary and her mother selected the name of Jennette Martin, by which Mary was to go after she reached Chowchilla. The place where Smith had worked previously, and to which he was going was on a ranch approximately three miles from Chowchilla,, the Hooper place being practically the same distance from the town of Chowchilla. After arriving at the Hooper home it appears that the defendant introduced Mary Spiers by the name which she had selected. Her testimony is to the effect that the defendant had nothing to do with the name which she selected; it was found in a magazine by herself. The record also shows that Estelle Spiers and Mary had contemplated going down to Chowchilla but that for some reason or other the mother could not go, and knowing that the defendant was going to Chowchilla, arranged for him to take Mary. There is nothing in the record to indicate that the defendant knew anything about Mary's contemplated running away from the academy, and had no information thereof until she arrived at her home, as hereinbefore stated. The record shows that the defendant had knowledge of the mother taking Mary to the cabin occupied by the Buchanans, and that she remained there approximately a week, or until such time as he (the defendant) was ready to go to Chowchilla. The fair interpretation of the record is that the defendant consented to take Mary Spiers to Chowchilla for the purpose of aiding in concealing her whereabouts from the probation officer of the county of Lake.

[1] While at the Hooper's near Chowchilla, in Madera county, it appears that Mary Spiers drove the defendant's car about the neighborhood until a breakdown in the car occurred, after which she drove a car belonging to the Hoopers. It further appears from her testimony that the defendant told her that in going about so much, information as to her whereabouts would likely be disclosed. It also appears from the testimony of Mary Spiers that after the defendant's car had broken down, the defendant said to her that when he got a new car, he would take her to Mexico. There is not a word in the record that we have found, other than just as stated herein, that the defendant cautioned Mary Spiers to remain secluded in the home of the Hoopers. The whole record shows that she was free to come and go in the neighborhood. There is nothing in the record, however, to the effect that Mary Spiers did or did not have any means by which she could secure transportation home if she so desired. Upon that question the record appears to be entirely blank. No physical force of any kind was used to induce Mary to remain at the Hoopers, nor is there anything in the record to the effect that the defendant, by persuasion, or otherwise, induced the said Mary Spiers to remain at the home of the Hoopers, or that he persuaded or induced Mary Spiers to accompany him to the Hoopers near the town of Chowchilla in Madera county.

[2] As pointed out in the case of People v. Simmons, 12 Cal.App.(2d) 329, 55 P.(2d) 297, 299, actual concealment and detention are not necessary to constitute the commission of the offense. The opinion in the Simmons Case reads as follows: "The statute does not include 'concealment' nor 'detention.' It does contain as an element 'with intent to detain and conceal.' As proof of that element, the courts will consider the acts and conduct of the parties, together with all the circumstances of the case both before and after the act complained of." Citing, People v. Black, 147 Cal. 426, 81 P. 1099; People v. Taylor, 88 Cal.App. 495, 263 P. 560, and People v. Annunzio, 120 Cal.App. 89, 7 P.(2d) 739.

[3, 4] All the acts and relations of the defendant with the minor from the time of leaving Kelseyville to the time of his arrest constituted proper matters for the jury to consider in determining the intent of the defendant; likewise, the testimony showing that the defendant had taken the minor to a place 225 miles from her home in Lake county, and boarded her out at a place where he was staying three miles from the town of Chowchilla, in the county of Madera. The inaccessibility of the place and the difficulties attendant upon leaving there and returning to her home are likewise conditions proper to be considered. The element of detaining specified in the statute does not necessarily include the idea of force. The word "detain" is thus defined in 18 California Jurisprudence 978, as follows: "'To arrest; to check; to delay; to hinder; to hold or keep in custody; to retard; to restrain from proceeding; to stay; to stop.' The term is susceptible of many shades of meaning. The idea of force or even duress, threat or menace can all be easily excluded and the word still be pregnant of meaning."

The appellant, relying upon what appears to be the undisputed testimony of Mary

Spiers, save as to the illicit relations between the defendant and herself, does not do anything more than raise a conflict as against the other circumstances proper for the jury to consider. We herewith set forth that testimony, and also a few excerpts from the testimony of Mrs. Hooper, as follows:

"Testimony of Mary Spiers:

"I drove Tom Smith's car from Deck's house to Santa Rosa. My mother and Deck traveled in my mother's car. I drove Mr. Smith's car from Santa Rosa to Chowchilla. I dyed my hair before I left Lake County. Tom Smith told me he was going to Chowchilla on the 12th of May. I stayed with James Buchanan from Sunday until Saturday.

"Q. At the time you ran away did Mr. Smith know you were going to run away? A. He didn't know I was going to run away.

"Q. You ran away of your own free will and accord? A. Yes.

"Q. Mr. Smith didn't ask you to come up there? A. He didn't even know I was any place around.

"Q. You asked him if he wouldn't go down to the house with you? A. Yes.

"Q. And you went to Cecil Blower's and he took you up to Kelseyville? A. Yes. My mother and Mr. Deck saw me dye my hair.

"Q. You changed your name? A. Yes. I changed my name.

"Q. You changed your name to Jennette Martin? A. Yes, I changed my name to Jennette Martin.

"Q. And you wanted him to introduce you as Jennette Martin? A. Yes.

"Q. *Your testimony at the preliminary examination was not true?* A. *No, it was not.*

"Q. When you left Santa Rosa you kissed your mother goodbye? A. I did.

"Q. Did you say you would be home soon? A. I told her I would come back and see her some time.

"Q. Well, did you say you would come back and see her soon? A. Yes, I did.

"Q. Did Mr. Smith lock the door at the house? A. No, he didn't lock the door.

"Q. Well, he was working in the day time? A. Yes, he was.

"Q. You could have gone when you wanted? A. Yes.

"Q. When you were there you ran away? A. I didn't run away, I went for a walk.

"Q. How long were you gone? A. I was gone from about 4 o'clock until about 7 o'clock.

"Q. And Mr. Smith and Mr. Hooper were all trying to find you? A. Yes.

"Q. How long have you known Mr. Smith? A. About 8 years.

"Q. He has always been like a father to you? A. Well, yes.

"Q. Now you state that you had sexual intercourse one night. What night? A. I don't know, Monday or Tuesday night.

"Q. Did you holler? A. No, I did not.

"Q. You didn't squeal or anything? A. No.

"Q. Did you tell anybody about it the next morning? A. No.

"Q. When was the first time you told anybody? A. The first time I told anybody was when I was down in Madera in the sheriff's office.

"Q. Who was present? A. The sheriff and probation officer.

"Q. You denied it the first time? A. Yes, I did.

"Q. You told them there was no such thing? A. Yes.

"Q. Your mother and you were going to take a trip to Chowchilla? A. Yes.

"Q. She couldn't go because she had too much business to attend to up here; that's why she couldn't go? A. Yes.

"Q. So you and your mother planned to go to Chowchilla? A. Yes, we were going to go.

"Q. Now, as you said, you told Mr. Smith to call you Jennette Martin, and introduce you as Jennette Martin, that is a fact? A. Yes.

"Testimony of Mrs. Lois Hooper:

"Q. Mrs. Hooper, Mr. Smith worked in the day time? A. Yes, he worked every day except the first day he fixed up his tent.

"Q. And Mary Spiers, she stayed there at the house with you? A. Yes.

"Q. And did she drive the car some days when he was away? A. Yes, she drove the car most every day."

[5] Appellant, further in his brief, alleges that the decision of this court in the matter of the application for writ of

habeas corpus, reported in Re Spiers (Cal. App.) 59 P.(2d) 838, is conclusive and final upon the questions presented here for our consideration. In that case, the record upon which Mary Spiers was adjudged a ward of the juvenile court was all before us. In the instant case the transcript is devoid of that record. The decision of this court of course was not pleaded in bar of the action against the defendant, and it could not have been, for the reason that it was rendered subsequent to the conviction of the defendant. However, to save the objection that the juvenile court had no jurisdiction, it would have been necessary for the defendant to introduce the entire record to show that proper notices of the hearing were not given of the hearing at which the court entered its order purporting to adjudge Mary Spiers a ward of the juvenile court. The original order made upon the petition filed by the then probation officer, D. F. McIntire, does appear in the transcript. This order is entirely silent as to any facts indicating whether the requisite notices were or were not given to invest the court with jurisdiction. The only real recitation therein is to the effect that Mary Spiers was personally present in court, represented by counsel. Nothing appears as to whether Mary Spiers did or did not have any living parents, and nothing as to notices being given.

Under such circumstances, and the failure to introduce any proof on the question, the case of Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742, decided in 1868, and followed in every decision since having to do with the same question, is decisive. It is there held that everything necessary to acquire jurisdiction will be presumed to have been done. The amendatory order upon which the respondent relies need not be considered, because if the original order was shown to be void, the amendatory order would certainly not give it vitality. But basing our decision upon the case of Hahn v. Kelly, supra, it must be held that the appellant has failed to present anything to this court justifying a holding herein that jurisdiction was wanting in the juvenile court at the time of the making of the order adjudging Mary Spiers a ward of the court and placing her in the custody and control of its probation officer, D. F. McIntire.

Not having the record of the juvenile court before us in this case, anything which we might say as to whether the decision in the habeas corpus case, supra, is a bar, would be immaterial. We may add, however, there seems to be a difference as to whether a proceeding in habeas corpus is or is not a bar to a subsequent proceeding when the custody of a minor child is involved, than in other proceedings where such an adjudication is not held to be a bar. 13 Cal.Jur. 283; In re Holt, 34 Cal.App. 290, 167 P. 184.

[6] The appellant also urges that the court erred in admitting in evidence certain preventive exhibits, there being no testimony that they were used on the person of Mary Spiers. If it be admitted that this was inadmissible testimony, under section 4½ of article 6 of the Constitution it would be insufficient to warrant a reversal of the case.

[7] The appellant insists that the court committed reversible error in giving the following instruction to the jury, to wit: "You are further instructed that the offense involved in the charge against the defendant is an offense against the person having lawful charge of such child, and it is immaterial whether the girl, Mary Spiers, accompanied the defendant voluntarily or not." There is no merit in the appellant's contention that the foregoing instruction is erroneous. In People v. Torres, 48 Cal.App. 606, 192 P. 175, a like instruction was approved, and a number of cases are cited in the opinion showing that the authorities are unanimous in upholding the doctrine that the willingness of the minor is immaterial in considering the guilt or innocence of the defendant.

[8] Finally, it is urged that the defendant was convicted upon perjured testimony. The uncontradicted affidavits filed on behalf of the appellant, and used upon his motion for new trial, do indicate that Estelle Spiers, James Buchanan, Cecil Blower, and Stroud Deck all testified falsely in relation to what was done with the person of Mary Spiers from the time she left the Ursuline Academy until she started for Chowchilla with the defendant. The fact, however, that perjured testimony was given in the case at the time of the trial, does not afford a basis for a reversal of the judgment. The leading case on the subject of what is called intrinsic fraud, to wit, the giving of perjured testimony at a trial, is that of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159, in

which it is held, after citing a number of authorities, that judgments should not be reversed on any such grounds, as no judgment would otherwise ever become final. See, also, People v. Tallmadge, 114 Cal. 427, 46 P. 282; People v. Lee, 9 Cal. App.(2d) 99, 48 P.(2d) 1003.

Whatever the rule may be in other states, these cases show that appellate courts will not reverse on the ground of perjured testimony having been given at the trial. At best, those matters are confided to the discretion of the trial court, and unless abuse of that discretion is shown, it will not be interfered with on appeal.

Finding no reversible error in the record, the order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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17 Cal.App.2d 527

PACIFIC STATES SAVINGS & LOAN COMPANY (a Corporation), Plaintiff and Appellant, v. Bernardo ROSELLI, Frank Roselli, Sam Roselli, Zelinda Roselli, Lorenzo Clemente, and Rose Clemente, Defendants and Respondents; Valley Mortgage & Finance Company (a Corporation), Defendant and Appellant.

Civ. 11257.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1936.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

John L. Mace, of Los Angeles, for appellant Pacific States Savings & Loan Co.

Oliver O. Clark, of Los Angeles, for appellant Valley Mortgage & Finance Co.

Oliver O. Clark, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

It is conceded that the questions raised by the appeals herein are concluded by the decision of the Supreme Court in the case of Brown v. Ferdon, 5 Cal.(2d) 226, 54 P.(2d) 712, and that the portion of the judgment of the superior court which orders and adjudges that Pacific States Savings & Loan Company take nothing as against defendants Bernardo Roselli, Frank Roselli, Sam Roselli, Zelinda Roselli, Lorenzo Clemente, and Rose Clemente should be reversed, and that the order sustaining the demurrer of said defendants to the complaint should be reversed, and that said defendants within the period prescribed by law should file their answers to said complaint.

It is further stipulated by the parties that the portion of the judgment which decrees and adjudges that plaintiff, Pacific States Savings & Loan Company, is entitled to recover of and from the defendant Valley Mortgage & Finance Company the sum of $16,064.94, together with interest thereon at the rate of 7 per cent. per annum from March 15, 1935, and together with costs of suit in the amount of $7.75, should be affirmed.

It is so ordered.

I concur: WOOD, J.

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17 Cal.App.2d 594

HARO et al. v. SOUTHERN PAC. R. CO. et al.

Civ. 1602.

District Court of Appeal, Fourth District, California.

Nov. 19, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

1. Death 🔑31(5)

Code section relating to actions for death gives joint, single, and indivisible cause of action for damages to heirs or personal representatives (Code Civ.Proc. § 377).

2. Death 🔑39

Widow under 21 years old *held* not under disability which would toll limitation against action for husband's death, where she was over age of 18 at time of death, in view of statute constituting lawfully married female over age of 18 an adult for purpose of entering into any "transaction respecting property," which includes bringing of action for death (Code Civ.Proc. § 340, subd. 3; §§ 352, 377; Civ.Code, §§ 14, 25, 654–663).

[Ed. Note.—For other definitions of "Transaction Respecting Property," see Words & Phrases.]

3. **Death** ⚿38

Where widow's cause of action for husband's death was barred by limitation, causes of action of minor children were also barred (Code Civ.Proc. § 340, subd. 3; §§ 352, 377).

4. **Appeal and error** ⚿937(3)

Although notice of appeal specified that appeal was taken from "order," District Court of Appeal disregarded such defect and assumed that it was intention to appeal from judgment, where question was not raised by respondent.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Ruth Haro and Ruth Haro and others, minors, by their guardian ad litem, David C. Marcus, against the Southern Pacific Railroad Company and another. From an adverse judgment, plaintiffs appeal. Affirmed.

David C. Marcus, of Los Angeles, for appellants.

Grant Holcomb, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment rendered in an action wherein plaintiffs, the widow and minor children of Demetrio Haro, sought to recover damages suffered by reason of his death. The sole question to be determined on this appeal is whether or not plaintiffs' cause of action is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure.

Ruth Haro, the widow, was born April 9, 1914, Carmen Haro on April 7, 1932, and Jose Haro on March 18, 1933. Demetrio Haro was killed on June 2, 1933. This action was commenced on July 7, 1934, or more than one year after Demetrio's death, and plaintiffs' action was barred by the statute of limitations unless it was tolled by the circumstance of the plaintiffs; each being under the age of twenty-one years at the time the action was instituted.

Section 352 of the Code of Civil Procedure provides in effect that the time of the existence of the disabilities there specified, which include the minority of the plaintiffs, shall not be included as "a part of the time limited for the commencement of the action." Therefore, the important question arises: Is the fact that all of the plaintiffs were under the age of twenty-one at the time of the commencement of the action a disability that would toll the statute?

[1] The action was brought under the provisions of section 377 of the Code of Civil Procedure, which gives a joint, single, and indivisible cause of action for damages to the heirs or personal representatives for the death of a person which is caused by the wrongful act or neglect of another. Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077.

In the case of Sears v. Majors, 104 Cal. App. 60, 285 P. 321, a widow, over the age of twenty-one years, and her minor son, brought an action to recover damages resulting from the wrongful death of their husband and father. The action was filed more than one year after the date of the death and the trial court sustained a demurrer to the complaint without leave to amend on the ground that the cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. On appeal plaintiffs conceded that the cause of action of the widow was barred, but urged that the minority of the son tolled the statute as to him and that he should be permitted to prosecute his action. On appeal it was held that because the action was joint the bar of the statute as to one plaintiff was a bar to the action of the other and that the demurrer was properly sustained.

[2] In the instant case it is urged that as the widow had been lawfully married, and that as she was over the age of eighteen years at the time of the death of her husband, she was under no disability to sue and her cause of action was barred, which circumstance would constitute a bar to the actions of her minor children.

Section 25 of the Civil Code provides in part as follows: "Minors are all persons under twenty-one years of age; provided, * * * that any female who has contracted a lawful marriage and is of the age of eighteen or over, shall be deemed to be of the age of majority and to be an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was twenty-one years of age."

The portion of this section necessary for us to construe is that provision constituting a female, who has been lawfully married and is over the age of eighteen years, an adult for the purpose of entering into any "transaction respecting property." As the widow, Ruth Haro, had been lawfully married, and was over the age of eighteen years at the time of the death of her husband, she was under no disability and could have instituted an action to recover damages for the death of her husband within a year following his death, if bringing it constituted a "transaction respecting property."

The term "transaction," as used in our Codes, is now held to include actions brought to recover damages for a tortious act. In Colla v. Carmichael U-Drive Autos, Inc., 111 Cal.App.(Supp.) 784, 294 P. 378, 379, it is said: "The term 'transaction' as here used is not limited in meaning to a commercial negotiation or contract, but includes tortious or delictual doings as well. In Bliss on Code Pleading, § 125, the word is said to embrace 'any occurrence between parties that may become the foundation of an action'; and in Glide v. Kayser, 142 Cal. 419, 420, 76 P. 50, the Supreme Court recognized that the word is comprehensive in meaning, and, as used in section 442 of the Code of Civil Procedure, might permit a cross-complaint in an action founded on tort. The broad scope of the term is exhibited in the definition taken from the law dictionaries and adopted in Scarborough v. Smith, 18 Kan. [399] 406, which is in these words: 'Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise' is a 'transaction.'"

"We conclude, therefore, that the collision of the two automobiles was a transaction, out of which arose questions of law and of fact common to all injured plaintiffs. Hence, there was no misjoinder because they united in one action instead of instituting five separate actions."

To the same effect are California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297; Hanes v. Coffee, 212 Cal. 777, 300 P. 963, and United States v. Pan-American Pet. Co. (C.C.A.) 55 F.(2d) 753, at page 776. See, also, Van Bibber v. Hilton, 84 Cal. 585, at page 590, 24 P. 308, 598.

Section 14 of the Civil Code contains the following:

"The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

"1. The word 'property' includes property real and personal;

"2. The words 'real property' are coextensive with lands, tenements, and hereditaments;

"3. The words 'personal property' include money, goods, chattels, things in action, and evidences of debt." (See, also, sections 654 to 663, inclusive, Civ.Code.)

In McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 P. 681, 682, 11 L.R.A. 252, it is said that: "The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action (Chicago etc. R. R. Co. v. Dunn, 52 Ill. 260 [4 Am.Rep. 606]; And. Law Dict.)."

To the same effect are Neale v. Depot Ry. Co., 94 Cal. 425, 29 P. 954, and Nielsen v. Gillespie, 97 Cal.App. 319, 275 P. 500.

[3] It would seem, therefore, that the phrase "transaction respecting property" includes within its definition the bringing of an action by a widow for the wrongful death of her husband. That being true, Mrs. Haro was under no disability that would prevent her from suing for the damages suffered from the wrongful death of her husband at any time during the year following his demise. As she did not so sue, her action is barred by the statute of limitations. Subdivision 3, § 340, Code Civ.Proc. As her cause of action is barred, the causes of action of the other plaintiffs are also barred. Sears v. Majors, supra.

[4] The notice of appeal specifies that the appeal is taken from an "order" of the trial court. As the question has not been raised by defendant, we have disregarded this defect and have assumed that it was the intention to appeal from the judgment.

However, our so doing must not be considered a precedent to be followed in other cases.

The judgment and "order" are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

In re DAVIS' ESTATE.*

L. A. 15690.

Supreme Court of California.

Nov. 16, 1936.

Appeal and error ⚷1160

Where issue of appeal has been disposed of by agreement, and parties agree to restore matter to superior court for further proceeding, Supreme Court would reverse judgment and order remittitur to issue, in accordance with such agreement.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

In the matter of the estate of Mary S. Davis, deceased. From an adverse judgment, Jennie Skinner and others appeal, opposed by Blanche McGavic and another.

Reversed and remanded.

Prior opinion, 59 P.(2d) 547.

See, also, 61 P.(2d) 1178.

Robert H. Gillmore, G. Randolph Miller, and Gerald C. Kepple, all of Whittier, for appellants Jennie Skinner and John K. Davis.

William L. Kuehn and Franz R. Sachse, both of Los Angeles, for appellant Elizabeth S. Bancroft.

Eckman & Lindstrom, Arthur W. Eckman, and Ralph G. Lindstrom, all of Los Angeles, for respondent Busy Bee Home Soc.

James J. Kirby, of Oakland, for respondent Blanche McGavic.

*Judgment vacated 63 P.(2d) 827.

PER CURIAM.

It appearing that the issue involved herein has been disposed by agreement of the parties in interest and that it has been mutually agreed that the matter be restored to the superior court for further proceeding, the judgment appealed from is hereby reversed, and the cause remanded to the superior court of Los Angeles county, remittitur to issue forthwith.

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7 Cal.2d 701

KERR GLASS MFG. CORPORATION v. CITY OF SAN BUENAVENTURA et al.

L. A. 15860.

Supreme Court of California.

Nov. 19, 1936.

1. Mandamus 🔑115

Under Improvement Bond Act requiring city to levy general tax to pay into redemption fund amount of assessment delinquencies on lands purchased by city for such delinquencies, city could not be compelled by holder of district street improvement bonds to levy general tax to pay into redemption fund amount of delinquencies on such lands arising subsequent to purchase by city, since levy was required only to amount of delinquencies for which lands were sold (St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St. 1921, p. 230, § 16(a); St.1923, p. 304, § 12).

2. Mandamus 🔑110

Under Improvement Bond Act, bondholder could not by mandamus compel city to advance general funds to insolvent redemption fund to meet district street improvement bonds where there was no surplus in general fund (St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

3. Mandamus 🔑115

Under Improvement Bond Act, bondholder could not by mandamus compel city to levy additional general tax to advance funds to insolvent redemption fund to meet district street improvement bonds where city had already imposed 10-cent levy for tax year in which petition was filed, since such levy was only mandatory levy provided for, and city could not "pyramid" such general levy to account for levies omitted in prior years (St. 1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

4. Mandamus 🔑168(4)

Holder of district street improvement bonds who refused tender of pro rata offer from insolvent redemption fund would not be entitled to mandamus directing payment in full of bonds held by it in absence of showing he was entitled to full payment or partial payment in excess of offer (St.1911, p. 730, as amended; St.1915, p. 1441, as amended).

5. Municipal corporations 🔑950

While bondholder may compel full payment of his bonds, though redemption fund is insufficient to meet all outstanding bonds if fund is replenishable by general levy, where fund is not so replenishable but is limited to replenishment from local assessment, insolvent redemption fund assumes trust status for ratable benefit of all bondholders, and, in absence of express statutory power, one bondholder may not compel full payment of his bonds to exclusion of other bondholders (St. 1911, p. 730, as amended; St.1915, p. 1441, as amended).

6. Municipal corporations 🔑950

Where redemption fund, not replenishable by general levy, is insufficient to meet all outstanding district street improvement bonds, in absence of express statutory power, bondholder may not compel full payment of his bonds, regardless of whether district is insolvent or whether previously matured bonds have been satisfied in full (St.1911, p. 730, as amended; St.1915, p. 1441, as amended).

7. Municipal corporations 🔑950

In absence of statute, insolvent redemption fund for district street improvement bonds assumes trust status for ratable benefit of all bondholders, though theoretically fund is replenishable from general levy where, actually, fund is unreplenishable due to general tax-collecting incapacity (St.1911, p. 730, as amended; St.1915, p. 1441, as amended).

8. Municipal corporations 🔑950

Where redemption fund was insufficient to meet outstanding district street improvement bonds, and was unreplenishable from city's general fund under statute for lack of surplus in such fund and unreplenishable

from general levy because only mandatory general levy provided by law had already been imposed, and was unreplenishable from local assessment because of default of 85 per cent. of landowners and because value of delinquent lands was less than total delinquencies, bondholder could not compel full payment of his bonds, but could only share ratably with other bondholders, notwithstanding provision of Improvement Bond Act that city should pay such bonds upon presentation, since, under such circumstances and in absence of mandatory words, provision would be held directory only (St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St. 1921, p. 230, § 16(a); St.1923, p. 304, § 12; St.1929, p. 1823, § 3).

9. Constitutional law ⚿143

Where holder of district street improvement bonds accepted as part of contract limitations of statutes providing for annual general levy of only 10 cents per $100 valuation for payment of bonds, and for payment from general fund only if surplus existed, no question of impairment of contract was involved in refusal of court to compel full payment of such bonds from redemption fund where fund was insufficient to meet all outstanding bonds (St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1921, p. 230, § 16(a); St.1923, p. 304, § 12; St.1929, p. 1823, § 3).

◆

In Bank.

Original mandamus proceeding by the Kerr Glass Manufacturing Corporation against the City of San Buenaventura, and others.

Peremptory writ denied.

Thorpe & Bridges and Gerald Bridges, all of Los Angeles, for petitioner.

Stacy C. Bates, of Ventura, and Leon T. David and William Mackenzie Brown, both of Los Angeles, for respondents.

SHENK, Justice.

The petitioner seeks the writ of mandamus to compel the respondent to levy a tax on all of the taxable property in the City of San Buenaventura sufficient to pay for all lands purchased by the city which were sold for delinquent improvement district assessment installments in the years 1929 to 1935, inclusive, and to pay for all of such installments which became delinquent on said lands subsequent to the sale thereof to the city. In the same proceeding the petitioner also seeks payment of $17,000 due on certain bonds held by it and payable out of the fund created for the redemption of bonds series E issued to discharge the cost of city improvement No. 201.

The street work known as city improvement No. 201 was authorized by the city council under the Improvement Act of 1911 (Stats.1911, p. 730, as amended), and series E bonds were authorized, and issued pursuant to the Improvement Bond Act of 1915 (Stats. 1915, p. 1441, as amended). The bonds represented an obligation in the total principal sum of $132,528.95. They were issued to mature in ten annual installments beginning July 2, 1929, with interest at 7 per cent. per annum. The petitioner is the holder of eleven $1,000 bonds of the installment due on July 2, 1932, and of six in the same denomination of the July, 1934, maturity. It is stipulated that there is due to the petitioner only the principal of said bonds, viz., $17,000. The bonds held by the petitioner were presented for payment to the city treasurer, but payment was refused because there was not sufficient money in the bond redemption fund to pay all of the outstanding and matured bonds of said series E, although there was sufficient to pay the petitioner in full. Upon such refusal the petitioner commenced this proceeding.

During each of the years 1929 to 1935, inclusive, the city has become the purchaser of property in said improvement district sold for nonpayment of assessment installments levied to pay the cost of said city improvement No. 201. It is alleged that the city has not paid into the bond redemption fund the amount of the delinquent assessments, penalties, and costs which constituted in effect the purchase price of such lands at the time of sale thereof to the city; further that the city has also failed to transfer from the general fund to the bond redemption fund the amounts of assessment installments falling due on said lands after such sale to the city. It is also alleged that in the years 1929 to 1933, inclusive, the tax collector has failed to file with the city council a demand that a suitable amount be included in the next tax levy to provide funds for transfer to the bond redemption fund wherewith to pay the purchase price of such lands sold to the city at delinquent tax sales. In August, 1934, such a demand was made by the tax collector on the city council, which thereupon included a tax levy of 10 cents on each $100 of assessable property for the purpose stated. A similiar demand in August, 1935, was met by a like levy. The petition shows that the respondents have offered to pay to the petitioner such proportionate amounts from said bond fund on account of interest and principal due it as the amount of such interest and principal bears to the total amounts of interest and principal on all of said bonds, series E, still outstanding and unpaid.

The respondents have demurred generally and specially to the petition and filed an answer thereto. In their answer the respondents allege the sum of $16,950.84 to be the total amount of initial delinquencies for which properties have been sold to the city for nonpayment of assessment installments in 1929 to 1934, inclusive; that in 1934 and 1935 the city caused a tax of 10 cents per $100 to be levied on all the taxable property in the city, from which it has so far realized the sum of $16,110.50 which has been paid into the bond redemption fund; that the total amount in the bond fund is the sum of $18,033.43; that but the sum of $860.34 remains unpaid into the redemption fund on account of the purchase price of lands so far sold to the city at delinquent tax sales; that only the amount of $5,796.45 is realizable from assessment installments not yet due, making a total probable fund of $24,690.22 to meet obligations of principal and interest still unpaid and to become due on said bonds series E of more than $100,000; that there are no moneys in the general fund available for transfer to the bond redemption fund to meet delinquencies of improvement assessment installments accruing against the land subsequent to the sale thereof to the city. The respondents aver that the sole reason for the inadequacy of the bond redemption fund is the failure of the landowners in said special assessment district to pay the installments of the assessment levied to discharge the cost of such improvement; that approximately 85 per cent. of the lands in the district are delinquent; that the value of the lands so delinquent is less than the total amount of delinquencies, penalties, and charges accrued against them; that there have been no sales or redemptions of such lands, and there are not likely to be any in the near future; and that the bond redemption fund is therefore insolvent. In its answer the respondent city admits its willingness and offer to pay the petitioner on a pro rata basis, computed on the ratio which the amount due to the petitioner bears to the total amount still unpaid on all outstanding bonds of series E, including also those which have not yet matured.

The principal question for determination is whether the petitioner is entitled to payment in full from the bond redemption fund, there being sufficient funds for payment to it in full, although not sufficient to pay in full all of the matured claims against said fund; or whether it must accept payment on some pro rata basis to be determined.

[1] Preliminarily it must be said that the petitioner is not entitled to a direction for a levy of taxes sufficient to pay the delinquencies against the lands purchased by the city at delinquent tax sales which occurred subsequent to the initial delinquencies which compelled the sale. It has so been decided in the case of American Co. v. City of Lakeport, 220 Cal. 548, 563, 32 P.(2d) 622, et seq. That case settled the interpretation of sections 12 and 16(a) of the Improvement Bond Act of 1915 (St.1923, p. 304, § 12; St.1921, p. 230, § 16(a), to the effect that, if there are no surplus moneys available in the general fund, the city is not obligated to levy a tax for the purpose of procuring advances to the bond redemption fund wherewith to meet the amounts of assessment installments falling due on the lands after the sale thereof to the city. The interpretation of those sections of the act by recent decisions limits the mandatory tax levy by the city to the 10-cent levy provided by section 16(a). American Co. v. City of Lakeport, supra; Union Safe Deposit Bank v. City of Menlo Park, 3 Cal.(2d) 264, 43 P.(2d) 811, and Id. (Cal.Sup.) 45 P.(2d) 347; Southern California Roads Co. v. County of San Luis Obispo, 4 Cal.(2d) 220, 48 P.(2d) 34; Griffith Co. v. County of Los Angeles, 4 Cal.(2d) 222, 48 P.(2d) 35; Sawyer v. County of San Luis Obispo, 4 Cal.(2d) 776, 48 P.(2d) 35; Thompson v. City of Compton (Cal.Sup.) 59 P.(2d) 505; Thompson v. City of La Mesa, 9 Cal.App.(2d) 542, 50 P.(2d) 504.

More recently in the case of Hammond v. City of Burbank (Cal.Sup.) 59 P.(2d) 495, it was determined that not only was the 10-cent levy the only mandatory levy provided by the Improvement Bond Act of 1915, but that the purpose of the levy as provided by the act is limited and exclusive; that is, that the tax realized from the 10-cent levy may be used only to provide advances to pay the purchase price (the amount of the initial delinquent improvement assessment installment, penalties, and costs) of the lands sold to the city on delinquent tax sales.

A further review of the cited cases or of the pertinent sections of the Improvement Bond Act involved therein is unnecessary for the purpose of making the observation that the immediate and important result of such recent discisions, viz., that the land in the district is the sole source of payment for the cost of the improvement and that the obligation of the municipality is limited merely to creating a revolving fund by certain authorized advances to the bond redemption fund, has a direct bearing upon the solution of the principal problem presented here.

[2, 3] Advances to the fund by the city are authorized to be made from two possible sources, one the mandatory levy not exceeding 10 cents on each $100 of taxable property in the city, further limited by the amount required to meet the purchase price of lands sold or to be sold to the city at delinquent tax sales; and, second, the transfer of moneys from the general fund when there are surplus moneys available, as advances on the amount of improvement assessment installments falling due on lands sold to the city subsequent to the delinquent tax sales. That fact, together with the further holding in the case of Hammond v. City of Burbank, supra, that the duty of the city to levy and collect the 10-cent tax is continuing only so long as advances to the redemption fund on account of the purchase price of lands sold to the city have not been made, and that the city may not "pyramid" the levies omitted in prior years, make manifest the preliminary conclusion that the petitioner is not entitled to have the respondents do more than levy a 10-cent tax each year until such levy has realized moneys sufficient to advance to the bond redemption fund the purchase price of all land sold to the city at delinquent tax sales. This duty the city has performed, and it is not shown that there are surplus moneys in the general fund available for transfer to the bond redemption fund for the payment of assessment installments falling due on such lands subsequent to the delinquent tax sales. It follows that the petitioner is not entitled to a writ directing the respondents in respect to any tax levy or transfer of funds.

[4] There remains for determination the principal question whether the petitioner is entitled to a writ directing payment to it in full of the sum of $17,000 due on the bonds held by it. If it is not so entitled, or if it is not entitled to any partial payment in excess of the offer made by the district and refused, its petition in this respect must also be denied. State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753, 68 S.W.(2d) 671, 679.

The petitioner relies mainly upon the provisions of section 3 of the Improvement Bond Act of 1915 (as amended by St.1929, p. 1823), and upon the decision in the case of Bates v. McHenry, 123 Cal.App. 81, 10 P.(2d) 1038, in support of its contention that it is entitled to full payment from the fund without regard to the probability that there will not be sufficient funds realized from all available sources to discharge in full the principal and interest on all unpaid bonds of the series.

[5–7] Section 3 of the act provides that the bonds and interest "shall be paid at the office of the city treasurer of said municipality who shall keep a redemption fund designated by the name of said bonds, into which he shall place all sums received by him from the collection of the assessments made for the payment of the cost of the work or improvements upon which the said bonds are issued and of the interest and penalties thereon and from which fund he shall disburse and *pay the said bonds and the interest due thereon upon presentation of the proper bonds and coupons;* and under no circumstances shall said bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register * * * and shall cancel and file each bond and coupon so paid." The petitioner contends that the italicized language of said section compels the same result as in the case of Bates v. McHenry, supra. That case involved section 52 of the California Irrigation District Law (St. 1931, p. 172) which provided that upon presentation of *any* bond or interest coupon, payment should be made from the bond fund. In the opinion it was pointed out that the particular language of the act, together with the further provisions that unpaid bonds and interest coupons should be registered and bear interest from the date of registration and creating an unlimited continuing obligation of the district to levy sufficient taxes to discharge the obligation in full, distinguished the facts from such cases as Thomas v. Patterson, 61 Colo. 547, 159 P. 34, and Norris v. Montezuma Valley Irr. Dist.(C.C.A.) 248 F. 369, and compelled a conclusion that payment in full upon presentation was contemplated by the act, even though the fund was at the time insufficient to discharge all the matured claims against it. The same court rendering the opinion in the case of Bates v. McHenry, supra, arrived at a contrary conclusion in the case of Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051, following the cases distinguished in its previous opinion. The case of Rohwer v. Gibson involved the reclamation district laws of the state. There it was noted that the act involved made no provision for priority of payment where several bondholders were entitled to payment from a fund which was insufficient to pay all. It was further observed that the taxing power and consequently the fund realizable for application to bond principal and interest and out of which payment may be expected were limited to the benefits conferred upon the land assessed. A distinction was made between such a case, that is, where the general taxing power of the district was not made available to increase the fund applicable to discharge the principal and interest of the bonds, and Bates v. McHenry, supra, and such cases as Meyer v. Porter, 65 Cal. 67, 2 P. 884, and Meyer v. Widber, 126 Cal. 252, 58 P. 532, where the general taxing power of the district or other municipal body may be resorted to until all the bonds were fully paid. It was thereupon concluded that, where the sources of the bond redemption fund were so limited and were not fortified by the authority to resort to a general or "inexhaustible" taxing power, the fund becomes a trust fund to be shared by all who hold claims against it without priority one over the other. Thus it was appropriately held that, where such a fund was insufficient to pay in full all who had claims against it, the petitioner was entitled only to share ratably with the other bondholders. Cases are cited in the Rohwer decision 126 Cal.App. 707, at page 721, 14 P.(2d) 1051, to the effect that payment in full to the petitioner will not be ordered where it appears that the moneys constitute a trust fund by virtue of the fact that the fund is not replenishable by an unlimited or so-called inexhaustible taxing power, even though the fund at the time of bringing suit is sufficient for such payment but not sufficient to pay all the outstanding matured claims against it. The weight of the authority which recognizes the distinction between the ability to replenish the fund from an inexhaustible or general taxing power and the cases where the taxing power or tax-collecting capacity is limited, unless the statutory provisions are clearly to the contrary, is in accord with the result in Rohwer v. Gibson, supra. Those cases further recognize that such result is proper whenever the fund so characterized as a trust fund is shown to be insufficient, whether or not the district is actually insolvent, and regardless of the fact that previously matured bonds have been satisfied in full. See, also, State ex rel. Gillespie v. Carlton, 103 Fla. 810, 138 So. 612; Moran v. State ex rel. Montgomery, 111 Fla. 429, 149 So. 477; State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753, 68 S.W.(2d) 671, and State ex rel. Drainage Dist. No. 8 v. Duncan, 334 Mo. 733, 68 S.W.(2d) 679, overruling State ex rel. Bliss v. Grand River Drainage Dist., 330 Mo. 360, 49 S.W.(2d) 121; Groner v. United States (C.C.A.) 73 F.(2d) 126; Norris v. Montezuma Valley Irr. Dist. (C.C.A.) 248 F. 369; Morris, Mather & Co. v. Port of Astoria, 141 Or. 251, 15 P.(2d) 385; Lucas v. First National Bank of Pawnee, 171 Okl. 606, 43 P.(2d) 752; Meyers v. City of Idaho Falls, 52 Idaho, 81, 11 P.(2d) 626; Rothschild v. Village of Calumet Park, 262 Ill.App. 96; note, 90 A.L.R. p. 717 et seq. The trust status of the fund has been considered appropriate where it is theoretically replenishable by a so-called inexhaustible taxing power, but the exercise of that power is rendered fruitless by reason of economic conditions resulting in a tax-collecting incapacity. Morris, Mather & Co. v. Port of Astoria, supra; see Moran v. State ex rel. Montgomery, supra, concurring opinion, 111 Fla. 432, 149 So. at page 478; State ex rel. Buckwalter v. Lakeland, 112 Fla. 224, 150 So. 508, 90 A.L.R. 704, opinion of Brown, J., dissenting in part.

[8] It is unnecessary to extend the discussion in view of the facts presented by the petition and answer and the direct

bearing upon the solution of the problem resulting from the decisions in this state hereinabove cited which define the limited liability of the city under the Improvement Bond Act of 1915. As in the act involved in the case of Rohwer v. Gibson, supra, there is no provision in the Improvement Bond Act which can be interpreted to inhibit the settlement of the claims of all bondholders ratably when the necessity requires. The language in section 3 above quoted and relied upon by the petitioner, unaccompanied by any provisions which would give it a mandatory character, must be deemed to be directory only. In Meyers v. City of Idaho Falls, supra, 52 Idaho, 81, 11 P. (2d) 626, a provision for payment in numerical order was held to be directory only and not to prevent the distribution of the moneys as a trust fund. Pursuant to direction for payment upon presentation, if it were possible for all bonds remaining unpaid to be presented simultaneously, the treasurer would find himself compelled to divide an insufficient fund ratably among all so presenting. The same duty arises to divide the funds ratably when it appears that there will not be sufficient to pay all bonds in full, whether or not all are technically presented for payment. No contention is made by the petitioner that there does not in fact exist an insufficiency resulting by virtue of the large percentage of delinquencies and the consequent inability of the city to realize from all available sources sufficient to pay all bonds in full from the redemption fund. With a large percentage of delinquencies and a reduction of the tax-collecting capacity to furnish a surplus in the general fund wherewith to replenish the bond redemption fund, either now or in the reasonably near future, by the amounts of improvement assessment installments falling due on delinquent property subsequent to its sale to the city, it can scarcely be doubted that the city has properly declared the bond redemption fund insolvent. In such a case it may restrict payments from the bond redemption fund on a pro rata basis among the holders of all bonds remaining unpaid, whether or not the same have matured.

[9] The authorities herein cited support the conclusion that the question of the impairment of a contract right is not involved in the consideration of the problem. The limited liability of the city as defined herein and by the cases above cited was a part of the bond contract. The bondholders accepted the limitation that the principal and interest of the bond were payable exclusively from the redemption fund. Stege v. City of Richmond, 194 Cal. 305, 228 P. 461. The question is simply one of the adequacy of the fund, under the conditions alleged to exist, to discharge in full the obligations against it created by the provisions of the act and the bond issue. In fact it has been held that a discharge of the obligations on a pro rata basis, by thus excluding payment in full to some to the prejudice of others, obviates the possibility of any impairment of their contract rights, inasmuch as all have an equal right to share in the trust fund. Moran v. State ex rel. Montgomery, 111 Fla. 429, 149 So. 477.

The petitioner is therefore not entitled to any of the relief prayed for.

The alternative writ is discharged and the peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; EDMONDS, Justice pro tem.

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7 Cal.2d 731

COMMERCIAL SOLVENTS CORPORATION v. RILEY et al.

S. F. 15678.

Supreme Court of California.

Nov. 23, 1936.

Intoxicating liquors 🔑48

Industrial alcohol intended for nonbeverage purposes *held* not within scope of taxing provisions of Alcoholic Beverage Control Act (Gen.Laws Supp.1935, Act 3796, §§ 2(d), 6(i), 24, 33).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Suit by the Commercial Solvents Corporation against Ray Riley and others, as members of the State Board of Equalization of the State of California, and others. From an adverse judgment, defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for appellants.

Norman A. Eisner and Joseph C. Meyerstein, both of San Francisco, for respondent.

LANGDON, Justice.

Plaintiff is engaged in the manufacture and sale of industrial alcohol, including ethyl alcohol which may be thereafter denatured and rendered unfit for beverage purposes, but which prior thereto, can be used for beverage purposes. In November, 1935, plaintiff sold to a manufacturer of flavoring extracts 54 gallons of ethyl alcohol in a steel drum. The purchaser intends to use it solely for the manufacture of flavoring extracts unfit for beverage use, and is not licensed to manufacture or deal in alcoholic beverages. At the time of this sale, defendants, representing the state board of equalization, demanded that the plaintiff pay an excise tax of 80 cents per gallon on the alcohol in said drum, claiming that the same was due under the provisions of the Alcoholic Beverage Control Act (Deering's Gen.Laws Supp.1935, Act 3796). Defendants threatened to seize the drum and destroy the alcohol if payment were not made. Plaintiff then brought this action to restrain the seizure. Defendants' demurrer was overruled, and the court granted a temporary injunction, afterwards made permanent, restraining the defendants from attempting to collect the tax or to seize the alcohol. Defendants appealed.

The question raised by this appeal is whether sales of ethyl alcohol, destined for use in the manufacture of nonbeverage products, are subject to tax under the provisions of the Alcoholic Beverage Control Act. (Deering's Gen.Laws, 1935 Supp., Act 3796, p. 1129.) In our opinion they are not.

The short title of the statute, "Alcoholic Beverage Control Act," and the provisions of its full title, which refer to the licensing and taxation of "alcoholic beverages," indicate at the outset an intention to tax alcoholic liquors used for beverage purposes, and disclose no intent to tax industrial alcohol as such. The taxing provision, section 24, provides for an excise tax on "all distilled spirits" sold in this state, with a rate graduated according to the quantity, from two ounces to one gallon. Although "distilled spirits" by definition in section 2, subdivision (d), include "ethyl alcohol," this does not compel the conclusion that ethyl alcohol intended for nonbeverage purposes is covered. As already stated, the unmistakable purpose of the act is to the contrary. Moreover, the taxing provision specifies rates which are applicable to the maximum quantity of one gallon, and under section 33, the tax upon the sale is collected "by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed." These stamps are attached "by the holders of on- or off-sale distilled spirits licenses" upon the opening of the original cases or the delivery of the spirits. And under section 34, such spirits cannot be delivered by the manufacturer in packages containing more than one gallon. It is clear that the tax is intended for the small package or container of beverage alcohol, and no plan is provided for collecting it from the manufacturer of alcohol, while the same is held by him in bulk, and prior to delivery to some one licensed to sell it for beverage purposes, and to affix the stamps.

This interpretation is strengthened by section 67, which reads: "Nothing in this act shall be deemed to prevent or restrict the use of a tax-free alcohol or of industrial alcohol or other distilled spirits or wine under regulation by the United States government in the manufacture of medicinal, pharmaceutical, or antiseptic products, including prescriptions compounded by retail druggists; of toilet products, of flavoring extracts, syrups, of food products, of scientific, chemical, or industrial products; provided such products are unfit for beverage use." "Tax-free alcohol" or "industrial alcohol," though not specifically defined in the act, must, by reason of the provisions heretofore mentioned, be understood to mean "undenatured ethyl alcohol or other distilled spirits in packages of more than one gallon for use in the trades, professions or industries," as described in section 6, subdivision (i).

It therefore appears that the act discloses an intention to tax alcoholic beverages; that it sets up machinery suitable for the taxation only of such beverages in small containers; and that it specifically refers to industrial alcohol as "tax-free." If any problems arise by reason of the uncertainty as to whether ethyl alcohol sold by a manufacturer may be used for beverage or nonbeverage purposes, this is solely one of enforcement of the act and prevention of its violation. The statute appears to contain sufficient safeguards in this respect.

Since sales of industrial alcohol intended for nonbeverage purposes are not within the scope of the taxing provisions of the act, appellants were without authority in attempting to seize the alcohol involved in this action.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.; EDMONDS, J.

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7 Cal.2d 696

PEOPLE v. BARWICK.

Cr. 4033.

Supreme Court of California.

Nov. 19, 1936.

Rehearing Denied Dec. 17, 1936.

1. Criminal law 🔑586

Continuance of trial of case should be granted on sufficient showing and court cannot arbitrarily refuse to grant continuance.

2. Criminal law 🔑590(1)

Refusal to grant continuance to defendant, accused of perjury, when amended information charging him with a prior conviction of felony was filed *held* not error, where trial judge stated he would entertain further application for continuance if facts warranted and no further request was made, accused not being entitled to continuance as matter of right (Pen.Code, §§ 969a, 990).

3. Criminal law 🔑1202(1)

Prosecution of accused as one previously convicted of a felony *held* proper, notwithstanding accused had on previous conviction been placed on probation and complied with conditions of probation (Pen.Code, § 1203.4, as added by St.1935, p. 1709).

4. Criminal law 🔑1202(1)

Prosecution of accused as one having previously been convicted of a felony *held* proper, even though statute on which previous conviction was based was repealed, where judgment of conviction became final before repeal of statute (St.1927, p. 497; St.1933, p. 2093, § 2).

5. Criminal law 🔑1206(5)

After final judgment has been rendered and sentence pronounced, power of court over subject-matter is terminated and all that remains to be done is ministerial act of execution of sentence and repeal of law under which defendant has been convicted will not arrest execution.

6. Criminal law 🔑1159(3)

Where evidence was conflicting, jury's verdict that accused, who testified in prosecution of son, was guilty of perjury, was binding on Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Samuel Barwick was convicted of perjury, and he appeals.

Affirmed.

Prior opinion, 58 P.(2d) 950.

Gladys Towles Root, F. N. Whichello, and Morris Lavine, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

The defendant appeals from a judgment of conviction for prejury and also from an order denying a new trial, relying principally upon the asserted error of the trial court in refusing to give him time to plead to an amended information charging a prior conviction of a felony.

The appellant pleaded not guilty to an information charging him with the crime of perjury. When the case came on for trial, the district attorney presented an amended information alleging the prior conviction "of the crime of possession of a still, a felony." Appellant asked time to file a demurrer to the information as amended, and also asked for a continuance of the trial.

Each of these requests was refused, but with the statement from the trial judge that if the district attorney proved the prior conviction, there might then be ground for a continuance. The appellant denied the prior conviction and the trial proceeded before a jury which found the appellant guilty of perjury and the allegation of prior conviction of a felony to be true.

Section 969a of the Penal Code provides: "Whenever it shall be discovered that a pending * * * information does not charge all prior felonies of which the defendant had been convicted * * * said * * * information shall be forthwith amended to charge such prior conviction or convictions." The purpose of this statute is plain. It requires not only an amendment forthwith, but also by a further provision that "defendant shall promptly be rearraigned on such information * * * as amended and be required to plead thereto."

Appellant takes the position that such rearraignment places a defendant in the same position as when he is arraigned upon an original information and entitles him to the time fixed by section 990, Pen.Code, to answer it. But the appellant when rearraigned had answered the information by pleading "not guilty." The rearraignment could serve no purpose other than to fix the time when "he must be asked whether he has suffered such previous conviction" (section 1025, Pen.Code), and he was not entitled as a matter of right to a continuance.

[1, 2] However, the procedure authorized by the sections cited is subject to the general rule that a court should always continue the trial of a case upon a sufficient showing and that it may not arbitrarily refuse to grant a motion therefor. In overruling appellant's motion for time to demur and his motion for a continuance, the trial judge stated that he would entertain a further application for a continuance if the facts developed warranted it. Not only was no later request made, but appellant took the stand and admitted the facts in connection with his previous conviction. It therefore appears that he was not prejudiced by being required to answer forthwith.

[3] Appellant also challenges the effect of his prior conviction. It appears that in October, 1931, he pleaded guilty to the crime of possession of a still. Stats.1927, p. 497. Thereupon the proceedings were suspended and appellant was placed on probation for two years upon condition that he serve the first six months of his probationary term in the county jail. Appellant served the required time and also complied with the other conditions of his probation. However, section 1203.4, Pen.Code (as added by St.1935, p. 1709), provides that where one has been convicted and has been granted probation, "in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

[4] A further point made by appellant in this connection is that after his conviction the statute making it a crime to possess a still was repealed by an act providing that the repeal "shall constitute a bar to the indictment or information and punishment of any criminal offense heretofore committed" in violation thereof. Stats.1933, p. 2093, § 2. But it appears that the judgment of conviction became final before the repeal of the statute.

In the case of Hosier v. Aderhold (C.C.A.) 71 F.(2d) 422, the petitioner sought to be released from the custody of the warden of Atlanta penitentiary, to which he had been committed after conviction upon an indictment charging violation of the National Prohibition Act (41 Stat. 305). At the time of his commitment the judgment against him had become final. Subsequently the Eighteenth article of the Amendments of the Constitution of the United States was repealed and petitioner claimed that upon such repeal all lawful authority to keep him in prison came to an end. The court held that the repeal could not apply retroactively to a case where a valid judgment had been entered and had become final before the repeal. See, also, In re Kline, 70 Ohio St. 25, 70 N.E. 511, 1 Ann. Cas. 219. The same principle was recognized in City of Sonora v. Curtin, 137 Cal. 583, 589, 70 P. 674, 677, where this court pointed out that upon the repeal of an ordinance it "must be regarded as if it never existed, except for the purposes of those actions, which were commenced, prosecuted, and concluded while it was an existing law." This is the general rule.

[5] In McCullough v. Virginia, 172 U. S. 102, at pages 123, 124, 19 S.Ct. 134, 142, 43 L.Ed. 382, the court said: "It is not with-

in the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." Ruling Case Law, vol. 25, p. 941, par. 194, in dealing with criminal statutes, states: "After final judgment has been rendered and sentence pronounced, the power of the court over the subject-matter is at an end and all that remains to be done is the mere ministerial act of doing execution, and the repeal of the law under which a defendant has been convicted will not arrest the execution of the sentence." And it has been held that where one has been convicted of a felony and thereafter pardoned, he may, nevertheless, be afterward charged with such prior conviction. State v. Edelstein, 146 Wash. 221, 262 P. 622. It is therefore clear that the appellant was properly charged with having suffered a prior conviction of a felony.

[6] Appellant also contends that the evidence is insufficient to support the verdict of conviction of the crime of perjury. He was charged with falsely testifying at the trial of his son, who was being prosecuted on a charge of grand theft and for a violation of section 503 of the Vehicle Code (St. 1935, p. 174). Appellant at that time testified that the son was in Quartzite, Ariz., "not later than 8 o'clock a. m. on the 25th of September." At the trial of appellant evidence was introduced showing that the automobile was missed from a residence in Los Angeles on the morning of September 25th and that later the same day appellant's son was found with it in Los Angeles. This evidence was in direct conflict with the testimony of appellant given in behalf of his son, but it was believed by the jury and this court is bound by the verdict.

Appellant complains that certain instructions offered by him were refused and that certain others were given to the jury. We find no merit in this point. The jury was fully and correctly instructed concerning the law.

The judgment is affirmed; the order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; CURTIS. J.; LANGDON, J.

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17 Cal.App.2d 575

PEOPLE v. MURPHY et al.

Cr. 1491.

District Court of Appeal, Third District, California.

Nov. 19, 1936.

Rehearing Denied Dec. 4, 1936.

Hearing Denied by Supreme Court Dec. 17, 1936.

1. Licenses ⚿18½

Transfer of stock in payment of previous debt *held* not within exemption from statute requiring license for sale of stock, since exemption applies only to one who holds stock as pledgee and who sells stock pursuant to pledge for purpose of satisfying debt for which stock was held as security (Gen.Laws 1931, Act 3814, § 2(c).

2. Licenses ⚿42(4)

Evidence that defendants were sole owners and controllers of mining company, that stock was issued to defendants, who sold stock as part of fraudulent scheme of evading Corporate Securities Act, and that part of proceeds were used to promote interest of corporation, *held* to sustain conviction for selling stock without license (Gen.Laws 1931, Act 3814).

3. Licenses ⚿18½

Purpose of Corporate Securities Act is to protect public from fraudulent sales of worthless and spurious securities (Gen.Laws 1931, Act 3814).

4. Licenses ⚿18½

Where defendants were sole owners and controllers of mining corporation, and they sold stock not for their individual benefit, but to promote mining enterprise, law would assume, in determining whether Corporate Securities Act had been violated by sale without license, that separate and distinct entity between corporation and stockholders did not exist (Gen.Laws 1931, Act 3814).

5. Licenses ⚿42(5)

Under evidence that defendants owned all stock of mining corporation except 100 shares, and that part of proceeds of stock was used to promote interest of company, whether defendants charged with selling stock without license were bona fide owners of stock, or whether enterprise constituted fraudulent scheme to evade law, *held* for jury (Gen.Laws 1931, Act 3814).

6. Licenses 🔑40

Specific intent with which securities are sold without license is not necessary element of crime of violating Corporate Securities Act (Gen.Laws 1931, Act 3814, § 3; Pen.Code, § 7, subd. 1; § 21).

7. Criminal law 🔑21

Unless intent with which an act is done is specifically made a necessary element of crime by terms of statute, it is not necessary to allege or prove that the act is performed with the intent of violating the law.

8. Licenses 🔑42(2)

Exceptions to statute prohibiting sale of corporate stock without license are matters of defense to charge of unlawful sale of stock, which defenses may be made by accused (Gen. Laws 1931, Act 3814, § 2(c) 3, and § 3).

9. Indictment and information 🔑166

To sustain conviction of unlawfully selling stock without permit, it is not necessary to allege or prove the negative circumstances enumerated in statute constituting mere exceptions to inhibition of the law (Gen.Laws 1931, Act 3814, § 2(c) 3).

10. Criminal law 🔑778(6)

In prosecution for selling stock without license, court correctly instructed jury that it was not necessary for prosecution to affirmatively prove that defendants intended by their acts to violate the securities act, but that proof of unlawful conduct raised presumption of intent to evade the law (Gen. Laws 1931, Act 3814).

11. Criminal law 🔑1172(7)

Where court, in prosecution for selling stock without license, instructed that it was not necessary for prosecution to affirmatively prove defendants intended to violate securities act, other instructions, if conflicting therewith, were favorable to and not prejudicial to defendants, who could not complain because such other instructions were given.

12. Criminal law 🔑371(1, 12), 372(1)

In prosecution for selling stock without license, evidence of other sales of stock by defendants was competent to show intent, motive, system, or scheme with which defendants operated enterprise to evade Securities Act (Gen.Laws 1931, Act 3814).

13. Criminal law 🔑707

Statement of defendants' counsel while examining prosecuting witness, "Just a moment, just answer the question and you can explain it, the court is taking good care of you," *held* improper, and defendant could not complain of criticism and warning of court as result thereof.

14. Criminal law 🔑1169(5)

In prosecution for selling stock without license, reception of letters constituting part of corporation commissioner's record *held* not prejudicial error, where letters were withdrawn on motion of district attorney and stricken from record in case, and contents of letters were not made known to jury.

15. Criminal law 🔑711

Limitation of argument of counsel within reasonable duration of time is usually within court's discretion.

16. Criminal law 🔑711

In prosecution for selling stock without license, limiting argument to jury by respective counsel to one hour and a quarter *held* not abuse of discretion.

17. Licenses 🔑42(3)

Information charging sale of stock of mining company without permit with felonious intent to violate Corporate Securities Act *held* to state public offense (Gen.Laws 1931, Act 3814).

18. Indictment and information 🔑196(5)

Uncertainty, if any, in information charging sale of stock of mining company without permit, *held* waived by failure to demur to information or to move in arrest of judgment (Gen.Laws 1931, Act 3814).

19. Criminal law 🔑1032(1)

Objections to uncertainty in information may not be raised for first time on appeal.

20. Licenses 🔑42(4)

In prosecution for selling stock of mining company without license, articles of incorporation of mining company *held* competent evidence to show that corporation existed, and to show that stock was not individual stock of defendants, but was their issue of corporation stock on theory of alter ego relationship to corporation itself (Gen.Laws 1931, Act 3814).

21. Criminal law 🔑444

In prosecution for selling mining company's stock without license, unverified file of proceedings consisting of copy of written notice served on defendants by corporation commissioner, demanding that they cease to sell stock, together with memorandum of reports made to commissioner by his agents, *held* inadmissible (Gen.Laws 1931, Act 3814, § 2(c); St.1931, p. 958, § 31; Pen.Code, § 686, subd. 3).

22. Criminal law ⚿1169(5, 10)

Error in admission of unverified record of corporation commissioner in prosecution for sale of stock without license *held* harmless, where letters contained in record were not read to jury, and were subsequently withdrawn, and where balance of record which remained in evidence was fully covered by testimony of witnesses by whom defendants were actually confronted (Gen.Laws 1931, Act 3814, § 2(c); St.1931, p. 958, § 31; Pen.Code, § 686, subd. 3).

23. Licenses ⚿42(4)

In prosecution for selling stock without license, evidence that defendants paid no money for shares of stock which were issued to them *held* competent as tending to show defendants were not bona fide owners of stock which they sold without permit, and for purpose of showing that corporation and individual defendants were same entity; the sale of stock being part of scheme to evade Corporate Securities Act (Gen.Laws 1931, Act 3814).

24. Licenses ⚿19(1)

Statute prohibiting sale of stock without license, but exempting bona fide owner who sells own stock for personal benefit, *held* not unconstitutional (Gen.Laws 1931, Act 3814, § 2(c)3).

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Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

A. E. Murphy and L. V. Murphy were convicted of unlawfully selling shares of stock of a mining corporation without having procured a license therefor, and they appeal.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., did not participate.

Dennett & Zion and Frank Cadmus Damrell, all of Modesto, for appellants.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from judgments of conviction of the offenses of unlawfully selling shares of stock of a mining corporation without having procured a license therefor, contrary to the provisions of the Corporate Securities Act of California (St.1917, p. 673, and amendments, 2 Deering's Gen.Laws, 1931, p. 1924, Act 3814). They have also appealed from the order denying their motion for a new trial.

It is contended the verdicts and judgments of conviction are not supported by the evidence; that the court was guilty of prejudicial misconduct; and that it erred in admitting evidence in the course of the trial and in giving to the jury certain instructions.

The evidence is conflicting, but the following statement of facts is adequately supported by the record: The defendants are husband and wife. During all of the time involved in this transaction they resided in Stanislaus county, California. They were neither miners nor mining experts, but were engaged solely as stockbrokers. In 1927, Andrew Johnson and Stephen Gardella located and owned nine adjacent mining claims in Sierra county, California. Johnson and Gardella organized a California mining corporation under the name of Deadwood Mining Company, with 500,000 shares of capital stock. They employed the defendants to market the stock of that company for the purpose of financing the enterprise. A. E. Murphy received a one-half interest in the corporation for his service. Pursuant to this employment the defendants went to San Francisco and sold stock without procuring a permit to do so from the corporation commissioner. October 9, 1928, Mr. Murphy was personally notified by a representative of the commissioner that he was violating the securities act in selling the stock without a permit, and he was directed to discontinue such sales. The defendants then visited the office of the corporation commissioner in Sacramento regarding their alleged violation of the law, and they were again warned not to sell other shares of stock of the corporation without first procuring a license as required by law. Following the advice of counsel, the defendants proceeded to organize a similar mining corporation in the state of Nevada. A. E. Murphy was elected president of the California corporation, and his wife was made secretary of that company. The Nevada corporation was organized under the same name of Deadwood Mining Company, with 250,000 shares of capital stock. A. E. Murphy as president and his wife as secretary conveyed by deed all of the property of the

California corporation to the Nevada company. There was no other consideration than that transfer of title. Thirty-seven thousand shares of stock were issued by the Nevada corporation, without further consideration, to each of the following persons: A. E. Murphy, Andrew Johnson, Stephen Gardella, and Mrs. Murphy. No other shares were issued in that corporation except a nominal block of 100 shares which was given to the daughter of Mrs. Murphy for the purpose of organization. By resolution duly adopted by the corporation, Mr. Murphy was constituted sole manager of the Nevada company. He and his wife subsequently purchased for a nominal consideration all of the other shares of the corporation except the 100 shares held by her daughter. Gardella died. His estate was paid $250 for his shares, and Johnson's interest was purchased for $1,000. The defendants thereby became sole owners and controllers of the Nevada corporation. They then proceeded to sell without license from the corporation commissioner some 20,000 shares of stock at a dollar per share to purchasers in Stanislaus county, California.

It is true that much of the stock which was sold and transferred nominally stood in the name of either Mr. or Mrs. Murphy. Some of the Johnson and Gardella stock was canceled and other stock in lieu thereof was issued directly to purchasers. It is also true that some of the money derived from the sales of stock was used for the personal benefit of the defendants to defray their own individual expenses, such as rent and maintenance. But it appears with some conflict of evidence that purchasers of stock were told by the defendants at the times of the sales that the money was to be used to promote the interest of the mining corporation. There is evidence from which the jury was warranted in assuming that some of the money derived from the sales of stock was actually used to promote the interest of the corporation, such as payments for property and corporation taxes; the costs of quieting title to the mining claims; the settlement of certain demands against the property; the hiring of experts; the procuring of reports upon the prospect of a successful operation of the mines; and expenses incurred by the defendants in an eastern trip, which was taken for the purpose of selling 25,000 shares of the treasury stock of the company. It appears the entire activity of the defendants was devoted to marketing the stock of the corporation in the indirect method of purporting to issue the stock to themselves and then to sell it with the claim that it was their own individual bona fide stock. The mine was never actually developed or operated. The enterprise appears to have been conducted as a wildcat scheme to evade the law.

It is true the stock which was issued to Dr. E. A. Julien was transferred to him in payment of money formerly loaned to the defendants, a part of which money was used to promote the interests of the mining corporation as heretofore stated. Mr. Murphy attempted to sell him stock at the time when the money was borrowed, but the doctor refused to take it. He advanced to the defendants from time to time ten or fifteen thousand dollars. When he later concluded that the defendants were unable to repay his money, the doctor consented to accept 12,500 shares of stock in payment of the debt.

[1] The appellants contend that since this stock was transferred in payment of a previous debt, the sale was not in violation of the securities act, but, on the contrary, that the transaction falls within the exception announced in section 2 (c) of the act, which declares: "The provisions of this act shall not apply to the sale * * * by or for the account of a pledgee or mortgagee selling or offering for sale or delivery in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt."

The sale of stock to Dr. Julien does not come within the previously quoted section of the act. The exemption from the general provisions of the act, therein mentioned, applies only to a person who holds stock as a pledgee, and who sells the stock pursuant to the pledge for the purpose of satisfying a previous bona fide debt *for which the stock* was held as security. Dr. Julien never held that stock as security for the payment of his previous loan to the defendants. The stock was never pledged or hypothecated to anyone. The consideration for the stock was the money previously loaned to the defendants, a part of which was used to promote the interest of the corporation. It is immaterial that the stock was not sold for cash at hand. It was sold for a valuable consideration, in violation of the law just as effectively as though the issuing of th stock and the payment of the purchase price therefor were parts of the same transaction.

[2] Under the circumstances of this case we are impelled to hold that the evidence adequately supports the verdicts and judgments to the effect that the defendants sold and transferred the stock in violation of the Corporate Securities Act; that they maintained the mining corporation, as sole owners and controllers thereof, and issued and sold stock therein as a part of a fraudulent plan "for the direct or indirect promotion of a scheme and enterprise with the intent to violate and evade the act"; that since they were the sole owners of the enterprise which was fraudulently conducted to evade the law, the corporation may be deemed to be the alter ego of the defendants as nominal stockholders, and for the purposes of this act they may be considered to have been the "issuers" of the stock.

[3] The purpose of the Corporate Securities Act is to protect the public from fraudulent sales of worthless and spurious securities. In view of the fact that the mining enterprise was never developed; that it had no ascertained value, but on the contrary, appears to have been a pure wildcat speculation; that, after warning, the defendants procured control of the enterprise, and abandoned the California corporation to organize another company in Nevada, to which all the property of the first corporation was transferred, with the evident intent of circumventing and evading the California law; that the only consideration for which they originally became the holders of stock was for services to be performed in violation of law; and that they subsequently acquired the Johnson and Gardella shares of stock for nominal consideration—we are driven to the conclusion that the entire plan consisted of a fraudulent scheme to evade the law, and to unlawfully dispose of worthless stock contrary to the provisions of the securities act.

Under such circumstances the jury was justified in determining that the defendants were not the bona fide owners of the stock which they sold contrary to law; that they did not sell it for their own individual benefit, but, on the contrary, that it was sold, in part, to unlawfully promote the mining enterprise as a part of a fraudulent scheme to evade the law; and that since they owned and controlled the company, in contemplation of law they were the alter ego of the corporation and guilty of selling stock without a license, of which stock they became the "issuers."

[4] Under such circumstances the law will assume that a separate and distinct entity between the corporation and the stockholders does not exist. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 695, 227 P. 723, 731; Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641. In the Hewlett Case, supra, it is said in that regard: "While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations."

[5] In accordance with the preceding statement of law and facts, it has been held that similar circumstances constitute unlawful sales of corporate shares or stock contrary to the inhibition of the securities act. It was the sole province of the jury to determine whether the defendants were the bona fide owners of the stock which they sold; whether it was sold exclusively for their own individual benefit; and whether the entire enterprise constituted a fraudulent scheme to evade the law.

In the case of People v. Smith, 111 Cal. App. 177, 295 P. 105, 109, the defendant was convicted of the crime of selling the stock of a foreign corporation without a permit, in violation of the Corporate Securities Act. In consideration of a quitclaim deed to certain mining claims the corporation issued 350,000 shares of its stock to the defendant, who thereby became the manager and controller of the company. The defendant claimed, just as the defendants assert in this action, that he became the bona fide owner of the shares for a valuable consideration. Some of these shares were subsequently sold without a permit to innocent purchasers. The facts of the Smith Case are quite similar to those of the present action. The court said:

"The jury was not compelled to believe his statement that he was the owner of the stock, but was entitled to consider the surrounding circumstances, in determining whether he was in fact the owner, whether he was acting for himself or for the corporation, and whether the sales were made in a bona fide way or for the purpose of evading the act.

"The evidence shows that at the organization meeting of the corporation all of the stock in the company was transferred to appellant and that no one else owned any of the stock until he caused certain shares to be transferred to others in payment for the mining claims involved. At the time his proposition to exchange the mining claims for all of the stock of the corporation was acted upon, he owned all of the stock in the corporation and through dummy directors was dealing with himself. Whether or not he was the owner of the 350,000 shares of stock, he was, in fact, the issuer thereof. The evidence is sufficient to show that the sales of stock described in the information were not sales of securities by an owner who was not the issuer thereof; that such sales were not made in a bona fide manner by an owner for his own account alone; and that such sales were not entirely for his own account but in part for the account of the corporation, and made with the purpose of securing funds to sufficiently develop the property which had been transferred to the corporation to make such a showing as would enable the appellant to make further sales for his own profit. We think the evidence is sufficient to show that the entire proceeding was carried out by the appellant for the purpose of evading the provisions of the Corporate Securities Act. If the circumstances disclosed by this record do not show a deliberate intention to evade this act, it would be difficult to imagine a set of circumstances that would show such an intention. In our opinion, the evidence is entirely sufficient to support the verdict."

In the case of People v. Craven, 219 Cal. 522, 27 P.(2d) 906, 907, the defendant was convicted of selling shares in an oil and gas project without a permit, contrary to the Corporate Securities Act. The defendant owned an oil lease upon which he issued and sold shares in the proposed enterprise. The judgment of conviction was affirmed. The court expressly approved the declarations of law which were made in the Smith Case, supra. It further said: "There would have been no practical difference in so far as the transaction might affect the public had the defendant formed a corporation, sold to it his leases in exchange for its stock, and then sold this stock without securing a permit. This was the course followed by the defendant in People v. Smith, 111 Cal.App. 177, 295 P. 105, which was held to be a direct violation of the penal provisions of the Corporate Securities Act."

In the present case the facts are less favorable to the defendants than they were in the Smith Case. In the Smith Case, the defendant conveyed to the corporation mining claims in consideration for which he received the certificate of stock which he subsequently sold without a permit. In the present case the defendants paid nothing of value for their stock. It was issued to them in consideration of services to be performed in unlawfully marketing the stock of the corporation, which they proceeded to do without procuring a permit therefor. In truth, they evidently attempted to evade the law by fraudulent and circuitous methods. We are satisfied these sales constituted a violation of the securities act.

We are of the opinion the court did not err in charging the jury that: "You are instructed that in this case, although there must exist a criminal intent in the defendant, the specific intent with which the alleged act was done is in this case immaterial, it being sufficient to show that the offense was done willfully. It is presumed that a person intends the natural consequences of an unlawful act, and therefore if the wilful commission of the act is shown, the criminal intent is necessarily established."

The jury was elsewhere charged that it was necessary for the prosecution to prove the intent with which the act was performed. Immediately preceding the challenged instruction above quoted, the court said to the jury: "You are instructed that the intent with which the unlawful act here charged was done, *must be proved,* as well as the other material facts in the information, and in arriving at your decision on the question of the intent of the defendant, you are at liberty to consider all the circumstances connected with the offense charged."

[6, 7] The specific intent with which securities are sold without a license is not made a necessary element of the crime of violating the Corporate Securities Act. It

has been so held. People v. McCalla, 63 Cal.App. 783, 794, 220 P. 436; People v. Eiseman, 78 Cal.App. 223, 246, 248 P. 716; People v. Stewart, 115 Cal.App. 681, 687, 2 P.(2d) 195; 8 Cal.Jur. 328, § 376; section 7, subd. 1, Pen.Code; section 21, Pen. Code. Unless the intent with which an act is done is specifically made a necessary element of the crime by the terms of the statute, it is not necessary to allege or prove that the act is performed with the intent of violating the law. On the contrary, when intent is not specifically made a necessary element of the crime, the intent to violate the law will be presumed from proof of the unlawful act. People v. Harris, 29 Cal. 678; People v. Stennett, 51 Cal.App. 370, 387, 197 P. 372. Section 7, subdivision 1, of the Penal Code provides in part that: "It does not require any intent to violate law." And section 21 of the same Code provides that: "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused."

The Corporate Securities Act does not make the intent with which the unlawful sale of securities without a license is procured an essential element of the crime. Section 3 of that act, as amended by St. 1931, p. 941, defines the offense. The intent with which such sales are made is not even mentioned in that section. It provides in part: "No company shall sell any security except upon a sale for a delinquent assessment against such security made in accordance with the laws of this state, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do."

[8] It is true that section 2 of that act, which primarily seeks to define particular words and terms of the act, does contain certain specified exceptions to which it is declared the act does not apply. These exceptions are not affirmative matters necessary to constitute the crime. They contain mere negative circumstances which are deemed to constitute a lawful sale of securities as distinguished from the unlawful sale of stock which is prohibited by the statute. These exceptions are matters of defense to a charge of unlawful sale of stock, which defenses may be made by the accused. That portion of section 2 (as amended by St.1931, p. 938) provides as follows:

"(c) Except as hereinafter expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * *

"3. The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act."

It is true that after charging in the language of the statute that the defendants did "knowingly, willfully and unlawfully sell" a specified number of shares in the Deadwood Mining Company to designated persons, without first obtaining a permit therefor from the corporation commissioner of the state of California, the information does further allege in a separate paragraph in negative language to that employed in the preceding subdivision (c) 3, of the exceptions to the act above quoted, to the effect that the defendants "did issue and sell said shares * * * for the direct or indirect promotion of a scheme or enterprise to finance the operations of said corporation, *with the intent of violating* and evading the provisions of said Securities Act, particularly the provisions of paragraph 3, subdivision C, section 2 of the Corporate Securities Act."

[9] It was not necessary that the information should negative or state the matters contained in the foregoing exception to the provisions of the act. That paragraph of the act merely declares certain negative circumstances which are not deemed to come within the inhibitions of the securities act. To sustain a conviction of unlawfully selling stock without a permit, it was not necessary to allege or prove the negative circumstances enumerated in section 2 (c) 3 of the act, which constitute mere exceptions to the inhibitions of the law. Those were matters of defense. People v. Main, 75 Cal.App. 471, 242 P. 1078; People v. H. Jevne Co., 179 Cal. 621, 178 P. 517, 519; 14 Cal.Jur. 52, § 39. In the case last cited, the well-established rule with respect to alleging in an information or indictment, negative

matter which exempts one from responsibility of a statutory offense, it is concisely said, in quoting with approval from Ex parte Hornef, 154 Cal. 355, 97 P. 891, that: " 'Such exceptions and provisos were to be negatived in the pleading only *where they are descriptive of the offense or define it,* and that where they afford matter of excuse merely, they are to be relied on in defense.' "

[10, 11] Since the negative matter contained in the exception to the offense of unlawfully selling stock without a permit is not an essential part of the prohibited crime, it was not necessary that those circumstances should be alleged in the information or proved. It was merely a matter of defense. It follows that it was not necessary to affirmatively prove that the act was intentionally violated. The court therefore correctly instructed the jury, in effect, that it was not necessary for the prosecution to affirmatively prove that the defendants intended by their acts to violate the securities act, but that proof of unlawful conduct in contravention of the act would raise the presumption of the intent to evade the law. The other instructions upon that subject may be reconciled with the preceding principle of law, but if they be deemed to conflict with it, they were favorable to the defendants. They were not prejudicial and the defendants may therefore not complain of the giving of these instructions.

[12] The jury was properly instructed that evidence of other sales of stock by the defendants was competent to show the intent, motive, system, or scheme with which they operated the enterprise to evade the securities act.

We have carefully examined each of the other alleged erroneous instructions which were given to the jury, and are of the opinion they were properly stated. They cover various elements of the offenses charged, and are warranted by the fact that each appears to have been based on competent evidence which was adduced. The court did not err in giving these instructions.

[13] It is contended the judge of the court was guilty of prejudicial misconduct in the remarks which he addressed to counsel for the defendants in the course of the trial. We have examined the record with reference to these challenged remarks and find no misconduct in any of them. It is not only the privilege, but it is the duty of a judge to see that trials of cases are conducted in an orderly and respectful manner. A lack of courtesy and respect toward the court and toward witnesses breeds contempt for our system of jurisprudence. It is the duty of a trial judge to see that all witnesses are treated with due consideration. It has frequently been said a judge should not permit counsel to intimidate witnesses. So far as we are able to see, there was nothing in the conduct or statements of the judge which transgresses his province and duty in that regard. The circumstance which led to the chief charge of error occurred when the prosecuting witness, Dr. Julien, was being cross-examined by counsel for the defendant. In an excess of zeal, the attorney said, interrupting the witness when he was making an apparently legitimate explanation: "Just a moment, just answer the question and you can explain it, *the court is taking good care of you.*"

This statement of counsel was improper. It implies that the court was unduly favoring and protecting the witness. There is no evidence of such conduct on the part of the court. The defendant, therefore, may not complain of the criticism and warning of the court as the result thereof. People v. Mahach, 65 Cal.App. 359, 377, 224 P. 130.

[14] The court did not err in striking from the evidence certain letters which were received as a part of a report rendered to the corporation commissioner. These letters constituted hearsay evidence, and were improperly admitted. The report was received over the objection of the defendant. It does not appear that these letters were called to the attention of the court at the time the report was offered. The letters were never read to nor in the presence of the jury. The contents of these letters were not made known to the jury. On motion of the district attorney they were subsequently withdrawn and stricken from the record. Under the circumstances of this case it may not be said the reception of these letters was prejudicial to the defendants.

[15, 16] The court did not err in limiting the arguments to the jury by respective counsel to one hour and a quarter. The limitation of the arguments of counsel, within a reasonable duration of time, is usually within the discretion of the court. 24 Cal.Jur. 741, § 25. The record

in this case indicates that the attorney for the defendants consented to that limitation of time. It does not appear the defendants were prejudiced thereby.

[17-19] The articles of incorporation of the Deadwood Mining Company of Nevada were properly admitted in evidence. The defendants were charged with unlawfully violating the provisions of the Corporate Securities Act by selling the stock without securing permission therefor. Each count of the information specifically charges them with willfully and unlawfully selling designated shares of stock "in the Deadwood Mining Company, a corporation * * * without first obtaining a permit * * *." The information then charges that the defendants so sold this stock with the "*felonious intent to violate the said Corporate Securities Act*"; that the defendants sold the stock "as vendors and *not as bona fide owners*"; that such sales were made "directly or indirectly *for the benefit of the * * * Deadwood Mining Company, * * * and for the direct or indirect promotion of a scheme or enterprise to finance the operations of said corporation, with the intent of violating and evading the provisions of said Securities Act*, particularly the provisions of paragraph 3, subdivision (c), section 2, of the Corporate Securities Act. * * *" The defendants failed to demur to this information. The information certainly states a public offense. We think its allegations are certain and definite. If it be deemed to be uncertain in any respect, the defendants have waived such uncertainties by failure to demur to the information or to move in arrest of judgment. Such objections may not be raised for the first time on appeal. People v. Stone, 199 Cal. 610, 250 P. 659, 8 Cal.Jur. 499, § 515.

[20] The articles of incorporation constituted competent evidence. The essential proof of a charge that one has violated the securities act by selling corporation stock without a license is to show that the corporation exists. The articles are the best evidence of that fact. Moreover, to rebut the defendants' claim, under the exemption of liability mentioned in section 2 (c), subdivision 3, of the act, it was competent to prove the stock which was sold was not the individual stock of the defendants, but, on the contrary, that it was their "issue" of the corporation stock on the theory of alter ego relationship to the corporation itself; that it was sold partly for the benefit of the corporation and not for their exclusive individual benefit; and that the entire plan of the defendants, of which the sale of the stock was a part, was for the "promotion of a scheme or enterprise to finance the operations of said corporation, with the intent of violating and evading" the provisions of the act. For any of the foregoing purposes the articles of incorporation of the mining company in question were competent. The court did not err in admitting them in evidence.

[21, 22] For the purpose of showing that no license to sell stock was issued to the defendants by the corporation commissioner, an unverified file of proceedings in that matter was received in evidence over the objection of the defendants. This record contained several letters of communications to the corporation commissioner by his agents. These letters were never read to the jury. Their contents were not made known to the jury. They were subsequently withdrawn on motion of the district attorney. The fact that they were included in the file as it was originally received in evidence is therefore harmless. The letters could not have prejudiced the defendants. The balance of that record, which did remain in evidence, is merely cumulative of competent evidence adduced at the trial, of witnesses who were subsequently sworn and examined at length. That record consists merely of a copy of the written notice which was served on the defendants by the commissioner demanding that they cease to sell stock, together with two or three memoranda of reports taken from its files, which were made to the commissioner by his agents, Messrs. Crase and Solomon. This report from the files was offered under the provisions of section 31 of the Corporate Securities Act (St.1917, p. 673, as added by St.1931, p. 958), which provides that all duly verified copies of reports made by the corporation commissioner, or his officers or employees, "shall be prima facie evidence of the facts therein stated." This record was hearsay evidence, and improperly received. It was not verified as the statute requires. Moreover, it is in direct conflict with the mandate of section 686, subdivision 3, of the Penal Code, which provides that a person who is accused of crime is entitled, with certain exceptions, to be confronted by the witnesses against him.

These unverified statements were hearsay and incompetent. Englebretson v. Industrial Acc. Comm., 170 Cal. 793, 151 P. 421. But they were harmless for the reason that each witness who furnished these statements to the commissioner and the individual who served the notice for the defendants to cease selling stock was subsequently called and thoroughly examined and cross-examined upon every material statement contained in the reports and in the notice. The portion of this record which remains in evidence was fully covered in every particular by the testimony of witnesses by whom the defendants were actually confronted. The challenged record of the commissioner's files was therefore merely cumulative and harmless. The defendants were not prejudiced thereby.

[23] The court did not err in receiving testimony over the defendants' objection that they paid no money for the shares of stock which were issued to them. This evidence was competent as tending to show that the defendants were not the bona fide owners of the stock which they sold without a permit. It was also competent for the purpose of showing that the corporation and the individual defendants were the same entity, and that the organization of the mining corporation and the sales of stock were a part of a fraudulent scheme to evade the Corporate Securities Act.

[24] We find no reversible error in receiving or rejecting testimony in the course of the trial.

In a final brief which the defendants were permitted to file after the cause was orally argued, for the first time, they have challenged subdivision 3 of section 2 (c) of the securities act as unconstitutional. In support of that contention, they rely on People v. Pace, 73 Cal.App. 548, at page 564, 238 P. 1089, 1096, wherein it is said: "We are of the opinion that the section of the Corporate Securities Act under consideration, so far as it attempts to require a natural person to secure a broker's permit as provided in said act before he may lawfully sell his own securities, where he is not the issuer or underwriter of the same, is unconstitutional and invalid for the reasons herein set forth."

Since the opinion was rendered in the Pace Case, supra, subdivision 3 of section 2 (c) was amended with the evident purpose of meeting the objections announced in that decision. St.1931, p. 938. In the Pace Case the securities in question were the bona fide property of the defendant and he sold them for his own personal benefit. In the later case of People v. Craven, 219 Cal. 522, 27 P.(2d) 906, 907, the same attack upon the alleged unconstitutionality of the act was made which is here urged. The Supreme Court specifically refers to the Pace Case and limits the application thereof in the following language: "It is true that the court * * * had much to say regarding the constitutionality of an act which would require a bona fide owner of securities to secure a broker's license before he could legally sell the same, but in our opinion, *what was said by the court in that regard was not necessary to the decision * * * nor was it applicable to the facts then before the court.*"

And then in support of the constitutionality of the securities act the court further said in the Craven Case: "On the other hand, there are decisions in this state directly in point which sustain the provisions of the Corporate Securities Act requiring an owner *who is also an issuer of securities* to secure a permit from the corporation commissioner before he can legally sell or negotiate the sale of such securities. We refer to the following decisions of the District Court of Appeal: People v. Smith, supra [111 Cal.App. 177, 295 P. 105]; Black v. Solano Co., 114 Cal.App. 170, 299 P. 843; People v. Shafer, 130 Cal. App. 74, 19 P.(2d) 861, and People v. Claggett, 130 Cal.App. 141, 19 P.(2d) 805. * * * We are in perfect accord with the conclusion reached therein, and in our opinion, the principles so announced should control the decision of the present case."

The challenged subdivision of the act makes it clear that the inhibition of selling securities without a license does not apply to *a bona fide owner of stock, who sells his own property for his personal benefit.* The section in question provides that the act does not apply to a bona fide owner of stock when he is not himself the issuer of the security and when it is not sold for the benefit of some other person, to wit, "for the benefit of the issuer", and when it is not sold to promote a fraudulent scheme or enterprise with the intention of evading the law. In accordance with the exceptions last mentioned it may not be said under such circumstances the owner is selling the stock *for his own benefit,* but, on the contrary, the sale then becomes an invasion of the spirit of the act, which is to protect the public against fraudulent sales of spurious and worthless wildcat securities. We are of the opinion the challenged portion of the act is constitutional.

The judgments and the order are affirmed.

We concur: PULLEN, P. J., PLUMMER, J.

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17 Cal.App.2d 528

PEOPLE v. YANDELL.

Cr. 2927.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1936.

Criminal law 🔑1182

Conviction of burglary would be affirmed, where clerk's transcript was filed October 6, 1936, reporter's transcript was filed October 8, 1936, case was ordered on calendar for November 13, 1936, and due notice given, and no briefs were filed and no requests for extension of time were made, and accused made no appearance (Pen.Code, § 1253).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William Yandell was convicted of burglary, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an appeal from a conviction of the crime of burglary, a felony. The clerk's transcript was filed October 6, 1936. The reporter's transcript was filed October 8, 1936, and the case was ordered on the calendar for November 13, 1936, and due notice given. No briefs have been filed and no requests for extension of time have been made. Defendant has made no appearance. Under authority of section 1253 of the Penal Code, the judgment is affirmed.

Judgment affirmed.

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17 Cal.App.2d 627

PEOPLE et al. v. COVELL.

Civ. 5576.

District Court of Appeal, Third District, California.

Nov. 23, 1936.

1. Boundaries 🔑44

Trial court's opinion that survey made by county surveyor, and approved by county supervisors, in creating public highway was doubtless correct *held* not binding.

2. Public lands 🔑25

Original survey granting and establishing certain rights, whether accurate or inaccurate, fixes rights not only of government, but of landowners, and government, after establishing such a line and granting and conveying certain rights, possesses no power thereafter to change course of that line.

3. Highways 🔑50

Where county surveyor surveyed and laid out proposed public highway, and his report, showing lines followed and government corners found, was adopted by county board of supervisors, highway so surveyed became fixed, and no change could thereafter be made, so far as county's rights were concerned and rights of landowners adjacent thereto were affected.

4. Boundaries 🔑54(2)

In making resurvey to determine boundaries of lands which have been granted, tracks of original survey should be followed, so far as it is possible to discover and locate lines of lands patented, as nearly as may be, according to original survey thereof, and in reference to which lands have been sold.

5. Highways 🔑157

Testimony of deputy county surveyor that fence built by defendant encroached on public highway *held* insufficient to support judgment finding such encroachment, where testimony showed no attempt to ascertain lines established by county surveyor in laying out highway in 1872, whose report, showing lines followed and government corners found, was adopted by county board of supervisors so as to fix highway lines.

6. Highways 🔑157

State's and county's allegations that fence built by defendant encroached on public highway set forth no cause of action, in absence of showing that fence encroached on highway according to lines established by

county surveyor in laying out highway in 1872, and adopted by county board of supervisors, since according to such lines, rights of all parties were fixed and remain fixed.

◆

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action by the People and another against George F. Covell. From a judgment for plaintiffs, defendant appeals.

Reversed.

A. J. Carlson, of Modesto, for appellant.

Leslie A. Cleary and Frank B. Collier, both of Modesto, for respondents.

PLUMMER, Justice.

Judgment was entered in favor of the plaintiffs in an action prosecuted against the defendant to compel him to remove or set back a certain fence alleged to be an encroachment upon the public highway now known as "Ward Avenue." From this judgment and the penalties attendant thereon, the defendant appeals.

The contention principally relied upon in this appeal by the defendant is that the testimony fails to show any encroachment by the defendant's fences upon any part of the road as originally laid out and established. A review of the testimony upon which the plaintiffs rely, to wit, a survey made by a deputy county surveyor by the name of McMath, as hereinafter set out, we think establishes the contention of the defendant beyond controversy.

The record shows that in 1872 the county surveyor of the county of Stanislaus by the name of G. B. Douglass surveyed and laid out the proposed road; that this road as surveyed and laid out by Douglass was approved by the board of supervisors and was created a public highway with a width of 33 feet on each side of a certain range line described in the survey. The record of this survey is set out in the transcript as it appears in the clerk's office of the county of Stanislaus, and which was followed by the board of supervisors in creating and establishing the public highway under consideration in this cause. This survey shows the finding and the starting of the survey of a certain United States corner as surveyed by officers of the United States government. The survey also shows the finding of two other corners established by United States surveyors. The range line is designated in the Douglass survey, the width of the road staked out, the different section corners are specified, distances set forth therein, and practically everything necessary to show the lines of the Douglass survey as they were then laid out and delineated along the course of the highway proposed to be established and which were followed by the board of supervisors in establishing the highway, a part of which is now known as "Ward avenue."

[1] The record before us shows that no attempt was made to locate the United States corners found and mentioned in the Douglass survey by the surveyor upon whose report judgment was entered in this case, nor was any attempt made to ascertain and follow the lines of the Douglass survey. The record shows that the Douglass survey was absolutely ignored by the surveyor upon whose report or survey the court found encroachment by the defendant's fences upon Ward avenue. In his opinion, which, of course, is not binding, the court remarked that the Douglass survey was doubtless correct, having been made only a short time after the establishment of the government corners by United States surveyors, but in its findings and conclusions the court overlooked the fact that the Douglass survey and the lines thereof, whether correct or incorrect, establishing the highway part of what is now known as "Ward avenue," and so declared by the board of supervisors, became the fixed lines of that public highway. In his survey Mr. McMath came to the conclusion that the east line of the defendant's property encroached upon the westerly portion of Ward avenue, at a distance varying from 6 to 8 and 10 feet at different places.

It appears in the record that McMath furnished one Steger, a draftsman, with certain data for the preparation of a map which was used upon the trial. The very beginning of Mr. McMath's testimony shows that it furnishes no basis for the conclusion that the defendant's fence constitutes an encroachment upon Ward avenue. In furnishing data to Mr. Steger for the preparation of the map, it appears that the surveyor started from the corner of the intersections of sections 25, 30, 36, and 31, and the accuracy of the location of this corner was established in the following manner:

"Q. Now, on what data did you base the information that you gave him concerning the location of that corner? A. Why, from actually measuring to the corner from the various fences.

"Q. From fences only? A. Yes."

Not a single witness was introduced in the case who testified that the defendant's fence is an encroachment upon Ward avenue as the lines thereof were laid out by the Douglass survey, and for all that the record shows, the westerly line of Ward avenue may be absolutely coincident with the fence which for many years has stood alongside of said Ward avenue, and which is now maintained by the defendant. Not a single witness made any attempt to locate the lines of the Douglass survey. As we have said, the Douglass survey was made only a short time after surveys were made and corners established by United States deputy surveyors, all of which appears to have been ignored by the later surveyors. Several surveys have been made by different persons for private purposes which appear in the testimony of Mr. McMath, none of which give any attention whatever to the Douglass survey.

[2-4] While the appellant has cited a number of cases having to do with property lines in cities which have been established and maintained for a number of years as constituting the lines which could not be disturbed by later surveys differing from the original survey, the principle involved in this case is really the same as that involved in the case of Churchill Co. v. Beal, 99 Cal.App. 482, 278 P. 894, 897, where it was sought by a later survey to move the lines established by a prior survey. This court held that whether accurate or inaccurate, the original survey granting and establishing certain rights fixed the rights not only of the government, but of the landowners, and that the government, after establishing such a line and granting and conveying certain rights, possessed no power thereafter to change the course of that line. That principle is applicable here. When the Douglass survey was made and the report thereof giving all the data necessary to establish the survey showing the lines followed, the government corners found, and such data as ordinarily appears in report of a surveyor in laying out a public highway, and that report being adopted by the board of supervisors, and the road laid out by Douglass, that highway so surveyed by Douglass became fixed, and so far as rights of the county are concerned and the rights of landowners adjacent thereto are affected, no change thereafter could be made. The rights of the respective parties, and the lines of the highway were limited and fixed by the Douglass survey. That this is the rule is clearly shown by the excerpt which we quote from the Churchill Case, supra: "That is the limitation involved in this action. The resurvey was made subsequent to the time when the government had parted with its title, and its power to recapture any of the lands theretofore sold to the plaintiff by means of a resurvey, or otherwise, was wanting. If the original survey, as made by McKay, fixed the westerly boundary of the lands granted to the plaintiff and the plaintiff's grantors as found by the trial court, then, and in that case, whether the line as originally located was correct becomes immaterial. It is the correct line in the determination of this action, as it fixes on the grounds the lands covered by the patents, the ownership of which has passed to the plaintiff in this action. The following California cases support the rules which we have just herein set forth: Kimball v. McKee, 149 Cal. 435, 86 P. 1089; Foss v. Johnstone, 158 Cal. 119, 110 P. 294; Weaver v. Howatt, 161 Cal. 77, 118 P. 519; Weaver v. Howatt, 171 Cal. 302, 152 P. 925; Spiers v. Spiers, 176 Cal. 557, 169 P. 73; Wilmon v. Aros, 191 Cal. 80, 214 P. 962. Practically all of the cases herein referred to support the principle that, in making a resurvey to determine the boundaries of lands which have been granted, the tracks of the original survey should be followed, so far as it is possible to discover the same and locate upon the grounds the lines of the lands patented as nearly as may be according to the original survey thereof and in reference to which lands have been sold."

The record further shows that none of the surveyors in the surveys made after Douglass' survey in 1872 made any attempt to check the field notes of the Douglass survey, and several of the surveyors did not make any checks to ascertain if their surveys agreed with the conclusion of the government surveys. The first of the later surveys was made some thirty years after the Douglass survey, according to which the highway part of which is now known as "Ward avenue" was laid out.

The testimony is further to the effect that some of the lines along the highway show that in extending back therefrom, instead of being 5,280 feet as a mile should be, covered only 5,250 feet. This appears in one of the lines of section 36. The report of the Douglass survey as found in the transcript is too lengthy to be set forth herein, but establishes everything which we have heretofore said, and as shown by the testimony of McMath, was not followed, and that no attempt was made to ascertain the lines of the highway involved herein as originally established, but that it was simply sought to establish the highway and the respective lines thereof made of later surveys, starting from a corner a certain distance from certain fences, as we have stated herein.

As the testimony in the case is challenged as being insufficient to support the findings and judgment of the trial court, it becomes necessary to set forth herein what appears to be the testimony of the surveyor McMath, upon which the findings and judgment rest. It may be here observed that McMath testified that they had no records of any government corners in their office, of which mention is made in the Douglass survey. The record shows that those corners are mentioned and designated in the reports of the Douglass survey, which were not considered by McMath in making his survey. The testimony of Mr. McMath which we have been discussing is as follows, to wit:

"Q. Did you take into consideration any government surveys? A. There is no government monument at that place.

"Q. Did you make any investigation for a government monument in the neighborhood from which you could make a measurement or take a reading? A. From past records. We have no record of any government corners in there, so I didn't dig up the whole country to find one.

"Q. Mr. McMath, you know from your investigation of this matter, that this road was laid out in 1872, pursuant to a survey made by Mr. Douglass, do you not? A. Yes, I know of that.

"Q. And you have seen the Douglass map, have you not? A. No, I haven't seen the Douglass map.

"Q. Haven't you examined the Douglass map? Have you read the description of the road? A. Yes.

"Q. Which was included in the report of the Douglass map or with the Douglass Survey? A. I read a copy of it.

"Q. You have read a copy of it. I assume Mr. McMath, that the copy you read corresponds with the original notes which are in evidence in this case? Now, did you endeavor to locate the Douglass Survey on the ground? A. No, sir. * * *

"Q. But did you ever find Mr. Douglass' corners? A. No, sir.

"Q. Do you know where he ran this line on the ground? A. No, sir.

"Q. Then, you are not prepared to say, are you, that the west line of the road as it now exists isn't identical with the west line of the road as laid out by him? A. No.

"Q. It may be exactly the same position? A. I don't know.

"Q. You don't know. In establishing the northerly corner here on that drawing, you didn't check against the Douglass survey at all? A. No.

"Q. And in checking the township corner at the southeast corner of section 36, you didn't check against the Douglass survey? A. Only checked against the 8-inch concrete monument by Finney.

"Q. You checked against the monument set there by Mr. Finney? A. Yes, sir.

"Q. And do you know when that monument was set? A. Set in June 21, 1904.

"Q. You are good for dates, aren't you? Now, you were not present when Mr. Finney made his survey? A. No, sir.

"Q. You don't know how the survey that he made corresponds with the Douglass Survey of 1872, do you? A. No.

"Q. It may not correspond at all? A. I don't know.

"Q. And when you set the corner at the southeast corner of section 1, what did you use for information? A. Sandstone rock, with an X, cross, marked on the top of it.

"Q. Do you know how long that rock had been there? A. No.

"Q. Do you know how that corresponded with the range line as established by Dr. Douglass? A. No, I don't know.

"Q. You don't know whether the range line as established by Douglass was east or west of that point or exactly on the point, do you? A. No.

"Q. And the same applies to the corner that you established at the southeast corner of section 12? A. Yes.

"Q. And also at the quarter section corner, you established between sections 36 and 31? A. Yes.

"Q. And to the quarter section corner you established between sections 1 and 6, in township 6 south? A. Yes.

"Q. Between ranges 7 and 8 east. Now, Mr. McMath, in establishing the corner at the northeast corner of section 36, did you run a line west at all, to any other corner? A. No, sir.

"Q. You did not measure that line then, if I understand you correctly, from the northeast corner of section 36? A. No.

"Q. And you do not know, and do not pretend to say whether or not that corner that you have testified to as being located in the northeast corner of section 36, is a mile, 5280 feet east, more or less, of the northwest corner of section 36, do you? A. No, I don't know.

"Q. You don't know whether or not as an actual fact, it is only distanced 5250 feet from the northwest corner of section 36? A. I don't have any idea about it.

"Q. You haven't any idea about that? The same would apply to the corner on the southeast corner of section 36? A. Yes.

"Q. You don't know what the distance of that corner is from the southwest corner of section 36? A. No, sir.

"Q. Do you know what the distance of that corner is from the corresponding corner approximately 6 miles west? A. No.

"Q. On the other township line? A. No.

"Q. You don't know whether or not there is a shortage there or not, do you? A. Not for certain.

"Q. Well, as a matter of fact, there is a shortage, isn't there? A. I don't know.

"Q. The corner which you found and which you have testified to in this case as being, in your judgment, the corner of those four sections, did you measure the distance from that corner to the west line of the section? A. No, sir.

"Q. And you don't know whether that corner is actually 5280 feet east of the corner on the west line of the section? A. No.

"Q. Now, Mr. McMath, you ran a survey even farther south than this, did you not? A. Yes, sir.

"Q. Did you run a survey to the south line of the township? A. Yes, sir.

"Q. And you established a corner at the south line of the township, did you not? A. I found one there.

"Q. You found one. And what evidence of a corner did you find there? A. Found a 5x5x18-inch concrete monument, set by Townsend under Hoskins.

"Q. When was that done? A. I will have to have my original notes to tell you that.

"Q. Yes, I meant to give them to you. Return them to the clerk. A. I beg your pardon, I haven't got it, but I can give you the date of the survey.

"Q. We won't quarrel over a day or two. A. It was in March, 1922.

"Q. Is that what is known as the Isom Survey? A. No.

"Q. It was not. Do you know when the Isom Survey was made? A. No. I don't; the records will show.

"Q. You have a record of the Isom Survey here, haven't you? A. Yes, sir.

"Q. Now, the Isom Survey, the so-called Isom Survey, was made on August 28th, 1916. A. Yes, sir.

"Q. Now, will you tell the court what the document is that you are examining at this time, Mr. McMath? A. It was survey of the petition in 413 of W. H. Isom, et al., in road district No. 5, 5-B.

"Q. By whom was the survey made? A. It was made by Hoskins under E. H. Annear.

"Q. Is the record that you are now examining one of the official records of the county engineer's office of this county? A. Yes, sir.

"Q. Now, I will call your attention to the south line of Section 24, township—that would be township 6 south, range 7 east, wouldn't it? A. Yes.

"Q. That is correct, isn't it? A. Yes, that is right, township 6 south, range 7 east.

"Q. That shows according to this survey the south line of section 24 S., 79 chains and 20 links? A. That is according to this, yes.

"Q. Now, Mr. McMath, do you know how that compares with the government survey of the same line? A. No, I haven't the records at my finger-tips.

"Q. Have you looked up the records so you can tell us? A. I don't remember what they are; I have looked at them.

"Q. Now, before we proceed with that question, Mr. McMath, will you kindly tell me what the document you are now examining and to which your attention is called— A. It is the government official maps.

"Q. That is, it is a certified copy? A. Certified copy.

"Q. Of the original government maps? A. Of the original government maps.

"Q. Made by the United States surveyors under supervision of the Surveyor General. A. That is right.

"Q. In July, 1874? A. Yes.

"Q. And now, what does that show, Mr. McMath, to be the distance of the south line of section 24, township 6 south, range 7 east? A. 79.8 chains.

"Q. There isn't a difference? A. 80 chains and .8 is the same.

"Q. How long is a link? A. 7.92 inches.

"Q. Practically 8 inches. So that represents a difference between the so-called Isom survey and the government survey, of how much? A. 60 links.

"Q. And now calling your attention to section 23, is there a difference between the Isom survey made by Mr. Hoskins and the U. S. official survey? * * * A. There is a difference.

"Q. Of how much? A. 62 links.

"Q. 62 links. And the result of the difference between the government surveys and the Isom survey, in so far as the south line of section 23 and 24 are concerned, is that the Isom survey would put the range line at least 120 links east, wouldn't it? A. I wouldn't say that.

"Q. What would be the effect of these differences then, Mr. McMath, to be entirely fair to you? A. The government distances in no case absolutely check it, equalize it.

"Q. That is correct; I agree with you. A. We run—to locate a corner, we proportion back.

"Q. Yes. A. To make the corrections.

"Q. In other words, that is engineering practice, to apportion back and to adjust and equalize, isn't it? A. Surveying practice.

"Q. Now, Mr. McMath, is the Isom survey in any way at all tied in with the location of Ward Avenue? A. Not the part that is involved in this suit.

"Q. Yes, but the Isom survey was made by Mr. Hoskins? A. Yes, sir.

"Q. Who was a deputy county engineer at the time the survey was made? A. That is correct.

"Q. Does it correspond with the other surveys that he made? A. Which?

"Q. Upon which you predicate your testimony with reference to the location of this road? A. I say his is the same as what I find, approximately the same.

"Q. It is the same as you find? A. Yes, on Ward Avenue.

"Q. On Ward Avenue? A. That is right.

"Q. And you didn't consult the Isom survey in this particular matter, Mr. McMath, because you didn't find it was necessary to go quite that far south, is that it? A. That is right.

"Q. Well, you did go south as far as the Isom survey, however, didn't you? A. We didn't take the Isom survey into consideration, though.

"Q. But the Isom survey shows a portion of Ward Avenue, doesn't it, in a portion of section 24, a portion of the south half of section 24? A. Well, it has it indicated here.

"Q. You checked against that didn't you? A. No.

"Q. You didn't check against that? A. No.

"Q. Now, did you make any survey or readings or check against the U. S. surveys. certified copies of which are in the engineer's office, in so far as the east and west lines on the south side of section 12 were concerned? A. No.

"Q. Or section 1? A. No.

"Q. Or section 13? A. No. * * *

"Q. And the Isom survey, that is the Survey No. 517, is short, isn't it; it is 62 links less than the government survey? A. It is 62 links less than the government survey.

"Q. In section 24, survey 517, known as the Isom survey, it is 60 links shorter than the government survey? A. Yes, sir. * * *

"Q. The dashes with the little crosses. Are you able to say that that fence at any point is east of a point 33 feet west of the range line as established by Mr. Douglass? A. No, I am not."

[5] The witness McMath, on his direct examination, as we have said testified that according to his survey the fence belonging to the defendant situate along the westerly line of Ward avenue, encroaches upon the highway, but the résumé of his testimony which we have set forth shows absolutely no basis for supporting a judgment to that effect, which shows no attempt to ascertain the lines established by Douglass, and according to which the highway was laid out and devoted to public use.

[6] In order to lay the basis for determining whether a fence belonging to the

defendant constitutes an encroachment, it is necessary for the People to establish as nearly as may be the lines of the Douglass survey according to which the rights of all the parties were fixed and still remain fixed, and these lines and these rights cannot be changed by subsequent surveys which ignored the original survey in accordance with which the highway was established. Until it is shown that the fence belonging to the defendant encroaches upon the highway according to the lines established by Douglass, and declared by the board of supervisors, no cause of action is set forth.

The judgment of the trial court is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

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17 Cal.App.2d 608

PEOPLE v. ORNELAS.

Cr. 336.

District Court of Appeal, Fourth District, California.

Nov. 20, 1936.

1. Assault and battery ⚷91

Evidence of identity of accused *held* to sustain conviction of assault by means of force likely to produce great bodily injury.

2. Criminal law ⚷1186(4)

In prosecution for assault by means of force likely to produce great bodily injury, submission of instruction on flight, which was erroneous because of total lack of evidence of flight, *held* not prejudicial (Pen.Code, § 1127c, Const. art. 6, § 4½).

3. Criminal law ⚷363

In prosecution for assault by means of force likely to produce great bodily injury allegedly committed by accused at time when strike was in progress, physician's testimony relating to various injuries sustained by party assaulted during attack *held* admissible as res gestæ, notwithstanding some injuries were not inflicted by accused.

4. Criminal law ⚷706

In prosecution for assault by means of force likely to produce great bodily harm, district attorney's attempting to introduce club found under bed occupied by accused *held* not prejudicial misconduct, where record showed club was offered under serious claim that it was admissible.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Severo Ornelas was convicted of assault by means of force likely to produce great bodily harm, and he appeals.

Affirmed.

J. R. LeGallez, of San Bernadino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of assault by means of force likely to produce great bodily injury, alleged to have been committed by striking one M. A. Patterson about the head and body with an iron bar. The jury found him guilty, and he appeals from the judgment of conviction and from an order denying his motion for a new trial.

The case arose out of acts occurring in an orange grove in Orange county at a time when a strike was in progress. Patterson testified that he was in charge of the packing house for an orange association; that on the day in question he was acting as a guard while a crew from the packing house was picking oranges on a certain ranch; that several cars drove up and a large group of men entered the grove; that as the men approached him he fired two shots in the air and the remaining four shots into the ground; that five or six of the men in the party were approaching him from various directions; that they were armed with sticks, clubs, and irons; that he directed them not to come any further; that they kept on coming and he hit two of them over the head with his empty revolver; that immediately thereafter he turned his head and saw the defendant swinging at him with an iron bar; that this was the first he had "noticed particularly this gentleman"; that he was then hit over the head and became unconscious; and that "I recognized the defendant as he swung and hit me over the head." On cross-examination he testified, "I didn't recognize, but I remembered him from the time he hit me."

[1] It is first contended that the evidence is not sufficient to establish the identity of the appellant as the one who assaulted Patterson. It is argued that Patterson's identification cannot be accepted because he had but a fleeting glance at his assailant at a time when he was beset by several men, and because his testimony is unworthy of belief, since he testified that the appellant was brought to his room in the hospital "some nine or ten days after" the day he was injured, whereas other witnesses testified that this occurred five days after that time. Patterson testified positively that the appellant was the man who struck him with the iron bar. The jury had a right to, and did, believe his testimony, and the same is amply sufficient to sustain the implied finding.

[2] An instruction was given on flight in the language of section 1127c of the Penal Code, and this is assigned as prejudicial error. We agree with the appellant's statement that "there is not a line or word of testimony in the record that could by any stretch of the imagination be construed as showing or even indicating any flight or attempt at flight on the part of defendant," and with his contention that the instruction should not have been given. However, there being no evidence of flight, the instruction could not have misled the jury, and we are unable to see how it was prejudicial. The appellant was positively identified as the man who struck the blow, and it cannot reasonably be supposed that the verdict would have been different had the instruction not been given. After reading the entire record, we are not convinced that a miscarriage of justice has occurred, and the error is not sufficient to justify a reversal in view of section 4½ of article 6 of the Constitution.

[3] It is next contended that the court erred in denying a motion to strike out the testimony of a physician relating to various injuries sustained by Patterson. The doctor testified that Patterson had a laceration across his forehead an inch and a half long and going down to the skull bone, and that he had another laceration two and one-half inches long on the left side of his head which was "deep down to the skull bone." He further testified to other injuries, including an injury to his collarbone, bruises on his back and his ankle, a cut to the bone on one finger, a broken leg, and "other minor bruises over different parts of the body." On cross-examination the doctor testified, in response to questions, that a blow on the head would not cause the finger injury, would not cause a broken ankle, and would not cause a wound on the man's shin, that either one of the blows on the head could have caused the mental disturbance about which he had testified, and that he was unable to say which of the two blows on the head actually caused the mental disturbance. Thereupon appellant's counsel moved to strike out all of his testimony "except as it relates to one blow on the head, and as the witness has been unable to state which blow it was, then I respectfully move that his entire testimony be stricken for that reason, because he doesn't know the cause of the injuries which he testified to." It is argued that the evidence of the effect of one blow on the head was sufficient to establish that phase of the crime and that evidence of other injuries was unnecessary and could have been introduced only for the purpose of creating prejudice in the minds of the jurors. No authorities are cited in support of this contention, and we are unable to see any good reason why, in cases of this nature, the condition in which the victim was found immediately after the occurrence should not properly be admitted. Such facts are a part of the res gestæ, and have an effect on the question of whether the means used were of a kind likely to produce great bodily injury. The prosecution is certainly not required to pick out the exact point at which the evidence becomes barely sufficient for this purpose, and rely on this alone. There is ample evidence that Patterson was rendered unconscious by a blow from an iron bar wielded by the appellant, and, if we assume that the other wounds were thereafter inflicted upon him by others, it was not incumbent upon the prosecution to prove which particular injury was the result of the original blow.

[4] The last point raised is that the district attorney was guilty of prejudicial misconduct in attempting to introduce into evidence a club which was found under the bed occupied by the appellant. The court sustained an objection to the introduction of this object and instructed the jury to disregard all evidence in connection therewith. The appellant contends that the district attorney well knew that the proposed exhibit was not admissible and that he offered it in bad faith for the sole purpose of prejudicing the jury. The record does not sustain this contention,

and indicates that the evidence was offered under a serious claim that it was admissible. The rights of the appellant were fully protected by the court's ruling and instruction.

The judgment and order are affirmed.

We concur: MARKS, J.; JENNINGS, J.

PROUD et al. v. McGREGOR et al.*

Civ. 11156.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1936.

Rehearing Denied Dec. 17, 1936.

Hearing Granted by Supreme Court Jan. 21, 1937.

1. Municipal corporations 🔑185(12)

Where city charter makes decision of board of police commissioners on matters of removal final, court cannot review board's decision to determine truth or falsity of reason for removal, but is limited to inquiring whether required procedure was followed in making removal.

2. Municipal corporations 🔑185(12)

Court of Appeal would not construe charter provision that policemen should hold office during good behavior unless removed for cause, or for improvement of public service, except as hereinafter provided, by omitting word, "except," and by construing words, "for cause," to include phrase, "for improvement of public service," as contended by policemen who were removed without notice or hearing (Code Civ.Proc. § 1858).

3. Officers 🔑70

Law which provides that officer may be removed in a certain way or for a certain cause does not restrain or limit power of removal to cause or manner so indicated (Const. art. 20, § 16).

4. Officers 🔑70

Power to remove officer can be limited only by fixing duration of time of office and then providing mode, if deemed necessary, by which officer may be removed during term (Const. art. 20, § 16).

5. Municipal corporations 🔑185(3, 4)

Board of police commissioners who had entire control and management of police department *held* not required to find express provision in charter conferring power of dismissal to maintain contention that board could remove policemen for improvement of public service without notice or hearing, nor was board required to follow any certain procedure or do more than charter required (Const. art. 20, § 16).

6. Municipal corporations 🔑185(5)

Charter *held* to manifest freeholders' intent to give board of police commissioners discretionary powers in provision authorizing removal of policemen for improvement of public service, in view of other provisions authorizing commission to demote police chief if commissioners believed, or if in their opinion, such action should be for good of public service.

7. Municipal corporations 🔑185(4)

Board of police commissioners who had entire control and management of police department *held* authorized by charter to remove policemen without notice or hearing for "improvement of public service," where charter prescribed no procedure with regard to removal for that reason, but only for removal for cause, and made no exception limiting board's powers with regard thereto (Code Civ. Proc. § 1858; Const. art. 20, § 16).

◆

Appeal from Superior Court, Santa Barbara County; A. Caminetti, Jr., Judge.

Action by Richard T. Proud and another for a writ of mandate against Merwyn S. McGregor and others, as the Board of Police and Fire Commissioners of the City of Santa Barbara. From a judgment for plaintiffs, defendants appeal.

Reversed.

Maxwell Nichols, City Attorney, of Santa Barbara, for appellants.

Coleman E. Stewart, of Santa Barbara, for respondents.

CRAIL, Presiding Justice.

The plaintiffs brought this action for a writ of mandate to compel the defendants to reinstate the plaintiffs as policemen in the police department of Santa Barbara. They were removed by the board of police commissioners on the ground that it was "for the improvement of the public service," without any charges filed against them and without any notice or hearing. The plaintiffs contend that their removal was not legal because their removal was not so preceded. The judgment went in favor of plaintiffs, directing the defendants to reinstate plaintiffs. From this judgment defendants appeal.

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*For subsequent opinion see 70 P.2d 194.

The city of Santa Barbara operates under a freeholders' charter and the parts of the charter which bear on the issues of this case are as follows: "Section 95: Said Board (of Police and Fire Commissioners) shall have entire control and management of the police and fire departments in the City of Santa Barbara. * * *" "Section 71: The police department shall consist of such number of policemen as the council shall, from time to time, authorize by ordinance. They shall be appointed by the Board of Police and Fire Commissioners, and shall hold office during good behavior, unless removed for cause or for the improvement of the public service, except as hereinafter provided." Section 70 provides that the chief of police shall have power to suspend members of the police force for cause. "He shall have power to suspend, for cause, any member of the police force, but when such power is exercised, he shall report the cause in writing to the said board of police and fire commissioners who may remove or discipline the offending member except as hereinafter provided." The first paragraph of section 100 provides that in the event the chief of the police department shall suspend for cause any member of his department he shall report the cause in writing to the board and it further provides the procedure for notice and hearing and decision as to removal under such suspension. Other paragraphs of said section provide for reinstatement or restoration and, under certain circumstances, for forfeiture of all rights to participate in the benefits of pensions; and the last paragraph reads as follows: "The decision of said board upon all matters of suspension, discipline and dismissal shall be final."

The question of bad faith, if any, on the part of the defendants was not pleaded or presented in the trial court and such question is not in the case.

The sole question for determination on appeal is whether the charter of the city of Santa Barbara requires the Board of Police Commissioners in removing a member of the police department "for the improvement of the public service" to give such person notice of charges and a hearing thereon prior to removal on such ground. The contention of the defendants is that no such notice and hearing is necessary. The contention of the plaintiffs is that proceedings for removal must be initiated by written charges filed by the chief of police, together with a suspension, notice and hearing; that the word "except" in the latter part of section 71, which reads as follows: "And shall hold office during good behavior, unless removed for cause or for the improvement of the public service, except as hereinafter provided," should be omitted and that said phrase should be interpreted as though it read as follows: "And shall hold office during good behavior, unless removed for cause or for the improvement of the public service, * * * as hereinafter provided." They further contend that the words "for cause" are inclusive of the words "for the improvement of the public service," and that the framers of the charter intended to designate the chief of police as the only person to initiate proceedings to remove an officer and to constitute the board a reviewing board even on the ground "for the improvement of the public service."

[1] It is clear that where, as here, the charter of a city makes the decision of the board of police commissioners on matters of removal final, the court cannot review the decision of the board for the purpose of determining the truth or falsity of the reason for removal. By the very terms of the charter the decision is placed beyond the reach of any review by the courts as to such matters. The court is limited to inquiring whether the required procedure was followed in making the removal. Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713; Brown v. Board of Police Commissioners, 2 Cal.App.(2d) 245, 251, 37 P.(2d) 737.

[2] In construing the various sections of the city charter of Santa Barbara certain rules should be kept in mind. Section 1858 of the Code of Civil Procedure provides a general rule of construction. "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." In the light of this section we must reject the contention that the word "except" should be omitted from section 71 of the Charter. Indeed, to omit it would be similar to construing "no" as

meaning "yes", or calling black, white. Likewise, we must reject the contention that the words "for the improvement of the public service" are swallowed by and included in the phrase "for cause." Some effect must be given to the phrase "for the improvement of the public service."

[3-7] The power to remove is an incident of the power to appoint, as a general proposition, and is made expressly so by the Constitution. (Const., art. 20, § 16.) "A law which provides that an officer may be removed in a certain way, or for a certain cause, does not restrain or limit the power of removal to the cause or manner so indicated. * * * The only way in which this power of removal can be limited is by first fixing the duration of time of office, and then providing the mode, if deemed necessary, by which the officer may be removed during the term." Sponogle v. Curnow, 136 Cal. 580, 69 P. 255, 256, and cases cited. In the case of Nightingale v. Williams, 70 Cal.App. 424, 430, 233 P. 807, 809, the court calls attention to the fact that this power of removal has been generally limited under charters and civil service laws, and adds: "Where such laws place restrictions upon the power of suspension or removal, the authority of the superior is to that extent curtailed; but it is not necessary that he should do more than the law limiting his authority requires." See, also, Hayes v. Long Beach, 105 Cal.App. 94, 287 P. 136. It is not necessary for defendants, in order to maintain their contention, to find in the charter any express provision conferring upon defendants the power of dismissal; and in dismissing an officer "for the improvement of the public service" it is not necessary for the defendants to do more than the charter requires nor to follow any certain procedure unless the charter prescribes such procedure. In the instant case the charter prescribes that the board of police commissioners shall have entire control and management of the police department. It provides a certain procedure for the suspension and removal "for cause," but it does not prescribe any procedure with regard to removal "for the improvement of the public service" and makes no exception limiting the board's powers with regard thereto.

Other sections of the charter using the phrase "for the improvement of the public service" show an intention on the part of the freeholders to give to the board with regard to such ground for removal discretionary powers. For illustration: The commission is authorized under section 77 to demote the chief of police if they believe it to be for the improvement of the public service; and in section 95 the phrase is used, "but such person may be demoted if in the opinion of the commissioners such action be for the good of the public service."

Furthermore, reason and common sense sustain the defendants' contention that no charges, notice, and hearing are required when removal is "for the improvement of the public service." If charges were required, what would the plaintiffs be charged with? There might be numerous reasons why the removal of plaintiffs would be "for the improvement of the public service," none of which could be stated as a charge against the plaintiffs. The situation in this regard is obviously different where the ground of removal is "for cause" and where the ground is "for the improvement of the public service."

Our conclusion is that the board of police commissioners was acting within the scope of its powers in removing the plaintiffs without notice or hearing, and that the judgment ought to be reversed.

Judgment reversed.

I concur: WOOD, J.

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17 Cal.App.2d 525

DYSART v. DAUGHERTY, Commissioner of Corporations.

Civ. 11133.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1936.

1. States 🔑68

Commissioner of Corporations is authorized to exercise discretionary administrative functions but is without authority to exercise judicial functions (Const. art. 6, § 1).

2. Certiorari 🔑21

Petition for writ of review to determine validity of order of Commissioner of Corporations *held* not to lie, since writ of review will lie only to review exercise of judicial functions, and Commissioner is without authority to exercise judicial functions (Code Civ.Proc. § 1068; Const. art. 6, § 1).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Petition by S. Dysart against Edwin M. Daugherty, Commissioner of Corporations, for a writ of review. From a judgment sustaining a general demurrer to the petition without leave to amend, petitioner appeals.

Affirmed.

M. G. Macneil and Jack P. Leonard, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty.Gen., for respondent.

CRAIL, Presiding Justice.

Appellant, who was the petitioner in the trial court, sought a writ of review for the purpose of determining the validity of an order of the Commissioner of Corporations. A general demurrer to the petition was sustained without leave to amend and judgment entered accordingly. This is an appeal from said judgment.

[1, 2] A writ of review will lie only to review the exercise of judicial functions. Section 1068, Code Civ.Proc. The Legislature is without power, in the absence of a constitutional provision authorizing same, to confer judicial functions upon the respondent or any other state-wide administrative agency of similar character. Constitution of California, art. 6, § 1. Our courts have determined that the Commissioner of Corporations is authorized to exercise discretionary administrative functions but is without authority to exercise judicial functions. Dominguez Land Corporation v. Daugherty, 196 Cal. 468, 482, 238 P. 703; Schwab-Wilson, etc., Corporation v. Daugherty (Cal.App.) 59 P.(2d) 1057; Standard Oil Co. v. State Board of Equalization (Cal. Sup.) 59 P.(2d) 119. It necessarily follows that this proceeding for a writ of review lacks an essential element and that the demurrer was properly sustained.

Judgment affirmed.

I concur: WOOD, J.

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17 Cal.App.2d 546

HAWLEY v. CLARK, State Real Estate Com'r.

Civ. 11262.

District Court of Appeal, Second District, Division 2, California.
Nov. 17, 1936.

Prohibition ⚷6(1)

Petition for alternative writ of prohibition commanding Real Estate Commissioner to refrain from proceeding against petitioner under Real Estate Act *held* not to lie, since writ lies only to arrest proceedings of power exercising judicial functions, and commissioner is administrative officer upon whom Legislature cannot confer judicial functions (St.1919, p. 1252, as amended; Code Civ.Proc. § 1102).

Petition by P. H. Hawley for an alternative writ of prohibition against J. Mortimer Clark, as State Real Estate Commissioner.

Petition denied.

Russell D. Garner and Robert Kingsley, both of Los Angeles, for petitioner.

WOOD, Justice.

Petitioner seeks an alternative writ of prohibition commanding the Real Estate Commissioner of the State of California to refrain from proceeding against the petitioner under certain sections of the California Real Estate Act (St.1919, p. 1252, as amended). In the late case of Standard Oil Co. v. State Board of Equalization (Cal.Sup.) 59 P.(2d) 119, it was held that a writ of review will lie only to review the exercise of judicial functions and that the Legislature is without power to confer judicial functions upon a state-wide administrative agency. The judgment denying relief to petitioner in that case was followed by the District Court of Appeal in Schwab-Wilson, etc., Corporation v. Daugherty, 59 P.(2d) 1057, and in Dysart v. Daugherty (Cal.App.) 62 P.(2d) 612. The reasons for these decisions given in cases involving applications for writs of review are equally applicable to cases involving applications for writs of prohibition directed to administrative officers. In section 1068 of the Code of Civil Procedure (as amended by St.1935, p. 386), it is provided: "A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction." In section 1102 of the Code of Civil Procedure it is provided: "It [writ of prohibition] arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction."

On the authority of the decisions above cited, the petition for an alternative writ is denied.

I concur: CRAIL, P. J.

17 Cal.App.2d 569

MURPHY v. CITY OF PIEDMONT et al.*

Civ. 10209.

District Court of Appeal, First District, Division 2, California.

Nov. 18, 1936.

Rehearing Denied Dec. 18, 1936.

Hearing Denied by Supreme Court Jan. 1, 1937.

1. **Municipal corporations 🔑67(5)**

Granting of pensions to members of fire department is municipal affair, and city is not subject to legislative control respecting that matter (Gen.Laws 1931, Act 2592; St.1929, p. 2046, § 37-a; Const. art. 11, § 6, amended in 1914).

2. **Municipal corporations 🔑65**

When city legislates on particular municipal affair, its control over that subject is exclusive and free from general laws (Const. art. 11, § 6, amended in 1914).

3. **Municipal corporations 🔑67(5)**

Where city charter provided that council may adopt ordinances which shall control as against general laws, and charter amendment provided that council shall provide pension plan for all employees in police and fire departments and that pension plan when adopted will be retroactive from date of amendment, rights of widow of chief of fire department who died after amendment but before adoption of pension ordinance *held* controlled by charter, amendment, and ordinance, rather than by the general laws (Gen.Laws 1931, Act 2592; St.1929, p. 2046, § 37-a; Const. art. 11, § 6, amended in 1914).

4. **Municipal corporations 🔑200**

A pensioner has no right to a specific sum as a pension, but sum may be increased or decreased as circumstances demand.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceedings by Mary Ellen Murphy against the City of Piedmont and others for a writ of mandate. From an adverse judgment, defendants appeal.

Reversed.

Girard N. Richardson, of Piedmont, for appellants.

Decoto & St. Sure, of Oakland, for respondent.

NOURSE, Presiding Justice.

The petitioner sued the City of Piedmont and certain designated officials for a writ of mandate to compel them to entertain and determine her application for a pension as the widow of a former chief of the city fire department. The cause was tried on an agreed statement of facts, and the petitioner had judgment.

The conceded facts are that deceased was chief of the fire department from August 16, 1930, to December 27, 1932, the date of his death; the city is governed by a freeholders' charter adopted February 27, 1923 (St.1923, p. 1564); on February 26, 1929 (St.1929, pp. 2045, 2046), this charter was amended by adding section 37-a, which reads as follows: "Pension Plan: The Council, by Ordinance, shall prepare and provide a pension plan for all employees in the Police and Fire Departments of the City of Piedmont. When such pension plan shall have been passed by Ordinance it will be retroactive from the date of the adoption of this amendment to the Charter, and on the First Thursday in September of each year, the City Council, if necessary, shall levy a tax to provide extra revenue for maintaining said pension plan." No action was taken pursuant to this amendment until December 5, 1935, when Ordinance No. 68, New Series, was enacted providing a complete pension and retirement plan. Section 14 of this ordinance provided that all its provisions should be retroactive and in full force from and after February 26, 1929.

In addition to the facts stipulated to below, the parties here concede that the matter of pensioning municipal officers and employees is a municipal affair; that the retroactive provisions of the charter and ordinance are not inhibited by the Constitution, but are valid and enforceable unless they have defeated some vested right of the petitioner; that the charter amendment of 1929 is not self-executing; and that mandate is the proper remedy in a matter of this nature. But they do not agree that the respondents are the proper parties.

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*Hearing denied by Supreme Court 64 P.2d 399.

Briefly, the petitioner contends that, because there was no effective pension plan in operation under the charter when her husband died in 1932, she is entitled to proceed under the general law (Stats.1905, p. 412 as amended; Deering's Gen.Laws 1931, Act 2592), and she has accordingly sued the pension board provided for by that statute. The respondents contend that the charter is controlling, that the ordinance enacted under it is the full measure of petitioner's rights, and that the pension board created by the ordinance is the only body having jurisdiction to award the relief. It may be added that the reason for this difference between the parties is that the state law would grant petitioner a somewhat higher pension than she could recover under the ordinance.

[1] The position of the respondents must be sustained. Since the granting of pensions of this character is a municipal affair, the city is not subject to any legislative control respecting that matter. Section 6 of article 11 of the Constitution was amended in 1914 to make that question free of doubt. Therein it is provided that when a chartered city elects to govern its own municipal affairs it is free to do so and that "in respect to other matters they shall be subject to and controlled by general laws." The purpose and effect of this amendment is clearly explained in City of Pasadena v. Charleville, 215 Cal. 384, 388, 10 P.(2d) 745, 746, where it is said: "Further to extend the privilege of autonomy to charter cities sections 6 and 8 of article 11 of the Constitution were amended in 1914 to provide that cities thereafter organized thereunder and cities theretofore so organized were empowered by amendment to the charter 'to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.' The city of Pasadena availed itself of the privilege thus extended by the people of the state through the Constitution by an amendment to its charter in 1923 (Stats.1923, p. 1664). By the charter amendment the powers of the city 'over municipal affairs became all-embracing, restricted and limited by the charter "only," and free from any interference by the state through general laws. * * * The result is that the city has become independent of general laws upon municipal affairs.' Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050, 1052, quoting from Civic Center Ass'n v. Railroad Comm., supra [175 Cal. 441, 166 P. 351]; In re Nowak, 184 Cal. 701, 195 P. 402; Bank v. Bell, 62 Cal.App. 320, 217 P. 538; see, also, Rand v. Collins [214 Cal. 168], 4 P.(2d) 529."

[2] The Pasadena Case also disposes of the point that the City of Piedmont has not assumed control of the matter of pensions because the charter section is not self-executing. It has been the custom of cities of the state to follow one of two courses to signify an acceptance of the power conferred by this section of the Constitution—an express declaration of acceptance covering all municipal affairs, or express legislation controlling the particular subject-matter. If the first course is followed, all municipal affairs are removed from the control of the legislature though no legislation be enacted by the city covering them. If the second course alone is followed, some doubt has arisen as to the control over other municipal affairs as to which the city has not attempted to legislate. There is no doubt, however, that when the city does legislate upon a particular municipal affair, having failed to follow the first course above mentioned, its control over that subject is exclusive and free from general laws. These observations are taken from the many decisions on the subject and especially from the Pasadena Case, where it is said: "But it is not necessary that the charter specifically legislate on the subject. In order to remove the city's municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution as amended in 1914 and has incorporated in its charter an acceptance of the privilege tendered. Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351; Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436; Morgan v. City of Los Angeles, 182 Cal. 301, 187 P.

1050; Rand v. Collins [214 Cal. 168] 4 P. (2d) 529. Where in the one case the charter specifically legislates upon the subject it is deemed a grant of power; and where, on the other hand, the charter in general terms accepts the offer extended by the Constitution, the enumeration of powers is unnecessary and the general language of the acceptance becomes a limitation of the power of the city and is all-embracing so far as the removal of the municipal affairs of the city from the control of the Legislature is concerned. In re Galusha, 184 Cal. 697, 195 P. 406; In re Nowak, 184 Cal. 701, 195 P. 402."

[3] Hence if the Piedmont charter has accepted the grant of power in general terms, all municipal affairs are removed from the control of the legislature. If it accepts that grant as to a particular affair, the legislative control is just as effectively suspended as to that subject-matter. The Pasadena charter (St.1923, p. 1664) provided that the city council shall have power "to make and enforce all laws and regulations in respect to municipal affairs." The Piedmont charter (St.1923, p. 1578, § 40) provides that "the Council may adopt and enforce ordinances which, in relation to municipal affairs, shall control as against the general laws of the State." In the Pasadena Case this clause of the charter was held to be an election within the meaning of section 6 of article 11 of the Constitution. Though the language of the Piedmont charter is somewhat less explicit, it would seem that the only purpose of the clause is to bring the city within the terms of the constitutional amendment.

But, if this was not the intention and effect of the clause in the Piedmont charter, the same result is reached in respect to the pensioning of officers and employees by the express declaration in the amendment of 1929 (St.1929, p. 2045). If this amendment had read, "The city will exercise full control in respect to the pensioning of employees in the police and fire departments," there would be no room for argument that this did not suspend all general laws in respect to such pensions. We are unable to read the language of the amendment as effecting any different result. To all intents and purposes it is a declaration that the city elects to assume full control over the subject-matter and it is wholly immaterial whether the plan prepared by the council conforms with that provided by general laws because it was just as competent for the charter to have provided that no pensions at all should be granted.

[4] This conclusion disposes of the question of vested rights. The arguments on this question are confusing since neither party explains what rights are claimed to be vested. If we may assume that the petitioner claims that a right was vested in the deceased by virtue of his appointment as chief, the answer is that this appointment occurred after the charter was amended, and hence his right was such as the charter gave and no more. If it is petitioner's contention that some right vested in her at the time of the death of her husband, the answer is that her rights rest solely upon the status of her husband at the time of his death—the status of an employee entitled to a pension under an ordinance to be thereafter enacted. But, assuming that some rights are vested it is settled law that a pensioner has no right to a specific sum as a pension, but that sum may be increased or decreased as the circumstances demand. Casserly v. Oakland (Cal.Sup.) 56 P. (2d) 237. Thus when the deceased was appointed to the office he accepted the provision of the charter that the city would by ordinance provide some pension, and this was the relation that existed between him and the city when he died. The city has fulfilled its part of the contract by providing a pension payable to his widow and that is the only obligation, or vested right, which can be found in the case.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

7 Cal.2d 718

ALEXANDER et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 15263.

Supreme Court of California.

Nov. 23, 1936.

As Modified on Denial of Rehearing Dec. 21, 1936.

1. Insurance 🔑215

Insurance indemnifying against property damage is not a substitute for the property in absence of special contract.

2. Insurance 🔑215

Insurance indemnifying against property loss does not pass with title to property.

3. Insurance 🔑580(2)

Lessor's interest in insurance indemnifying against loss of mortgaged premises is not superior to that of mortgagee of leasehold, simply because lessor's interest in property is superior to that of mortgagee.

4. Insurance 🔑124

Insurance against property loss is a special agreement of indemnity with person insuring against such loss or damage as he may sustain, and is not an insurance of the specific thing without regard to ownership.

5. Insurance 🔑115(2)

Different persons, such as mortgagor and mortgagee and lessor and lessee, may have separate insurable interests in same property.

6. Insurance 🔑115(4)

Lessee is under no obligation to procure insurance for benefit of his lessor, insuring against fire or other risks in absence of special provisions of lease.

7. Insurance 🔑580(1)

Neither lessor nor lessee ordinarily has an interest in proceeds of insurance obtained by the other on his own separate insurable interests.

8. Insurance 🔑580(2)

Rule that, in absence of special provision in lease, there is no obligation of lessee to procure insurance for benefit of the lessor against fire or other risks, and that neither lessor nor lessee has interest in proceeds of insurance obtained by the other on his own interest, is applicable to relationship between mortgagor and mortgagee.

9. Insurance 🔑580(1)

Where there is an agreement for insurance against loss of property between parties standing in relationship of mortgagor and mortgagee, lessor and lessee, vendor and vendee, life tenant and remainderman, and party obligated, in violation of his agreement procured insurance, payable to himself alone, other party for whose benefit agreement was made has equitable lien on proceeds.

10. Insurance 🔑580(1)

Under trust indenture covering leasehold by which lessee was to procure earthquake insurance payable to trustee to be used for redemption of bonds, if not expended for repairs and "unless otherwise provided by the ground leases" where lease required lessee to carry fire insurance and to expend "all" insurance monies in repairs, lessors *held* entitled to proceeds of earthquake insurance notwithstanding leasehold interest terminated because of lessee's default in payment of rent.

11. Insurance 🔑580(1)

Under trust indenture covering leasehold by which lessee procured earthquake insurance payable to trustee to be used for redemption of bonds if not expended for repairs and "unless otherwise provided by the ground leases" where lease required carrying of fire insurance, and that buildings be kept in good condition, trustee *held* entitled to proceeds of earthquake insurance, notwithstanding termination of lease through lessee's default in payment of rent.

12. Landlord and tenant 🔑150(1)

Trustee for bondholders under trust indenture covering lessee's leasehold interest *held* not liable on covenants to keep buildings in good condition, where assignment was made to trustee by way of security for a loan and not accompanied by change of possession under statute (Civ.Code, § 822).

13. Insurance ⚷580(1)

Where lease required lessee to carry fire insurance and to expend "all" insurance money in repairs, even though earthquake insurance procured by lessee as required by trust indenture covering leasehold was payable to trustee under policies, payments for losses should go to lessor in view of trust indenture, expressly making trustee's rights subject to provisions of lease.

14. Insurance ⚷580(1)

Where lease required lessee to procure fire insurance and did not require proceeds of all insurance to be expended in repair, earthquake insurance procured by lessee under trust indenture requiring it to be made payable to trustee would be payable to trustee even if lessee, in violation of its covenant, had caused policies to be issued payable to itself or payable to lessor.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Elsie K. Alexander and others, William Chick and others, against the Security-First National Bank of Los Angeles and others. From an adverse judgment, the named defendant appeals.

Judgment reversed with directions in part and judgment affirmed in part.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles (Frederic H. Sturdy, of Los Angeles, of counsel), for appellant Security-First Nat. Bank of Los Angeles.

C. C. Mishler and Carl L. Elven, both of Los Angeles (Arthur T. Stollmack, of Los Angeles, of counsel), for respondents William Chick et al.

Byron F. Story, of Los Angeles, for respondent Helen Evans Wheeler.

Wallace & Crandall, of Los Angeles, for cross-defendants and respondents.

SEAWELL, Justice.

By the judgment appealed from the court below awarded to plaintiffs the sum of $62,500 deposited in court by defendant insurance companies, and denied judgment to defendant Security-First National Bank of Los Angeles for any part of said sum. The amount deposited in court was payable under certain policies of insurance on account of damage resulting to the buildings of the Alexandria Hotel, in the city of Los Angeles, from the earthquake of March 10, 1933. Plaintiffs severally own the six parcels of real property upon which the hotel buildings are situate. On May 1, 1927, the Alexandria Hotel Realty Corporation, then holder of long-term leases covering the several parcels, executed a deed of trust whereby it transferred the leasehold estates to defendant Security-First National Bank, then Security Trust & Savings Bank, as trustee, to secure an issue of bonds by said hotel corporation. The insurance which is the subject of this action was procured on or about October 15, 1932, by the Spring Street Properties, Inc., which by mesne assignments had become the owner of the leasehold interests subject to said deed of trust.

The defendant insurance companies admitted liability for $62,500 and deposited this sum in court. The action then proceeded as a contest between the plaintiffs, owners of the fee in the real property, on the one hand, and defendant bank as trustee representing bondholders of the lessee, on the other. The trial court found that defendant Security-First National Bank, trustee, was entitled to receive no part of said sum, and distributed it among plaintiffs in accordance with an agreement for division entered into between them. Defendant bank appeals from the judgment only in so far as it awarded to the respective owners of the property referred to on this appeal as the Chick property and the Wheeler property the insurance payable on account of earthquake damage to buildings on said two parcels, in the sum of $10,789.29 for the Chick property, and $4,510.45 for the Wheeler property.

The insurance policies were in form fire insurance policies made to cover earthquake damage also by attachment of earthquake damage assumption indorsements. There is a controversy between the parties as to whether the several policies of insurance procured by the lessee made losses on account of earthquake damage payable to the lessors, or to defendant bank as trustee for bondholders of the lessee. We are of the view that the policies, considered in the light of evidence which defendant bank sought to introduce of the circumstances under which they were issued, made losses on account of earthquake damage payable to the trustee for the bondholders of the lessee. We shall consider the effect of the terms of the policies on the rights of the parties at greater length hereafter.

At the date of the earthquake, March 10, 1933, the leases were in full force and effect. But installments of rent due April 1, 1933, were not paid, and thereafter the leases were terminated for default of the lessee, which was subsequently adjudged bankrupt. The damage due to the earthquake had not been repaired upon the termination of the leases.

The several leases did not require the lessee to procure earthquake insurance for the benefit of the lessors. They bound the lessee only to obtain fire insurance, and provided that proceeds of such insurance should constitute a fund for repair and rebuilding, or be forfeited to the lessors if the premises were not repaired. But the trust indenture by which the lessee transferred the leasehold estate to defendant bank as trustee for bondholders of the lessee required said lessee to procure earthquake insurance, and provided that the insurance against earthquake damage should be payable to the trustee bank. In rendering judgment for plaintiff lessors the court did not find that the provisions of the several leases obligated the lessee to procure earthquake insurance. But the court was of it the view that the effect of the terms of all six leases was to provide that if the lessee did in fact obtain other insurance than fire insurance, such as earthquake insurance, such insurance should be held for the benefit of the lessors. The court was further of the view that in so far as any loss-payable clauses of the policies made losses on account of earthquake damage payable to the trustee for bondholders of the lessee, such clauses were contrary to the provisions of the leases, of which the trustee had actual and constructive notice, and should not govern the disposition of the insurance proceeds.

[1-5] In considering the instant case it should be borne in mind that insurance is not in the absence of special contract a substitute for the property. Corder v. McDougall, 216 Cal. 773, 16 P.(2d) 740; Thompson v. Gearheart, 137 Va. 427, 119 S.E. 67, 35 A.L.R. 36, note, p. 40. A contract of insurance, that is, the insurance policy, does not pass with title to the property. Miller v. Gold Beach Packing Co., 131 Or. 302, 282 P. 764, 66 A.L.R. 858; Newark Fire Ins. Co. v. Turk (C.C.A.) 6 F.(2d) 533, 534, 43 A.L.R. 496; Harrison v. Pepper, 166 Mass. 288, 44 N.E. 222, 33 L.R.A. 239, 55 Am.St.Rep. 404. It does not follow that because the lessor's interest in the property is superior to that of a mortgagee of the leasehold interest, that the lessor's interest in whatever insurance exists is superior to that of the lessee or mortgagee. Although it is frequently said that the property is insured, this is inaccurate. "The policy is not an insurance of the specific thing without regard to the ownership, but is a special agreement of indemnity with the person insuring against such loss or damage as he may sustain." Newark Fire Ins. Co. v. Turk, supra. See, also, Corder v. McDougall, supra; Davis v. Phoenix Ins. Co., 111 Cal. 409, 43 P. 1115; Sievers v. Union Assur. Soc. of London, 20 Cal.App. 250, 128 P. 771; Miller v. Gold Beach Pack. Co., supra; Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792, 68 A.L.R. 1340, note, p. 1344; Savarese v. Ohio Farmers' Ins. Co., 260 N.Y. 45, 182 N.E. 665, 91 A.L.R. 1341. Different persons may have separate insurable interests in the same property, as, for example, a mortgagor and a mortgagee, a lessor and lessee.

[6-8] In the absence of special provisions in the lease there is no obligation on the lessee to procure insurance for the benefit of his lessor insuring against fire or other risk, and neither lessor nor lessee ordinarily has an interest in the proceeds of insurance obtained by the other on his own separate insurable interest. Miller v. Gold Beach Pack. Co., 131 Or. 302, 282 P. 764, 66 A.L.R. 858, note, p. 864, citing numerous decisions; Yoshida v. Security Ins. Co. of New Haven, 145 Or. 325, 26 P.(2d) 1082. The rule is the same as between mortgagor and mortgagee, vendor and vendee, life tenant and remainderman. Brownell v. Board of Education, 239 N.Y. 369, 146 N.E. 630, 37 A.L.R. 1319, with note, p. 1324; White v. Gilman, 138 Cal. 375, 71 P. 436; 14 Cal.Jur. 590. It is sometimes held otherwise as between vendor and vendee, see notes, 92 A.L.R. 559; 40 A.L.R. 607, citing cases; Corder v. McDougall, supra; Thompson v. Gearheart, 137 Va. 427, 119 S.E. 67, 35 A.L.R. 36, note, p. 40.

[9] But if there is an agreement for insurance between parties standing in these

relationships, and the party obligated, in violation of his agreement, procures insurance payable to himself alone, the other party for whose benefit the agreement was made has an equitable lien on the proceeds of such insurance. Nelson v. Nelson Neal Lumber Co., 171 Wash. 55, 17 P.(2d) 626, 92 A.L.R. 554, with note, p. 559; Farmers' Loan & Trust Co. v. Penn Plate-Glass Co. (C.C.A.) 103 F. 132, 56 L.R.A. 710, affirmed 186 U.S. 434, 22 S.Ct. 842, 46 L.Ed. 1234; Miller v. Gold Beach Pack. Co., supra; Pearson Mfg. Co. v. Pittsburgh Steamboat Co., 309 Pa. 340, 163 A. 680, 94 A.L.R. 1382, note, p. 1387; Gibbes Mach. Co. v. Niagara Fire Ins. Co., 119 S.C. 1, 111 S.E. 805, 21 A.L.R. 1460; Farmers' & Merchants' Nat. Bank v. Moore, 135 S.C. 391, 133 S.E. 913, 47 A.L.R. 1001, 1011; 14 R.C.L. 1367.

[10] On this appeal we are not concerned with the provisions of any of the several leases except those covering the Chick and Wheeler properties. The court found that the other leases provided that in case of damage or destruction by fire or by any cause covered by insurance, all insurance moneys recovered or paid should be used in the reconstruction or repair of the building or be forfeited to the lessors. Defendant bank has not appealed from the judgment in so far as it affects insurance moneys payable on account of damage to buildings on said other leaseholds. The provisions in the Chick lease which the court construed as being similar in effect to the provisions of the other four leases, and as giving the lessor a claim upon whatever earthquake insurance the lessee obtained, as is follows:

"6th—In case of destruction or damage by fire *or other injury* to the said structure and building, and so often during said term as such shall happen, to rebuild the same with all reasonable diligence after such destruction or injury, such building when rebuilt to be of such construction, size and value as the economical expenditure of *all* insurance moneys will warrant. (Italics ours.)

"7th—To maintain, renew, repair and amend and keep during the whole of the said term the said premises and buildings and appurtenances in good condition, renewal and repair."

Although this provision did not obligate the lessee to procure earthquake insurance, its effect, the trial court held, was to require that the proceeds of all policies of earthquake insurance procured by the lessee should be devoted to repair. It followed therefrom that the lessor, in the event of termination of the lease for default of the lessee in payment of rent after the earthquake, but before the making of repairs, had an equitable claim upon the insurance proceeds and the right to demand that such proceeds be paid over to him.

The trust indenture, as noted above, expressly required that the lessee should procure earthquake insurance, and provided that such insurance should be payable to the trustee, representing bondholders of the lessee. It was further provided therein that the lessee should be entitled to use the insurance proceeds for repair and rebuilding. If not expended in rebuilding and repair, "and unless otherwise provided by the ground leases," the trustee was to apply the insurance moneys to the redemption of the bonds. By inserting in the trust instrument the quoted phrase—unless otherwise provided by the ground leases—the right of the trustee to retain proceeds of earthquake insurance effected by the lessee, even though the policies were payable to it as trustee, was made subject to the terms of the leases. The insurance moneys were to be applied in redemption of the bonds only if such application did not conflict with provisions of the leases in regard to insurance.

The effect of paragraph 6 was to require as between lessor and lessee that all insurance moneys, including the proceeds of earthquake insurance, should be used in rebuilding and repairing. Under said provision the lessor's claim upon the insurance proceeds could not be defeated by the subsequent termination of the lease for default of the lessee in payment of rent. By virtue of the provision in the trust indenture for application of the proceeds of the insurance to redemption of the bonds "unless otherwise provided by the ground leases," the trustee's right in the proceeds of earthquake insurance effected by the lessee was made subject to the lessors' claim. We conclude as to the insurance payable on account of earthquake damage to buildings on the Chick property, that the judgment in favor of the lessors must be affirmed.

[11, 12] As to the Wheeler property a different situation exists. Said lease provided that the lessee at its own cost should keep the building on the premises and all appurtenances in a "good and safe and se-

cure condition." But the only stipulation in said lease in regard to insurance relates plainly only to fire insurance. Said lease did not contain a provision, analogous to that in the Chick lease and the other four leases, that *all* insurance moneys should be used in repair. In this situation the lessors have no claim as against the trustee upon the insurance procured by the lessee. As between the lessors who did not place in their leases a provision in regard to earthquake insurance, and the trustee for the bondholders under a trust indenture which required the lessee to insure against earthquake loss for the benefit of the bondholders, the claim of the trustee, representing the bondholders of the lessee, is superior.

The subsequent termination of the lease, through default of the lessee in the payment of rent, did not defeat the trustee's rights. We have heretofore held that insurance is not a substitute for the property in the absence of special agreement, and does not pass with the property. The trustee, representing bondholders of the lessee, was not liable on the covenants to keep in good condition contained in the lease, since the assignment to said trustee was made by way of security for a loan and was not accompanied by change of possession. Section 822, Civ.Code.

[13] There is an element of ambiguity in the loss-payable clauses of the several policies, which covered both fire and earthquake damage. Appellant bank contends that under the policies losses on account of earthquake damage were payable to the said bank as trustee for the bondholders, while losses due to fire were payable to the lessors, or to a trustee for the lessors under certain of the leases. We are inclined to the view that appellant's construction of the policies is the only reasonable one. However, like the trial court, we are of the opinion that the rights of the parties do not depend on the interpretation of the loss-payable clauses of the policies. As to the Chick property, if, as appellant bank contends, losses sustained on account of earthquake damage were payable to it, it would not be entitled to retain such proceeds in view of the provisions in the trust indenture expressly making the bank's right as trustee to apply such insurance proceeds in redemption on the bonds subject to the provisions in the Chick lease in regard to insurance.

[14] As to the Wheeler property, if, as respondents contend, the policies made losses on account of earthquake damage, as well as fire, payable to the lessor, or to a trustee for the lessor, nevertheless the defendant bank as trustee for the bondholders of the lessee would have an equitable claim upon said proceeds and would be entitled to demand that they be turned over to it. The lease covering this particular property contained no provision in regard to earthquake insurance. The trust instrument required the lessee to effect such insurance, payable to the trustee. If the lessee, in violation of its covenant to procure earthquake insurance payable to the trustee, had caused policies to be issued payable to itself, the trustee would have an equitable claim upon such policies. Miller v. Gold Beach Pack. Co., supra, note, 66 A.L.R. 864. Or, if instead of making the losses payable to the trustee, the lessee caused them to be made payable to the lessor notwithstanding the lease contained no provision in regard to such insurance, the lessor would be as to such insurance the claimant to a mere gratuity, without right to retain the proceeds as against the trustee under a trust instrument requiring the lessee to protect the trustee, representing the bondholders, by such insurance.

As to respondent Helen Evans Wheeler and respondents P. W. Stevens and Aleck Curlett (to the extent of $144.43, which was payable to them out of the Wheeler allocation in the event that respondent Helen Evans Wheeler recovered judgment herein) the judgment is reversed, with directions to the trial court to enter judgment for appellant Security-First National Bank of Los Angeles as to the portion of the insurance fund deposited in court and allocated to the Wheeler property, which was by the trial court awarded to respondents Helen Evans Wheeler, P. W., Stevens, and Aleck Curlett. As to the other respondents, and as to respondents P. W. Stevens and Aleck Curlett (to the extent of $345.21, which was payable to them out of the so-called Chick allocation in the event that respondents Chick and Patton recovered judgment herein), the judgment is affirmed.

The petition for rehearing is denied.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

7 Cal.2d 728

PRUDENTIAL INS. CO. OF AMERICA v. SLY et al.

S. F. 15454.

Supreme Court of California.

Nov. 24, 1936.

Rehearing Denied Dec. 22, 1936.

1. Mortgages ⚷8

Whether an instrument is a "deed of trust" or a "mortgage" depends upon the intention of the parties.

2. Mortgages ⚷349

Nonjudicial sale under deed of trust giving trustee authority to sell "in accordance with the provisions of the laws of the State of California" *held* valid, since statutes recognize right to sell at nonjudicial sale if authorized by deed of trust, and since purpose of quoted provision was merely to require exercise of power of sale in accordance with any statutory limitations (Civ.Code, §§ 2924, 2924a).

3. Mortgages ⚷354

Notice of sale under deed of trust for "lawful money of the United States" *held* sufficient as against contention notice should have called for payment in "gold coin," as provided in note secured, since provision in note was unlawful and notice contended for would have eliminated all bidders because gold coin was unobtainable.

4. Mortgages ⚷343

Sale under deed of trust by attorney of holder of note secured, as representative of a substituted trustee, *held* valid, where deed of trust broadly permitted such substitution.

5. Mortgages ⚷369(2)

That court, in unlawful detainer, appointed receiver on ex parte application, *held* no ground for reversal of judgment for plaintiff, where defendant could not be found at time of application, and trial court refused to vacate order, and reviewing courts refused to review order.

6. Mortgages ⚷369(3)

Inadequacy of price *held* not to avoid sale under deed of trust where there was no showing of fraud or other fault.

* * *

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action for unlawful detainer by the Prudential Insurance Company of America against L. H. Sly and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Gaylord & Gaylord and Robert B. Gaylord, all of San Francisco, for appellant.

Probasco & McClean, Ramsey Probasco, and Cyril W. McClean, all of Oakland, for respondent.

LANGDON, Justice.

This is an action for unlawful detainer following sale under a deed of trust. Judgment was rendered for plaintiff, and defendant Sly appealed.

In 1925 said defendant and his wife executed a note and deed of trust in the sum of $840,000, covering the Stanford Court Apartments, at California and Powell streets in San Francisco. In 1932, after default in payment of principal, interest, and taxes, plaintiff recorded notice of breach, posted and published notice of sale, and held the sale on May 10, 1933. Plaintiff was the only bidder, and purchased the property for $350,000. Thereafter this proceeding in unlawful detainer was commenced.

[1, 2] A number of technical objections to the judgment are raised by defendant, which may be briefly considered. It is first contended that the deed of trust in question does not authorize the usual nonjudicial sale, because it gives authority to the trustee to sell "in accordance with the provisions of the laws of the State of California," and these laws, it is asserted, provided only for a judicial sale, prior to 1931. Such provisions as sections 2924 and 2924a of the Civil Code are said to be mere limitations, and not grants of power. There is no merit in this position. Whether an instrument is a deed of trust or a mortgage depends upon the intention of the parties, gathered from all of its provisions (First Federal Trust Co. v. Sanders, 192 Cal. 194, 219 P. 440), and the terms of the present instrument are characteristically those of a deed of trust. The right to sell at a nonjudicial sale under a deed of trust has long been recognized in this state, and the obvious meaning of the instrument here is that the power of sale is given by it, but must be exercised in conformity with any limitations imposed by the statutes of this state. See McDonald v. Smoke Creek

Live Stock Co., 209 Cal. 231, 286 P. 693; Hanson v. Federal Land Bank (S.D.) 262 N.W. 228; 41 C.J. 926.

[3] The second contention is that the sale was void because of the notice of sale, which called for payment "in lawful money of the United States of America" instead of in "gold coin" as provided in the note. Defendant argues that, even though at the time of sale the gold coin was unobtainable and the provision was illegal by federal law, this did not excuse the giving of notice exactly as stated in the note. This point is also without merit, since a call for payment in gold coin would, if enforced, have eliminated all bidders, and the substitution of "lawful money" was not only in accordance with the law but of unquestioned benefit to defendant, in stimulating possible bidders. See Pacific States Sav. & Loan Co. v. O'Neill (Cal.Sup.) 61 P.(2d) 1160.

[4] Defendant also attacks the conduct of the sale by plaintiff's attorney as representative of a substituted trustee, but the terms of the instrument broadly permitted such substitution, and there is no valid objection on that ground. See Stevens v. Plumas Eureka Annex Mining Co., 2 Cal.(2d) 493, 41 P.(2d) 927; Orloff v. Pece, 134 Cal.App. 434, 25 P.(2d) 484.

[5] Objection is finally made to the appointment of a receiver in the action on an ex parte application, but the evidence shows that great difficulties were experienced in attempting to locate defendant, who was absent from the city at the time. Moreover, a motion to vacate the order appointing the receiver was made and denied, and a petition for writ of review was denied by the District Court of Appeal, and a further petition for hearing in this court on said point was likewise denied.

[6] Although defendant urges that the sale was for an inadequate price, in proportion to the alleged value of the property, it is settled that, without proof of fraud or other fault, such inadequacy does not avoid the sale. Stevens v. Plumas Eureka Annex Mining Co., supra.

There being no sound legal or equitable grounds of attack on the sale, plaintiff must prevail.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

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7 Cal.2d 735

COLYEAR v. TOBRINER et al.

S. F. 15495.

Supreme Court of California.

Nov. 25, 1936.

Rehearing Denied Dec. 22, 1936.

1. Landlord and tenant ⚿86(1)

Provision of lease that lessee should have two-year option to renew it, on expiration thereof, at monthly rental not exceeding 20 per cent. increase of present rental, gave lessor right to demand such increase as condition to renewal of lease.

2. Landlord and tenant ⚿86(2)

Lessee's option to renew lease on its expiration at monthly rental not exceeding 20 per cent. increase of present rental was not exercised before expiration of term, where he failed to inform lessors that he would pay increased rent after being informed that lessor construed lessee's letters as exercise of option only on condition that rent remain same and was unwilling to renew lease for less than such increased rental.

3. Landlord and tenant ⚿90(6)

Lessors' acceptance of monthly rental payments after expiration of term at rate fixed by lease, which gave lessee option to renew it at monthly rental not exceeding 20 per cent. increase of present rental, did not create renewal of lease at lower figure, but occupancy from month to month at that rate, where lessors had offered to permit lessee to occupy premises on such basis at expiration of term.

4. Appeal and error ⚿1011(1)

Appellate court cannot disturb trial court's decision on conflicting evidence.

5. Landlord and tenant ⚿200(3)

Lessors, notifying lessee after expiration of year's lease that his tenancy from month to month at rental rate fixed by lease was terminated as of date one month later and that rental thereafter would be stated larger sum per month, *held* not entitled to latter rent after such date; statute authorizing landlord to change terms of month to month lease from expiration of month on giving written notice 30 days before such expiration being inapplicable (Civ.Code, §§ 827, 1946).

6. Landlord and tenant ⚿200(3)

Tenant holding over beyond fixed term of lease after notice of increased rental is not liable therefor, in absence of express or implied assent thereto, but is tenant at sufferance and must pay reasonable value of use of premises for time he holds over.

7. Landlord and tenant ⚿116(5), 291(1)

Lessors, desiring to evict tenant for failure to pay rent, cannot demand immediate possession, but must give notice to pay rent or surrender possession, and to obtain possession in any event by terminating tenancy, 30 days' notice is required (Code Civ.Proc. § 1161, subd. 2, as amended by St.1933, p. 1315; Civ.Code, § 827).

8. Landlord and tenant ⚿116(5)

Statute requiring notice, as of termination of tenancy or change in terms of month to month lease, without specifying how it shall be given, is presumed to require personal service (Civ.Code, §§ 827, 1946).

9. Landlord and tenant ⚿116(5)

Statute providing for service of notice by mail in proceedings under Code of Civil Procedure does not apply generally to notices required independently of action under Civil Code, such as notice of termination of tenancy or change in terms of month to month lease, but personal service of such notices may be made through mails (Code Civ.Proc. § 1012; Civ.Code, §§ 827, 1946).

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by C. C. Colyear, doing business under the firm name and style of Colyear Motor Sales Company, against Mathew O. Tobriner and another, in which defendants filed a cross-complaint. From a judgment for defendants and cross-complainants, plaintiff appeals.

Reversed, with directions.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Livingston & Livingston, and Lawrence Livingston, all of San Francisco, for respondents.

SEAWELL, Justice.

Plaintiff brought this action to obtain a judicial determination that he had exercised an option to renew contained in a lease of premises in San Francisco owned by defendants, and was entitled to possession of said premises for a term of two years. From a judgment which decreed that plaintiff had not exercised said option, and that defendants and cross-complainants should be restored to possession, plaintiff prosecutes this appeal.

The lease in question was executed by one Kurz, then owner of the property, for a term of one year expiring on May 9, 1934, at a monthly rental of $45. The option to renew is as follows: "It is hereby agreed that the Lessee upon expiration of this lease have a two year option to renew this lease at a monthly rental not to exceed 20% increase of the present rental basis." It is agreed between the parties that this provision gave the lessee an option to renew the lease for a two-year term, the option to be exercised before expiration of the one-year lease period. Plaintiff conducted a shop on the leased premises for the sale of automobile accessories under the name of Colyear Motor Sales Company. Said shop was one of a number conducted by plaintiff in various cities in this state.

Defendants Mathew O. Tobriner and Oscar Tobriner purchased the property on or about February 2, 1934. The firm of Morrison & Burke, real estate brokers in San Francisco, handled the transaction. Said firm and Kurz, the lessor, notified plaintiff after the sale to the Tobriners to remit the monthly rent payments to Morrison & Burke. Plaintiff complied with this request. Morrison & Burke regularly deducted a collection commission, and sent their checks for the balance to the Tobriners.

On February 16, 1934, almost three months before the lease was to expire, Mr. Dean Morrison, an employee of the firm of Morrison & Burke, wrote to plaintiff as follows:

"The new owners of your store at First Avenue and Geary Street have asked us to inquire of you if you intend to exercise the option provided for in your existing lease.

"Will you kindly notify us at your earliest convenience, as to your intentions."

Morrison testified that the defendant in fact had not asked him to ascertain plaintiff's intention with regard to the renewal; that he made the inquiry of his own initiative because if plaintiff did not wish to renew, he had another prospective tenant. In reply to Morrison's letter, Mr. F. E. Nolen, for plaintiff, wrote to Morrison & Burke as follows on February 19:

"It is our intention, and you may consider this a notice, that we will exercise our option at the First Avenue and Geary

Street location, which I believe to be on a two year basis.

"This answers your note of February the 16th and please advise if any further notice is necessary to the new owners."

On February 22, Mr. Nolen sent another letter by registered mail as follows: "This will be a notice that we will renew the lease by exercising our option on the expiration date, May the 9th, and we assume the monthly rental will remain the same, as conditions do not warrant any change, as I think you will agree."

It is upon these two letters, written before the expiration of the lease term, that plaintiff relies to establish an exercise of the option to renew. The court found that in the circumstances shown plaintiff had not exercised the option. Defendant Mathew Tobriner testified that he refused this offer of plaintiff, communicated to him by Morrison of the real estate firm, to pay a monthly rental of $45 for a renewal, as he had a right to do, since the option authorized the lessor to demand an increased rental not to exceed $54 monthly. Said defendant directed Morrison to inform plaintiff that he had not exercised the option by offering to pay $45 a month; that defendants would not renew the lease for a rental of less than $54 a month; but that plaintiff could remain in possession after expiration of the term in May as a tenant from month to month for $45 until defendants should elect to terminate the tenancy.

Morrison testified that he informed Mr. Nolen and Mr. Pimentel, manager of plaintiff's shop in San Francisco, of Tobriner's decision, including his offer that plaintiff might remain in possession upon a month to month basis at $45 a month after expiration of the lease term. Mr. Nolen and Mr. Pimentel, denied that Morrison had informed them in accordance with his testimony. By its judgment for defendants, the trial court resolved all conflicts in the evidence in favor of defendants.

Plaintiff continued to pay monthly rental of $45 through December 9, 1934, the last payment being made on November 6. Plaintiff attempted to make a payment of $45 on or about December 10, but it was refused. Subsequent to the expiration of the term on May 9, 1934, further correspondence took place between those in charge of plaintiff's business and Morrison & Burke and defendant Mathew Tobriner, who represented his father, defendant Dr. Oscar Tobriner. The court found that notwithstanding plaintiff had not exercised the option to renew before expiration of the term, defendants offered to accept a rental of $54 monthly in October, 1934, but plaintiff's agents said that plaintiff was unwilling to pay a monthly rental in excess of $50, to which defendants would not agree.

[1] The option provision clearly gave the lessor the right to demand a 20 per cent increase, that is, a monthly rental of $54, as a condition to renewal of the lease. Wright v. Kaynor, 150 Mich. 7, 113 N.W. 779; Heyward v. Willmarth, 87 App.Div. 125, 84 N.Y.S. 75; Sun Association v. Remington Co., 201 App.Div. 3, 193 N.Y.S. 698, in the Court of Appeals, 235 N.Y. 338, 139 N.E. 470; Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329. If plaintiff informed defendants that he was willing to renew the lease only if defendants would continue the rental at $45, and defendants replied that they would renew the lease only if plaintiff would agree to pay $54 monthly, and plaintiff did not so agree, then plaintiff did not exercise the option.

[2, 3] The letters of February 19 and 22, written by Mr. Nolen, authorized agent and employee of plaintiff, when considered together, are somwhat ambiguous. In both letters Nolen states that plaintiff will exercise the option, but the letter of February 22 is qualified by this statement: "We assume the monthly rental will remain the same, as conditions do not warrant any change, as I think you will agree." By this statement did Nolen mean that the plaintiff exercised the option in any event and would pay $54 a month if defendants demanded that sum, but merely expressed the hope that the rent would not be increased? Or did he mean that plaintiff exercised the option only on condition that defendants would consent to a monthly rental of $45 for the renewal? The testimony of defendant Mathew Tobriner, an attorney at law, indicates that he placed the latter construction on plaintiff's letters as their contents were communicated by Morrison to him.

If Tobriner had not expressed himself upon his interpretation of plaintiff's communications, and caused his views to be communicated to plaintiff through Morrison, a question would be presented as to whether the right of a renewal of the lease would not be established by plaintiff's remaining in possession after expiration of the term and continuing to pay $45 monthly with the acquiescence of defendants. Tay-Holbrook, Inc., v. Tutt, 218 Cal. 600, 24 P. (2d) 463. But when plaintiff's authorized agents were informed by Morrison that Tobriner construed the letters of February 19 and 22 as an exercise of the option only on condition that the rental for the renewed term should be $45, and that he was unwilling to renew the lease for a monthly rental of less than $54, it became the duty of plaintiff if he wished to renew the lease to inform defendants that he would pay the increased rent. This he failed to do. As a result the option was not exercised before expiration of the term. Plaintiff continued to pay rent after expiration of the lease term at the rate of $45. But the acceptance thereof by defendants did not create a renewal for the two-year period at the lower figure, but, rather, an occupancy from month to month at that rate, since Morrison had communicated to those in charge of plaintiff's business Tobriner's offer to permit plaintiff to occupy the store on that basis at the expiration of the lease term.

[4] Certain letters written by plaintiff's agents between March 6 and July 19 lend support to plaintiff's contention that Morrison had not informed them orally, as he testified, that Tobriner took the position that plaintiff had not accepted the option and that after May 9, 1934, plaintiff's occupancy at the rate of $45 a month would be on a month to month basis. According to plaintiff's witnesses, the first intimation they had that Tobriner took the stand that the option had not been exercised was contained in a letter of July 19 written by Tobriner to plaintiff. However, the trial court by its judgment for defendants accepted Morrison's testimony that he had fully informed plaintiff's agents. As an appellate court we cannot disturb the decision of the trial court on conflicting evidence. The above letters do not as a matter of law establish the falsity of Morrison's testimony.

Tobriner testified that Nolen's letters of November 1 and 7, expressing willingness to pay rental at the increase of 20 per cent, were written only after plaintiff's agents orally had informed him that plaintiff would not pay in excess of $50 a month.

[5, 6] On November 8, 1934, defendants sent to plaintiff at San Francisco and Los Angeles the following letter:

"You are hereby notified that your tenancy of the premises at 3652 Geary Boulevard, San Francisco, is hereby terminated as of midnight, December 9, 1934.

"You are further notified that rental for said premises commencing December 10th, 1934, and from that time on will be the sum of Seven Hundred and Fifty ($750.00) Dollars per month, and that if you remain in said premises subsequent to the time above specified, you will be held liable for rental at the rate of Seven Hundred and Fifty Dollars per month."

On December 12, the following notice was sent to plaintiff by defendants: "Demand is hereby made upon you for immediate possession of the premises at 3652 Geary Boulevard, San Francisco, and demand is further made that you vacate and surrender said premises." On December 7 plaintiff had filed the instant action, and at the time of trial was still in possession. The trial court gave judgment for defendants against plaintiff for $1,125, as rental from December 10, 1934, to the date of judgment, January 25, 1935, at the rate of $750 per month, and decreed that plaintiff should continue liable at that rate until surrender of possession. In so far as it allows this recovery the judgment is erroneous.

Plaintiff contends that it does not appear that the notice dated November 8 reached him by November 9, which was necessary to terminate the tenancy from month to month at the rate of $45 a month as of midnight December 9, 1934. Sections 1946, 827, Civ.Code. Conceding that the notice was effective as of that date, nevertheless defendants are not entitled to receive rent for the period beyond December 9 at the rate of $750 a month. Defendants rely on section 827, Civil Code, which provides that in all leases from month to month, the landlord may, upon giving notice in writing at least thirty days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month. "The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month." A tenant holding over who does not assent to an increased rental, either expressly or impliedly, is liable therefor only where section 827 is controlling. For example, the section does not apply to a tenancy for a fixed term. A tenant for a fixed term who holds over beyond the term after notice of increased rental, in the absence of express or implied assent thereto is not liable for the increased rent, but is a tenant at sufferance, who must pay the reasonable value of the use for such time as he holds over. Cowell v. Snyder, 15 Cal.App. 634, 115 P. 961; Canning v. Fibush, 77 Cal. 196, 19 P. 376; Stoppelkamp v. Mangeot, 42 Cal. 316; Field v. Walton, 94 Cal.App. 596, 271 P. 500; Meaher v. Pomeroy, 49 Ala. 146; Atkinson v. Cole, 16 Colo. 83, 26 P. 815. The tenancy at an increased rental cannot be imposed upon the lessee without his consent, but must rest on agreement.

We are of the view that section 827 does not apply to the case herein. Defendants did not, in the language of section 827, "purport to change the terms of the lease," and thereafter continue an existing tenancy on changed terms. Instead in clear and unequivocal language they "terminated" the tenancy as of midnight December 9, 1934. In the following paragraph they offered plaintiff a new tenancy from month to month at the rate of $750. Plaintiff never assented thereto. On December 7 he filed an action to establish his contention that he was in possession by virtue of a renewal of the lease for a term of two years.

[7] That a new tenancy at the rate of $750 a month was never created is indicated by the conduct of defendants. On December 12, 1934, defendant Mathew Tobriner, an attorney at law, prepared and sent to plaintiff a demand for immediate possession. If a tenancy at the rate of $750 had come into existence, defendants could not rightfully have demanded immediate possession. If they desired to evict plaintiff for failure to pay $750 rental, then the proper form of notice would be in the alternative, to pay rent or surrender possession. Section 1161, subd. 2, Code Civ.Proc. (as amended by St. 1933, p. 1315); 15 Cal.Jur. 783, 811. If they wished to obtain possession in any event by terminating the tenancy at $750 a month, then a thirty-day notice was required.

Upon a retrial of the issue as to the amount of the money judgment which should be awarded defendants, the facts as to sending and delivery of the letter of November 8, which were not clearly shown on the trial, may be established. If said notice became effective as of December 9, 1934, then after said date plaintiff was a tenant at sufference liable for the reasonable value of the use (cases cited, supra, and 15 Cal.Jur. 644, 816), or, perhaps, for the rate of rent paid during the term. See Cowell v. Snyder, 15 Cal.App. 634, 639, 115 P. 961. Otherwise plaintiff remained liable at the rate of $45 a month until termination of the tenancy.

[8, 9] As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required. Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881; Long v. Chronicle Pub. Co., 68 Cal.App. 171, 228 P. 873; 20 Cal.Jur. 243; 21 Cal. Jur. 561. This rule applies to notice of termination of tenancy given under section 1946, Civil Code, or to a notice under section 827, Civil Code. Section 1012, Code of Civil Procedure, providing for service by mail, relates to actions and proceedings provided for in the Code of Civil Procedure, and does not apply generally to all cases where notice is required to be given, independent of any action, under the Civil Code. However, personal service may be made through the instrumentality of the mails. The post office department, as well as any other type of messenger, may be used to effect personal service. Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8.

The judgment is reversed, with directions to the trial court to retry only the issue as to the termination of the month to month tenancy at the rate of $45 a month and the amount which defendants are entitled to recover by reason of plaintiff's occupancy after December 9, 1934, and thereafter to enter judgment in accordance with the views herein expressed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; THOMPSON, J.; SHENK, J.

17 Cal.App.2d 728

SYLVIA v. MELLEMA et al.

Civ. 11179.

District Court of Appeal, Second District, Division 2, California.

Nov. 30, 1936.

1. Landlord and tenant 🔑169(10)

In tenant's action against proprietors of apartment for injuries sustained by slipping in puddle of soapy water on kitchen floor, allegedly left by janitor, instruction that proprietors owed no absolute duty to have floor in reasonably safe condition to walk upon, but fulfilled their duty by using ordinary care, *held* not error.

2. Landlord and tenant 🔑164(1)

Proprietors of apartment house were not insurers of safety of tenant who slipped in puddle of soapy water on kitchen floor, allegedly left by janitor, but owed duty to use ordinary care to keep premises in safe condition.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Action by Anna Sylvia against Helena Mellema and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Milton D. Klein, of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants entered upon the return of the verdict of a jury. Plaintiff was a tenant in the apartment house conducted by defendants Mellema. She alleged in her complaint that the janitor of the apartment, defendant Amonoy, negligently left a puddle of soapy water on the kitchen floor, causing her to slip and be thrown to the floor. She asked for damages suffered in the fall. Defendants deny negligence on their part and allege contributory negligence on the part of plaintiff. Upon the presentation of these issues to the jury a verdict was returned against plaintiff.

[1, 2] Plaintiff complains of the giving of the following instruction: "There was no absolute duty on the part of defendants to have the floor in a reasonably safe condition to walk upon. In this regard I instruct you that defendants' duty was fulfilled when defendants used ordinary care, if you find that they did use ordinary care." We find no error in this instruction. The proprietors of the apartment house were not insurers of plaintiff's safety. It was their duty to use ordinary care to keep the premises in a safe condition. In Mautino v. Sutter Hosp. Ass'n, 211 Cal. 556, 296 P. 76, the court set forth the rules governing situations like those of the present case. The language used by the court is almost identical with the language of the instruction which is attacked by plaintiff.

The judgment is affirmed.

I concur: CRAIL, P. J.

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17 Cal.App.2d 729

COYKENDALL v. JACKSON et al.

Civ. 5651.

District Court of Appeal, Third District, California.

Nov. 30, 1936.

1. Pleading 🔑236(1)

Filing of an amended complaint is not a matter of absolute right, but rests largely in discretion of trial court.

2. Assignments 🔑19
Specific performance 🔑73

Contract conveying right to resell entire output of factory in consideration of other party's devoting his entire time to distributing the product *held* contract for personal services which could not be assigned nor specifically enforced while executory (Civ.Code, § 3390, subd. 1; Code Civ.Proc. § 1060).

3. Assignments 🔑19
Specific performance 🔑73

Executory contract for personal services involving a personal relation of confidence between the parties, or involving liabilities or duties, which in express terms impute or indicate reliance on the character and personal ability of the parties, cannot be assigned, nor can such a contract be specifically enforced (Civ.Code, § 3390, subd. 1).

4. Appeal and error ⟹1041(2)

Denial of motion to amend complaint which does not state a cause of action is not reversible error.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action for a declaratory judgment by J. M. Coykendall against L. G. Jackson and others. From a judgment for the defendants after demurrer to the plaintiff's complaint was sustained without leave to amend, the plaintiff appeals.

Affirmed.

Minor Blythe, of Los Angeles, for appellant.

John L. Fleming, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Appellant began this action seeking a declaratory judgment under the provisions of section 1060 of the Code of Civil Procedure. The defendants interposed a demurrer to the plaintiff's complaint, which was sustained by the court without leave to amend. The appellant thereafter made a motion to vacate the order of the court denying the privilege to amend his complaint, which motion was denied. Judgment was thereafter entered in favor of the defendants. From this judgment the plaintiff appeals.

[1] While ordinarily the court will permit an amendment to a complaint, this action is largely within the discretion of the court, and the filing of an amended complaint is not a matter of absolute right. Billesbach v. Larkey, 161 Cal. 649, 120 P. 31; Davidson Investment Co. v. Dabney, 103 Cal.App. 392, 284 P. 673.

[2-4] That the court did not abuse its discretion satisfactorily appears from the following résumé of the complaint and the cause of action attempted to be alleged. The complaint alleges that certain of the defendants, on or about the 31st day of August, 1934, being a copartnership, entered into a contract in writing with the defendant Chester G. Mills. This contract is set forth in Exhibit A, attached to the complaint and made a part thereof. This contract, so far as material here, is in the following words and figures:

"This agreement made and entered into this 31st day of August, 1934, by and between Power Seal Co., a copartnership, consisting of Lyle G. Jackson and N. E. Woolman, first party, and Chester G. Mills, second party,

"Witnesseth:

"That, Whereas, first party is the inventor and manufacturer of certain merchandise and material known as 'Power Seal' for use in internal combustion engines; and

"Whereas, second party is desirous of undertaking the sale, advertising and exploitation of said product;

"Now, Therefore, in consideration of, and subject to the terms, conditions and agreements herein contained, it is mutually understood and agreed as follows:

"(1) That subject to the performance of the conditions and covenants herein contained to be performed by said second party, the said first party does hereby give and grant to said second party the exclusive right to purchase, merchandise, distribute and resell the entire output and production of the factory of said first party, etc.

"(3) Second party agrees to devote his entire time and attention, and use his best efforts and endeavors in the sale and distribution of said product, and to nationally advertise same by means of newspapers, magazines and radio, and to purchase from or sell for said first party at least the following quantities thereof," etc.

The foregoing excerpts from the agreement establish the contract as being one for personal services, and the cases are unanimous that an executory contract for personal services involving a personal relation of confidence between the parties, or involving liabilities or duties, which in express terms impute or indicate reliance on the character and personal ability of the parties, cannot be assigned, nor can such a contract be specifically enforced. Subdivision 1 of section 3390 of the Civ. Code; Fitch v. Brockmon, 3 Cal. 348; Montgomery v. De Picot, 153 Cal. 509, 96 P. 305, 126 Am.St.Rep. 84; Sumner v. Nevin, 4 Cal.App. 347, 87 P. 1105; Walton v. Davis, 22 Cal.App. 456, 134 P. 795.

One or two technical points are advanced by the appellant, but the foregoing disposes of the appellant's cause of action.

There being absolutely no merit in the appeal, the judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.App.2d 686

MAYO et al. v. LISKO et al.

Civ. 10985.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1936.

Hearing Denied by Supreme Court Jan. 25, 1937.

Automobiles ⚿192(1)

Finance company which on day of receiving note and chattel mortgage to secure loan on automobile transferred such note and mortgage to another finance company which caused itself to be registered as "legal owner" *held* not liable as "owner" to persons injured through operation of automobile by loan broker who guaranteed payment of loan, notwithstanding collections of payments due under mortgage were made through office of finance company and finance company received money for automobile when it was sold since other finance company became prime creditor and was entitled to hold automobile as collateral for payment of note and mortgage (Civ.Code, § 1714¼).

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Earl Mayo and another against Carl Lisko, George Hambaugh, and the National Funding Corporation. From a judgment for plaintiffs, last-named defendant appeals.

Reversed.

S. A. Shoop, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an action brought to recover damages resulting from injuries sustained by plaintiffs in an automobile accident. Judgment was rendered in said action in favor of the plaintiffs and against the defendants Carl Lisko and National Funding Corporation. The appeal from said judgment has been taken solely by the defendant National Funding Corporation.

Appellant was held liable as owner under the provisions of section 1714¼ of the Civil Code, in effect at the time of the accident, on October 28, 1934. The main question raised upon this appeal was whether appellant was chargeable with liability as the owner under the facts disclosed by the record herein.

In the month of June, 1934, the Cadillac automobile involved in this action stood of record in the names of one Begeman as "registered owner" and Rucklos and Kingsley as "legal owner." On June 22, 1934, defendant Carl Lisko, a loan broker, procured a loan on said automobile from appellant, National Funding Corporation, on behalf of the defendant Hambaugh, who gave a note and chattel mortgage securing the same; defendant Lisko guaranteeing payment thereof. Upon payment of $370 to Rucklos and Kingsley, the latter delivered the so-called "pink slip" to appellant National Funding Corporation. On the same day, appellant transferred, in the regular course of business, the Hambaugh note and chattel mortgage to Standard Discount Corporation, by indorsement and written guaranty of payment; and likewise gave a written assignment of the chattel mortgage to Standard Discount Corporation. On June 29, 1934, Standard Discount Corporation then duly caused itself to become the legal owner of record, and a certificate of legal ownership ("pink slip") was issued by the department of motor vehicles, showing Hambaugh as "registered owner" and Standard Discount Corporation as "legal owner," which registration remained unchanged until January 18, 1935, and constituted the record of registration at the time of the accident which is the subject of this action.

About October 19, 1934, Hambaugh, the registered owner and in possession of said Cadillac automobile, drove the same to Kelley Kar Company to trade it in on another automobile, which latter automobile is of no further concern in this case. Kelley Kar Company got in touch with Standard Discount Corporation, the then registered legal owner, and was referred by the latter to National Funding Corporation, who in turn referred it to Lisko as the party who had originally guaranteed the Hambaugh note. As a result of these negotiations, Kelley Kar Company entered into an indemnity agreement with defendant Lisko, and on October 20, 1934, Lisko took possession of the Cadillac automobile. It was while Lisko was driving it a few days later that the accident which is the subject of this action occurred.

Appellant's main contention is that the finding of the trial court that appellant owned said automobile at the time and place of the collision, and that it was being driven by Lisko with the consent and permission of appellant, is contrary to law and not supported by the evidence. We find ourselves in accord with this claim of appellant. While it is true there is evidence in the record to sustain the claim of respondent that when the car was finally sold in January, 1935, appellant received the money therefor, nevertheless, in our opinion, the evidence clearly shows that throughout the year 1934 appellant was a mortgagee who had assigned its mortgage to another finance company, and consequently was not at the date of the accident the legal owner of the automobile in question. While collections of payments due under the mortgage were made through the office of appellant, it appears that Standard Discount Corporation maintained a collector in appellant's office for the purpose of making these collections. In our opinion, the record clearly establishes the fact that on the very day the mortgage was executed in favor of appellant upon the automobile in question appellant transferred the note and mortgage to Standard Discount Corporation, guaranteeing the payment thereof. Consequently, Standard Discount Corporation became the prime creditor and was entitled to hold the automobile as collateral for the payment of the note and mortgage in addition to the guaranty of appellant; a claim which Standard Discount Corporation asserted when said company registered itself as legal owner of the car; a registration which we think they were entitled to make by reason of the assignment of the note and mortgage covering the car to them. We find no analogy in the facts of this case with the case of Schmidt v. C. I. T. Corp. (Cal.App.) 57 P.(2d) 1016, cited by respondents. In the latter case C. I. T. Corporation sold the automobile under a conditional sales contract. The conditional sale vendees were given possession of the automobile by C. I. T. Corporation and used the same up to and including the time of the accident. So far as the record in the case just cited shows, the C. I. T. Corporation continued to hold in its possession the conditional sales contract, and was therefore the legal owner, whereas in the instant case the record clearly indicates that appellant, on the very day it received the note and mortgage, assigned the same to Standard Discount Corporation, and the latter company filed the certificate of legal ownership showing itself as legal owner.

Other contentions are advanced by appellant which we find it unnecessary to discuss, because in our opinion appellant was erroneously held liable as owner under the facts as disclosed by the record herein.

The judgment appealed from is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

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17 Cal.App.2d 653

THEREN et al. v. HODOROWICZ.

Civ. 1975.

District Court of Appeal, Fourth District, California.

Nov. 25, 1936.

Automobiles ⚷245(59)

In action for injuries received in automobile collision, evidence that automobile in which plaintiffs were riding entered intersection with right of way at speed of 15 miles per hour after driver observed defendant's automobile approaching intersection at speed of 22 or 23 miles per hour, approximately 45 feet from intersection, *held* not to establish contributory negligence of driver as matter of law (St.1931, p. 2120, § 113(b)(2).

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Robert Theren and another against Gladys Hodorowicz. Verdict for defendant, and from an order granting plaintiffs' motion for a new trial, defendant appeals.

Affirmed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

A. F. Molina, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of a collision between an automobile occupied by the plaintiffs and another driven by the defendant. After a verdict in favor of the defendant, the plaintiffs made a motion for a new trial, which was granted.

From the order granting that motion the defendant has appealed.

The collision occurred on August 2, 1935, at the intersection of Fairmount and Wightman streets in San Diego. It was stipulated that this is a fifteen-mile per hour intersection within the meaning of the obstructed corner provision of the Vehicle Act (St. 1923, p. 553, § 113(b) (2), as amended by St. 1931, p. 2120). The respondents' car was proceeding south on Fairmount, a paved street, while the appellant's car was traveling west on Wightman which was not paved. It appears without conflict that Robert Theren, who was driving respondents' car, slowed down to fifteen miles an hour as he approached the intersection; that when he was about twenty feet from the intersection he looked to his left and saw the appellant's car about fifty feet east from the intersection; that when he entered the intersection, while going slightly less than fifteen miles an hour, he again observed the appellant's car which was then about twenty feet east of the intersection; that he did not observe how fast the appellant's automobile was coming; that he continued across the intersection, near the middle of his half of the street, at fifteen miles an hour or less; that he next saw the appellant's car when the front of his automobile was five or six feet south of the center line of Wightman street, at which time the other car was five or six feet to his left, and astride the center line of Wightman; that he accelerated his speed in an attempt to avoid a collision; that the rear two feet of the left side of his automobile was struck by the front end of appellant's car; that respondents' car tipped over on its right side; and that the point of impact was about two feet south of the center line of Wightman street.

The only point raised by the appellant which requires attention is that the court erred in granting a motion for a new trial, since the undisputed evidence would not have supported a verdict in favor of the respondents. This is based upon the contention that the driver of the respondents' car was guilty of contributory negligence as a matter of law. It is argued that this conclusively appears for the following reasons: That this driver, as he entered the intersection, observed that the other car had traveled thirty feet after he first saw it while his own car had gone but twenty feet; that he must have known that the other car was coming at a rate of speed one and one-half times greater than his own; that he should have known that the two cars would inevitably come together in the intersection if each maintained its speed; and that, having observed these things, he drove serenely into the path of appellant's car although he could have stopped, turned aside or speeded up sufficiently to have avoided the collision.

The appellant relies on a number of cases from other jurisdictions and on the following cases from this state: Arnold v. San Francisco-Oakland Terminal Railways, 175 Cal. 1, 164 P. 798; New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, 265 P. 517; Ogden v. Lee, 61 Cal.App. 493, 215 P. 122; and Cummins v. Yellow & Checker Cab Co., 127 Cal. App. 170, 15 P.(2d) 536. Because of the different facts involved, none of these cases have any application here with the exception of the one last cited, which supports the conclusion that the question of contributory negligence here involved was one of fact rather than one of law.

According to the undisputed evidence the driver of respondents' car entered the intersection at a lawful rate of speed at a time when the other car was twenty feet back from the intersection. He had the right of way, and if it be assumed that he should have made the mathematical calculation which the appellant suggests, it only would have disclosed to him that the other car was coming at a speed one and one-half times greater than his, or some twenty-two or twenty-three miles per hour. The other car was then about forty-five feet from the center of the intersection, and no good reason appears why it could not have been stopped or why Theren should have foreseen that it would not be stopped or its speed reduced. This case comes squarely within the principles laid down in Leblanc v. Coverdale, 213 Cal. 654, 3 P.(2d) 312; Page v. Mazzei, 213 Cal. 644, 3 P.(2d) 11; Briggs v. Koyer, 138 Cal.App. 487, 32 P. (2d) 649; Shamlian v. Minardi, 123 Cal. App. 495, 11 P.(2d) 402. The question of contributory negligence was one of fact, and the granting of a new trial was within the discretion of the trial court.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

McPHERSON et al. v. CITY OF LOS ANGELES et al.*

Civ. 10996.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1936.

Rehearing Denied Dec. 22, 1936.
Hearing Granted by Supreme Court Jan. 25, 1937.

Mandamus ⚿111

Right of property owners to secure interest on principal sums adjudged to be due them in condemnation proceeding, payments of which sums were deferred by appeal, could not be determined in mandamus proceeding.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus proceeding by Venita R. McPherson and others against the City of Los Angeles and others. From a judgment granting a writ of mandamus, defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., James M. Stevens, Asst. City Atty., Carl A. Davis, Deputy City Atty., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for appellants.

Thomas Wade Cochran, Chapman & Chapman, and Ward Chapman, all of Los Angeles, for respondents Venita R. McPherson and Title Ins. & Trust Co.

Anderson & Anderson and William R. Law, all of Los Angeles, for respondent Wallis D. McPherson.

BISHOP, Justice pro tem.

Petitioners secured a judgment that a peremptory writ of mandate should issue compelling the defendants, appellants now, to pay interest upon a judgment in a condemnation action. Because we are of the opinion that it is the established law of this state that the question thus presented may not be determined in a mandamus proceeding, we find it necessary to reverse the judgment.

In the condemnation action, tried in Tuolumne county, a judgment was entered decreeing that $85,000 was to be paid for one parcel sought, $35,000 for another. The city, feeling aggrieved by the judgment, appealed, but unsuccessfully, the judgment being affirmed over a year later. The principal sums, thus finally adjudicated as the amounts to be paid, appellants have paid. The defendants in the condemnation action accepted the payments of the principal sums under an agreement that their claim to interest on the judgment was not thereby waived. Their demands for the interest meeting with refusal, they brought this proceeding to secure it by court mandate.

We base our statement that the question thus presented may not be answered in a mandamus proceeding on the case of Howe v. Southrey (1904) 144 Cal. 767, 78 P. 259. The appellant-plaintiff in that proceeding had secured a judgment against the defendant school district for $55, together with costs in the sum of $134.50. The school district was willing to pay the principal sum of the judgment but refused to pay the costs. A writ of mandate was sought to compel the issuance of the proper requisition for the full amount of the judgment, including the costs, and also for the interest which had accrued on the judgment. Our Supreme Court held that the writ should issue for the $55 and the costs, but with respect to the interest stated (page 769 of 144 Cal., 78 P. 259): "As to the matter of interest, it does not appear from the petition herein that any interest was provided for in the judgment entered in the original suit. Mandamus does not lie to enforce the obligation of contracts, but only to enforce the performance of an act which the law specially enjoins. In this case it can go no farther than to compel the board to issue its requisition for the exact amount of the judgment. It cannot determine whether the obligation rests upon the district to pay interest upon the judgment, for such is not the office of the writ of mandate. Barber v. Mulford, 117 Cal. 356, 49 P. 206."

The language just quoted was quoted and relied upon in Sheehan v. Board of Police Commissioners (1922) 188 Cal. 525, 534, 206 P. 70. We are therefore forced to hold that the right of petitioners to secure interest on the principal sum adjudged to be due them, the payments of which were deferred by the appeal, may not be decided in this mandate proceeding.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

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*For subsequent opinion see 68 P.2d 707.

17 Cal.App.2d 638

SEABOARD SURETY CORPORATION OF AMERICA v. HOLLYWOOD STATE BANK.

ELLIS v. BROWN et al.

Civ. 11149.

District Court of Appeal, Second District, Division 2, California.

Nov. 24, 1936.

Hearing Denied by Supreme Court Jan. 21, 1937.

Pledges ⇨34

Where holder of deposit certificate indorsed it to defendant bank, which obtained proceeds thereof from issuing bank and subsequently, in lieu thereof, issued four certificates of deposit, third person claiming ownership of such four certificates on theory that he was beneficiary of surety bond to which original certificate was pledged *held* not entitled to recover against defendant bank regardless of whether or not defendant was holder of original certificate in due course.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Seaboard Surety Corporation of America, by E. Forrest Mitchell, State Insurance Commissioner, as liquidator, against the Hollywood State Bank, wherein defendant filed a cross-complaint and A. I. Ellis and others intervened. Judgment for defendant, and the named intervener appeals.

Affirmed.

Philip Grey Smith and L. O. Hatch, both of Los Angeles, and Philip S. Ehrlich, of San Francisco, for appellant A. I. Ellis.

Leonard Wilson and Joseph M. Argabrite, both of Los Angeles, for respondent Hollywood State Bank.

CRAIL, Presiding Justice.

The Seaboard Surety Corporation of America had in its possession a certificate of deposit for $20,000 issued by the Security-First National Bank in favor of intervener Brown, properly indorsed by Brown. Its officers brought the certificate to the Hollywood State Bank. The sum was large, and C. A. Adams, vice president of the bank, as a careful and prudent banker, for the convenience of identifying signatures, agreed to meet them at the Farmers & Merchants Bank, which is located in metropolitan Los Angeles. This they did. The certificate was indorsed by the Seaboard. Adams thereupon handed it to the Farmers & Merchants Bank, which sent it by messenger to the Security-First National Bank. That bank, pursuant to telephonic request, returned its cashier's check for the amount of the certificate, made out to the Farmers & Merchants Bank. That bank then credited the Hollywood State Bank with $20,000, and on the same day the Hollywood State Bank opened an account in favor of the Seaboard and credited the account with $20,000. Later it issued four certificates of deposit to cover the item. Thereafter the Seaboard borrowed and received from the bank the face amount of the certificates of deposit, and executed a collateral note in usual form to the Hollywood Bank, assigning the certificates of deposit to the bank as collateral security for the payment of said notes and other obligations. All of this was done before the Hollywood State Bank had notice of any infirmity in the title of the Seaboard to the original $20,000 certificate. In fact, the bank never at any time had notice of such infirmity until this action was filed and summons served.

The Seaboard commenced this action to recover on the four certificates of deposit issued by the Hollywood State Bank in favor of the Seaboard. Appellant A. I. Ellis, as intervener, thereafter filed his complaint in intervention alleging ownership of said certificates and asking for recovery thereon, on the ground that he was the beneficiary of a surety bond to which the original $20,000 certificate was pledged as collateral by the Browns, who were principals on the bond. After hearing the evidence the trial court entered judgment in favor of the defendant. The appeal is by Ellis and concerns only the rights of Ellis, if any, in the four certificates of deposit.

Appellant contends that "a fundamental point in the case is that the Hollywood State Bank never became the holder in due course of the Security-First National Bank certificate of deposit," and "that the bank extended no credit to Seaboard until after the certificate of deposit was safely collected and the proceeds of which were credited to the Hollywood State Bank by the Farmers and Merchants Bank," and "that under no view of the law could this transaction have constituted the Hollywood State Bank the holder in due course of the [$20,000] certificate," and that "the findings that the Hollywood State Bank became the holder in due course of the $20,000 certificate of deposit are unsupported by any evidence." Appellant cites the case of Bank of Italy v. Welbilt Auto Body Company, 101 Cal.App. 526, 281 P. 1060, and quotes that case at length. The facts in that case are not similar to the facts in this case and the law of that case is not applicable here. When the Hollywood Bank cashed the $20,000 certificate, or, to use appellant's language, "collected" it, the bank no longer was the holder of the certificate either in good faith or bad faith. It was then not a holder of the paper at all. The certificate was no longer in existence; and the law, with regard to the question, who is a holder of paper in good faith and who is not, has no application to the facts in this case as between the intervener Ellis and the Bank of Hollywood. Ellis at no time had any interest in the cash or in the four certificates of deposit which were later issued, under the law applicable to commercial paper held or not held in due course.

It is true that the trial court made a finding that the Hollywood Bank was the holder of the certificate in due course, but such finding, whether supported by the evidence or unsupported by the evidence, was unnecessary in order to sustain a judgment for the defendant.

Judgment affirmed.

I concur: WOOD, J.

17 Cal.App.2d 713

SWASEY et al. v. L'ETANCHE et al.

Civ. 9922.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1936.

Hearing Denied by Supreme Court Jan. 28, 1937.

1. Appeal and error 🔑854(3)

Judgment for defendants upon order sustaining demurrer without leave to amend must be affirmed notwithstanding order did not state grounds upon which demurrer was sustained, if demurrer was good upon any ground therein stated.

2. Appeal and error 🔑1040(3)

If special demurrer was well taken in any particular, order sustaining it without leave to amend would not constitute reversible error notwithstanding complaint stated cause of action, where record did not disclose that plaintiffs requested leave to amend and did not claim on appeal that they made such request.

3. Fraud 🔑45

Complaint for fraud must allege defendant's knowledge of falsity of his representation, such knowledge being a necessary element of actionable fraud.

4. Fraud 🔑45

Complaint alleging that vendors "falsely and fraudulently" represented to purchasers that building was situated entirely upon vendors' land *held* good as against general demurrer, since words "falsely and fraudulently" implied vendors' knowledge of falsity of representation, but complaint was subject to special demurrer.

5. Pleading 🔑402

Allegation in complaint for fraud that purchasers believed representations to be true and solely in reliance thereon and without knowledge of falsity of representations, which were then known by vendors to be false, purchased land, *held* not to cure defect pointed out by special demurrer to complaint which alleged that vendors "falsely and fraudulently" represented that building was situated entirely upon vendors' land.

6. Fraud 🔑41
Pleading 🔑17

In purchasers' action against vendors for misrepresenting that building was situated entirely on vendors' land, allegation that at time of sale realty was community property of vendors *held* not subject to general or special demurrer on ground that it could not be ascertained whether wife was one of owners of land or how or in what manner or with what funds she acquired land, or when vendors acquired the land.

7. Pleading 🔑192(2)

Demurrer for uncertainty will not lie as to immaterial matter.

8. Fraud 🔑47

In purchasers' action against vendors for misrepresenting that building was situated entirely on vendors' land, allegation that at time of sale realty was community property *held* not demurrable for uncertainty on ground that amount of damages against wife would vary according to whether or not she was owner of the land, since each defendant connected with fraud is liable for full amount of damages.

9. **Fraud** 🔑41

Complaint in purchasers' action against vendors for misrepresenting that building was located entirely on vendors' land *held* not demurrable for failure to describe adjoining owner's land upon which one-third of building was located, since vendors were presumed to know boundaries of their land, which knowledge necessarily included knowledge of location of building.

10. **Pleading** 🔑192(2)

Demurrer for uncertainty does not lie where facts are presumptively within knowledge of demurrant.

11. **Fraud** 🔑47

Complaint in action against vendors for misrepresenting that building was located entirely upon vendors' land, alleging that purchasers were specially damaged in cost of improvements upon one-third of building located on adjoining owner's land, *held* demurrable for failure to state causal connection between misrepresentation and items of damage.

12. **Fraud** 🔑59(1)

In purchasers' action against vendors for misrepresenting that building was situated entirely on vendors' land whereas portion of building was located on adjoining owner's land, depreciation in value of improvements placed upon such portion of building *held* proper element of damages.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by W. N. Swasey and another against Francis J. de L'Etanche and another. From a judgment for defendants, after sustaining their general and special demurrer to the amended complaint without leave to amend, plaintiffs appeal.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

Rittenhouse & Snyder, of Santa Cruz, and John L. McNab and S. C. Wright, both of San Francisco, for appellants.

Harry J. Bias, of Santa Cruz, and Wyckoff, Gardner & Parker, of Watsonville, for respondents.

GRAY, Justice pro tem.

[1, 2] The general and special demurrer to the fourth amended complaint was sustained without leave to amend and, accordingly, judgment was entered in favor of defendants for their costs. Plaintiffs appeal from the judgment, arguing that the complaint stated a cause of action and that therefore the court erred in sustaining the demurrer without granting leave to amend. Although the order did not state the grounds upon which the demurrer was sustained, the judgment must be affirmed if the demurrer was good upon any ground therein stated. Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.(2d) 501. The record does not disclose that plaintiffs requested leave to amend, nor do they now claim that they made such request. Under such circumstances, if the special demurrer was well taken in any particular, the order sustaining it without leave to amend would not constitute reversible error even if the complaint stated a cause of action. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268; Fitzpatrick v. Fidelity & Casualty Company (Cal.Sup.) 60 P.(2d) 276.

The following summary of the complaint will suffice for an understanding of the nature of the action. The defendant Francis J. de L'Etanche acted for himself and as agent for his wife, also a defendant, in negotiating a sale to plaintiffs of land, subsequently conveyed, and a three-story frame building. Before the sale he showed to plaintiffs the land and building, which contained 26 rooms and was used as a hotel, and, with the intent to defraud them and induce them to so believe, falsely and fraudulently represented to them that the building was entirely situated upon such land. On August 15, 1928, defendants conveyed to plaintiffs by deed, which was subsequently recorded, the land which is described, together with all improvements thereon. The land was community property of defendants. Plaintiffs believed the representation to be true and solely in reliance thereon and without notice or knowledge of its falsity, which was known to defendants, purchased the land conveyed. They would not have purchased such land and improvements, nor expended on the building sums subsequently stated, if they had not believed and relied upon the representation. One-third of the building, consisting of described rooms, is not situated upon the land conveyed but is located upon land of an adjoining owner. In June, 1932, plaintiffs discovered the fraud under circumstances which it is unnecessary to repeat. They sustained general damages in the sum of $25,000, which is the difference between the value of the property conveyed and its value if the representation had been true, and also special damages in the sum of $7,125 for expenditures on the building.

[3-5] Since defendant's knowledge of the falsity of his representation is a necessary element of actionable fraud (12 Cal.Jur. 724), it is essential that a complaint for fraud contain an allegation to that effect (12 Cal.Jur. 810). Defendants argue that the complaint fails to state a cause of action because it contains no direct averment that either defendant knew that the representation was false. They also contend that the complaint is uncertain as to whether either defendant knew that the representation was false. In allegation IV it is charged that "said defendant * * * *falsely* and *fraudulently* represented and declared to plaintiffs * * * that said three-story frame building was situated entirely upon land belonging to and owned by said defendants. * * *" (Italics ours.) Since the italicized words imply defendants' knowledge of the falsity of the representation, the general demurrer is not well taken. However, the special demurrer is good. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Cameron v. Evans Securities Corp., 119 Cal.App. 164, 6 P.(2d) 272. Allegation VII avers that "plaintiffs believed said representations to be true, and solely in reliance thereon, and without any notice or knowledge that said representations were false and untrue, and *which were then and there known to be false and untrue by said defendant* * * * the plaintiffs purchased * * * the said land. * * *" (Italics ours.) As the italicized phrase is a mere recital, which cannot supply the lack of a positive allegation, it does not cure the defect pointed out by the special demurrer. Johnson v. Fletcher, 97 Cal.App. 153, 274 P. 1001.

[6-8] The complaint alleges that at and before the sale the real property was the community property of the defendants. The latter demurred thereto for uncertainty, in that it could not be ascertained therefrom whether Monica de L'Etanche (the wife) was one of the owners of the land or how or in what manner or with what funds, or when, defendants acquired the land. Because amendments to the Civil Code have repeatedly changed the wife's rights in the community property (Cal.Jur., 10 Yr.Supp., vol. 3, p. 592 et seq.), the additional facts sought by the special demurrer would have more accurately defined the wife's interest in the property than is done by the questioned allegation. The absence of such facts does not, however, create any uncertainty. Brown v. Brown, 125 Cal.App. 429, 13 P.(2d) 1004. Had such facts been added, the allegation would have been a legal conclusion from them. Standing alone, the allegation avers an ultimate fact and not a conclusion of law. Vanasek v. Pokorny, 73 Cal.App. 312, 238 P. 798. The allegation is subject to neither general nor special demurrer. Brown v. Brown, supra. A demurrer for uncertainty will not lie as to immaterial matter. Kraner v. Halsey, 82 Cal. 209, 22 P. 1137. To establish the materiality of the allegation, defendants fallaciously argue that the amount of damages that could be awarded against the wife would vary according to whether or not she was an owner of the land. Each defendant connected with the fraud is liable for the full amount of the damages. Conlin v. Studebaker Brothers, 175 Cal. 395, 165 P. 1009. "It is not essential to liability that the person charged with fraud should have received any benefit therefrom, nor where misrepresentations concern property that he should have owned it." 27 C.J. 13; Ackerman v. Schultz, 178 Cal. 190, 172 P. 609; Evans v. Gibson, 220 Cal. 476, 31 P.(2d) 389. "Liability is predicated upon the fact that the plaintiff has been misled to his prejudice, and not that defendant has profited by his wrong." Von Schrader v. Milton, 96 Cal.App. 192, 201, 273 P. 1074, 1078.

[9, 10] Defendants further claim that the complaint is uncertain because of its omission of a description of the land which it alleges is owned by the adjoining owner and not by defendants and upon which one-third of the building is located. Defendants are presumed to know the area and boundaries of their land. Edwards v. Sergi, 137 Cal.App. 369, 30 P.(2d) 541; Harder v. Allred, 61 Cal.App. 394, 214 P. 1017. Knowledge of such boundaries necessarily includes knowledge of the location of the building with reference to such boundaries. A demurrer for uncertainty does not lie where the facts are presumptively within the knowledge of the demurring party. Tristam v. Marques, 117 Cal.App. 393, 3 P.(2d) 947.

[11] The complaint alleges that plaintiffs were specially damaged in the amount of the following expenditures, which they made in reliance upon the false representation and before their discovery of the fraud, to wit: (1) $3,000, the cost of additions to the one-third of the building located on the adjoining land; (2) $1,500, the cost of plumbing installed in such portion of the building; (3) $2,000, the difference between the cost and present value of furniture installed in the building; and (4) $625, the cost of fire insurance upon the building. Defendants demurred for uncertainty in that the complaint did not state either the causal connection between the false representation and the various items of damage, or in which part of the building the various articles of furniture were installed, or the proportionate cost of the fire insurance upon such one-third of the building. In approving the action of the trial court, sustaining a demurrer for uncertainty interposed to a defense of fraud, the appellate court, in Woodson v. Winchester, 16 Cal.App. 472, 476, 117 P. 565, 567, said: "'Fraud without damage furnishes no ground for action; nor is fraud without damage a defense.' Holton v. Noble, 83 Cal. 7, 9, 23 P. 58. It must be shown in the pleading that the damage claimed was sustained by reason of the fraud and should show the relation between the fraud and the damage alleged; that is, it must appear that the fraud and the damage sustain to each other the relation of cause and effect. 20 Cyc. 103, 107." "A pleading is defective whenever evidence cannot be received in its support, and, as there is no allegation in the counterclaim herein of facts under which any evidence of substantial damage would be admissible, the special demurrer of the plaintiff thereto for not setting forth in what manner, or by what facts, the defendant had been damaged in the amount claimed was properly sustained by the court. As was said in Philip v. Durkee, 108 Cal. 300, 41 P. 407: 'Considered as an action for damages for a breach of the contract, it does state a cause of action, but as such it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage.'" Harron, R. & McC. v. W., L. & Co., 4 Cal.App. 488, 500, 88 P. 512, 516. Since the claim for the expenditures was one for special damages, defendants were entitled to know with particularity the facts upon which the claim was based, and the absence of such facts could be raised by demurrer for uncertainty. Duell v. Sanstrom, 120 Cal.App. 414, 7 P.(2d) 1087.

[12] The complaint alleges that the land was conveyed on August 15, 1928, and that in June, 1932, plaintiffs discovered the falsity of the representation that the entire building rested upon the land conveyed. The expenditures were made some time between these two dates but the exact time of each is not averred. Presumably, although it is not alleged, plaintiffs had possession of the entire building at the times of the respective expenditures. However, there is no allegation that they were ever ousted from possession of the one-third of the building by the owner of the land upon which it rested. Until such ouster occurred it would not appear plaintiffs were damaged as to such expenditures. The depreciation in value of improvements placed upon the portion of the building resting on the land not conveyed is a proper element of damages. Hines v. Brode, 168 Cal. 507, 143 P. 729; Berettoni v. Sargentini, 78 Cal. App. 472, 248 P. 760. However, plaintiffs erroneously claim damages to the extent of the cost of the additions and plumbing, without any deduction for wear and tear during the period they used the same. They further seek recovery of the depreciation in value of the furniture installed in the entire building, and have not limited such claim to the furniture installed in one-third of such building. No fact is alleged to show that such depreciation was due to the location and removal of the furniture from such one-third of the building or that it was not due to its age and use. Defendants are not liable for the depreciation of the furniture located on the two-thirds of the building which was conveyed. Recovery is sought of the cost of fire insurance on the entire building. Obviously defendants are not chargeable for the earned portion of the premium on the entire building, or the unearned portion on the two-thirds of the building resting on the land conveyed. The demurrer for uncertainty in the allegations of special damages was properly sustained.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

17 Cal.App.2d 637

DYSART v. CLARK, Real Estate Com'r.

Civ. 11261.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1936.

Appeal and error 🔑456

Appellate court would not grant motion of plaintiff, whose temporary injunction against defendant had been dissolved by trial court, for an order directed against defendant to stay all proceedings against plaintiff pending decision of appellate court on plaintiff's appeal from judgment, since appellate court does not possess original jurisdiction in injunction matters.

Action by S. Dysart against J. Mortimer Clark, Real Estate Commissioner. From a judgment dissolving plaintiff's temporary injunction, the plaintiff appeals and applies for writ of supersedeas and order directed against defendant to stay all proceedings against plaintiff pending appeal.

Application denied.

M. G. Macneil, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for respondent.

WOOD, Justice.

Plaintiff commenced an action in the superior court to obtain an injunction against the defendant, Real Estate Commissioner of the State of California, and obtained a temporary injunction in that court. Later the demurrer of defendant was sustained without leave to amend and the temporary injunction was dissolved. Thereupon plaintiff appealed to this court and now presents a motion for "an order directed against the defendant to stay all proceedings against the plaintiff pending the decision of this court upon the plaintiff's appeal from the judgment."

This court may not grant plaintiff's motion. In Wollenshlager v. Riegel, 186 Cal. 622, 200 P. 726, the appellants petitioned for a supersedeas in an action in which it was sought in the lower court to procure an injunction to stay an execution sale and in which the injunction had been denied in the lower court. In denying the application the court said: "The effect would be that this court would grant the injunction which the court below refused to grant. It is well established that this court is without power to exercise original jurisdiction of this character." See, also, McCann v. Union Bank & Trust Co., 4 Cal.(2d) 24, 47 P.(2d) 283.

The application is denied.

I concur: CRAIL, P. J.

17 Cal.App.2d 626

CHRISTY v. CITY OF ALHAMBRA.

Civ. 11176.

District Court of Appeal, Second District,
Division 2, California.

Nov. 23, 1936.

Appeal and error 🔑787

Appeal was required to be dismissed for want of prosecution, where clerk's transcript was filed August 26, cause was ordered on calendar for following November 20, due notice was given, and service on order to show cause was duly made, and appellant made no appearance in the case, filed no briefs, and requested no extensions of time.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by L. M. Christy against the City of Alhambra. From an adverse judgment, the defendant appeals. On order to show cause why appeal should not be dismissed.

Appeal dismissed for want of prosecution.

James B. Ogg, City Atty., of Alhambra, for appellant.

Clark & Morgan, of Alhambra, for respondent.

PER CURIAM.

This case is before us on an order to show cause why the appeal should not be dismissed for want of prosecution. The clerk's transcript was filed August 26, 1936. Thereafter the cause was regularly ordered on calendar for November 20, 1936, and due notice given, and service on the order to show cause has been duly made. The appellant has made no appearance in the case. No briefs have been filed. No extensions of time have been requested.

The appeal is dismissed **for want of** prosecution.

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17 Cal.App.2d 625

VAN BRUNT et al. v. HATHAWAY.

Civ. 11211.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1936.

Appeal and error 🔑787

Appeal *held* dismissed for want of prosecution, where appellant had made no appearance three days after date when cause was regularly ordered on calendar, and due notice had been given, and service on order to show cause had been duly made and no briefs had been filed or extensions of time requested.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Walter C. Van Brunt and others against Gladys M. Hathaway. From an adverse judgment, the defendant appeals.

Dismissed.

Parker & Stanbury, of Los Angeles, for appellant.

Hulen C. Callaway, of Los Angeles, for respondents.

PER CURIAM.

This case is before us on an order to show cause why the appeal should not be dismissed for want of prosecution. The clerk's transcript was filed September 23, 1936. Thereafter the cause was regularly ordered on calendar for November 20, 1936, and due notice given, and service on the order to show cause has been duly made. The appellant has made no appearance in the case. No briefs have been filed. No extensions of time have been requested.

The appeal **is dismissed for want of prosecution.**

STEWART v. STOCKBURGER, Director of Finance.

Civ. 5592.

District Court of Appeal, Third District, California.

Nov. 24, 1936.

Hearing Granted by Supreme Court Jan. 21, 1937.

1. Mandamus 🔑168(2)

Where petitioner in mandamus proceeding charged that she was illegally deprived of civil service status because of abolition of her position, respondent had burden of proving lack of funds as a defense (Gen.Laws Supp. 1933, Act 1400, § 14a).

2. Mandamus 🔑187(4)

Where petitioner in mandamus proceeding challenged legality of abolition of her position and creation of part-time job for same work at decreased salary, respondent could not first contend on appeal that funds were insufficient to pay original salary (Gen.Laws Supp.1933, Act 1400, § 14a).

3. Mandamus 🔑72

Court will not interfere, as by writ of mandamus, with determination of facts dependent for solution on mere discretion of officer, board, or commission to whom decision is delegated by statute, if there is substantial evidence to support conclusion.

4. Mandamus 🔑174

In proceeding, such as mandamus proceeding, involving discretionary powers of officer or commission, trial court retains right to pass on witnesses' credibility and competency of evidence.

5. Mandamus 🔑76

If civil service position is abolished for purpose of evading law, such act may not be considered mere exercise of discretion of officer, board, or commission, and peremptory writ of mandamus will issue reinstating civil service employee (Gen.Laws Supp.1933, Act 1400, § 14a).

6. Mandamus 🔑172

Where petitioner in mandamus proceeding alleged that abolition of her position as full-time senior clerk in state department of finance and creation of part-time job for same work at decreased salary were for purpose of evading Civil Service Act, trial court *held* empowered to determine motive of appointive power, as against contention that questions as to lack of work or considerations of economy involved discretion of director of finance (Gen.Laws Supp.1933, Act 1400, § 14a).

7. Mandamus ⚷187(9)

In mandamus proceeding, findings that abolition of petitioner's position was for purpose of evading Civil Service Act *held* controlling on appeal where supported by substantial evidence (Gen.Laws Supp.1933, Act 1400, § 14a).

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Proceeding by Edna Stewart for a writ of mandamus against Arlin E. Stockburger to compel respondent, as State Director of Finance, to reinstate petitioner as a full-time senior clerk termed intermediate office appliance operator of the State Department of Finance. A peremptory writ of mandamus was granted, and respondent appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen. for appellant.

Fontaine Johnson, of Sacramento, for respondent.

PER CURIAM.

This is an appeal from a peremptory writ of mandamus ordering the Director of Finance to reinstate the respondent Edna Stewart to her civil service status as a full-time senior clerk termed intermediate office appliance operator of the department of finance of the state of California, and authorizing the payment to her of her fixed salary of $160 per month.

For twenty years Edna Stewart was employed with the state of California as a clerk in the industrial relations department. She attained civil service status. On May 1, 1934, she was transferred to the state department of finance. In 1921 her department was reclassified, and the office of senior clerk of the industrial relations department was created at a salary which was fixed at from $140 to $200 per month. That job was termed intermediate office appliance operator. From the time of the creation of that position the duties thereof have remained the same. Miss Stewart was appointed to that office under civil service and her salary was ultimately fixed at $160 per month. Ever since her appointment she has performed the duties required of that employee without criticism respecting her efficiency. Under a previous Director of Finance, that department attempted to reduce her salary to $110 per month without attempting to abolish the office. Her classification as senior clerk or intermediate office appliance operator and the services required of her remained the same as they were previously. She continued to perform those duties but refused to accept the reduction of salary. She instituted a mandamus proceeding in the superior court of Sacramento county to establish her civil service status and to require the payment of her fixed salary of $160 per month. The court determined that she had acquired civil service status as senior clerk of that department; that the services which she performed were of the "same kind and nature" previously discharged; that there were funds with which to pay for her services; and that she was entitled to the salary of $160 per month. The court found in that regard that Edna Stewart "is the legal holder of a permanent civil service position in the department of finance of the state of California, classified and graded by the state civil service commission in the class and grade of intermediate office appliance operator" at the fixed salary of $160 per month. A peremptory writ of mandamus was accordingly issued. No appeal from that order was taken. That judgment became final.

Pending the determination of the last-mentioned mandamus proceeding, the personnel division of the department of finance notified Miss Stewart in writing that "for lack of work and in the interest of economy," her position as full-time senior clerk had been abolished to take effect October 31, 1934, and that a part-time job had been created for the performance of the same work under the same title, at a salary of $110 per month, to which part-time position she would be assigned. Once more Miss Stewart brought a proceeding of mandamus in the superior court of Sacramento county to fix her civil service status and to determine her right to the full-time clerkship with its salary of $160 per month. The petition in this proceeding alleges that the pretented abolishing of the full-time position at a fixed salary of $160 per month and the creation of the part-time job at $110 per month were not performed in good faith, but were mere subterfuges resorted to for the purpose of evading the Civil Service Act (St.1913, p. 1035, as amended [Deering's Gen.Laws 1931 and Supp.1933, Act 1400]) in an effort to decrease the petitioner's salary. The Director of Finance answered the petition, denying the material allegations thereof, except that it was admitted the petitioner had attained civil service status as senior clerk; that her position was abolished, and she was placed on the eligible list for appointment to the new part-time job which had been created at a salary of $110 per month on account of a "lack of work and in the interest of economy" pursuant to the provisions of section 14a of the State Civil Service Act. St. 1913, p. 1035, and amendments, 1 Deering's Gen.Laws of 1931, p. 621, and Supp.1933, Act 1400. Upon these issues a trial was had in the superior court, in which hearing oral and documentary evidence was adduced.

The court adopted findings favorable to the petitioner and issued a peremptory writ of mandamus requiring the department to reinstate her in the position of full-time senior clerk, under the title of intermediate office appliance operator of the department of finance at the salary of $160 per month.

Among the findings which the court adopted in this proceeding are the following: "It is not true that said full-time position of the class of Intermediate Office Appliance Operator was abolished; * * * that it is not true that said petitioner was duly and regularly laid off or separated from said full-time position; * * * that it is true that the duties prescribed for said [purported] part-time position were the same duties as were attached to the full-time position theretofore occupied by the petitioner; * * * it is true that petitioner is entitled to receive a salary of $160 per month from November 1, 1934, as the holder of a full-time position classified as Intermediate Office Appliance Operator in the said Department of Finance; * * * that the position occupied and held by petitioner * * * was and now is necessary, and * * * it was not necessary or advisable * * * to abolish one or more positions of the class of Intermediate Office Appliance Operator or to temporarily discontinue the same because of lack of work or lack of funds or in the interest of economy; that the notice [abolishing the position] * * * and the separation report * * * and each of them was a mere subterfuge for the purpose of circumventing, avoiding, and evading the provisions of the State Civil Service Act, and other laws of the State of California, and neither said notice nor said report was given in good faith or because of lack of work or lack of funds or in the interest of economy; * * * that petitioner has been and now is performing * * * her same duties in the same place and manner, and under the same title; * * * that the work required in the performance of the duties of the petitioner's position occupied and now occupy not less than seven hours of time each day, other than legal holidays. * * *"

From the peremptory writ of mandamus which was thereupon issued directing the reinstatement of Miss Stewart in her full-time position, at a salary of $160 per month, the Director of Finance has appealed.

The Attorney General contends that the issuance of the writ of mandamus in this proceeding is an unlawful interference with the discretion conferred upon the appointive power by the provisions of section 14a of the Civil Service Act, supra, to abolish the full-time office and create a new part-time office, at a decreased salary, for the performance of the work of that department. That section of the act provides:

"Whenever it is necessary because of lack of work or lack of funds, or whenever it is advisable in the interests of economy, to reduce the staff of any department or agency in the State service, the appointing power may with the approval of the commission lay off employees according to the procedure set forth in this act and the rules and regulations thereunder. * * *

"In the event that any department, board, commission, elective office or other State agency decides to abolish one or more positions of any grade, or to temporarily discontinue the same because of lack of work or lack of funds, or in the interest of economy, then a number of employees of that department, board, commission, elective office or agency equal to the number of positions to be so abolished or discontinued, shall be laid off. * * * The names of employees thus laid off or demoted shall be placed upon the departmental lay-off list for the grade from which they were laid off or demoted, and also upon the general lay-off list for such positions as, in the opinion of the commission, the employees are qualified and entitled to hold. * * * All employees compensated on a monthly basis who are to be laid off or demoted under the provisions of this act shall be given fifteen days' notice of such lay off or demotion prior to the effective date thereof."

Under section 14a, supra, the appointive power of any agency of the state service may, subject to approval of the civil service commission, abolish one or more positions and lay off employees thereof on account of (1) lack of work, (2) lack of funds, and (3) when that procedure is in the interest of economy.

[1] In this proceeding it may not be said the effort to abolish the full-time clerkship was because of a lack of funds. There was neither an allegation in the answer nor proof of a lack of funds. The burden was on the respondent to establish proof of a lack of funds as a defense to the charge that the petitioner was illegally deprived of her civil service status as senior clerk contrary to the Civil Service Act. Lotts v. Board of Park Com'rs, 13 Cal.App.(2d) 625, 635, 57 P.(2d) 215; Kennedy v. City of Gustine, 199 Cal. 251, 256, 248 P. 910; Johnson v. County of Yuba, 103 Cal. 538, 37 P. 528.

[2] The cause was tried on the theory that there were ample funds with which to pay the salary, and the respondent may not, for the first time on appeal, contend there are not sufficient funds with which to pay the salary. In truth, the Attorney General abandoned that contention in his final brief.

It is, however, strenuously insisted by the appellant that the questions as to whether there was a lack of work to be assigned to that department, and whether it was in the interest of economy to abolish the full-time position and establish a part-time job in lieu thereof, are problems calling for the discretion of the Director of Finance which may not be interfered with by the court since there is substantial evidence to support his decision.

[3] It is true that the court will not interfere with the determination of facts which are dependent for solution upon the mere discretion of an officer, board, or commission to whom that decision is delegated by statute, when there is substantial evidence to support the conclusion. Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784, 797; 16 Cal.Jur. 809, § 28.

[4] There is a conflict of evidence regarding the preceding questions. The court adopted findings adverse to the appellant upon those issues. The court specifically found there was not a lack of work in that department; that it was not in the interest of economy to abolish the position; that the new part-time job required just as much time to perform the work assigned to it as was previously consumed in discharging the duties of the full-time position; and that the work assigned to both positions required seven entire hours of each working day to fulfill the duties thereof. There is substantial evidence to support these findings. It may sometimes be difficult to determine whether certain decisions depend on the exercise of a discretion. Some problems may be decided with mathematical accuracy, and under such circumstances there is no room for a discretion in determining such questions. It may be argued with reason that if a position which is filled by one particular individual has work enough assigned to it to keep that employee actively and continuously engaged all of the working hours of each working day both before and after the so-called full-time job is abolished, it may not consistently be said it is suffering from a lack of work. It is true there was a controversy regarding just what class of work is deemed to properly appertain to the ordinary duties of that office. That question seems to belong more properly to the realm of discretion which is delegated by statute to the appointive power to decide. It may, therefore, be true that under such circumstances, since there is substantial evidence to support the exercise of discretion on the part of the appointive power, a court may not interfere on that ground with his decision in that regard. It is, however, still true that in a proceeding involving the discretionary powers of an officer or a commission, the trial court retains the right to pass upon the credibility of witnesses and the competency of evidence. Under the pleadings in this proceeding and the findings which were adopted it becomes unnecessary for us to determine whether the trial court exceeded its authority in adopting adverse findings upon issues which were controlled by the exercise of the discretion of the Director of Finance.

The petitioner alleges, in effect, that the act of abolishing the full-time position and creating, in lieu thereof, a part-time job, and in placing the petitioner on the accredited lay-off list of employees, "was a mere subterfuge for the purpose of circumventing, avoiding and evading the provisions of the State Civil Service Act," and that "neither said notice nor said report was given in good faith or because of lack of work or lack of funds or in the interest of economy." The trial court found each and all of those allegations to be true. Even though the trial court may have been precluded from interfering with the sound discretion of the Director of Finance in determining that there was a lack of work in the department or that it was in the interest of economy to abolish the position and place the employee on the lay-off list, since there is substantial evidence to support his conclusions in that regard, still, under the pleadings in this case, the court had the authority and was called upon to determine whether those acts were performed in good faith or whether, on the contrary, they amounted to an abuse of discretion and were really done to unlawfully circumvent and evade the Civil Service Act. Of course, an officer has no discretion to violate or evade the law. The court specifically found the office was not abolished in good faith, and upon the contrary that the act in attempting to do so was a mere subterfuge resorted to for the purpose of circumventing, avoiding and evading the Civil Service Act.

In the case of Bank of Italy v. Johnson, supra, upon which the appellant chiefly relies, there was no issue regarding an arbitrary abuse of discretion or with respect to an act alleged to have constituted a mere subterfuge performed in bad faith for the purpose of circumventing, avoiding and evading the law. In that case the Supreme Court assumed original jurisdiction in a petition for a writ of mandamus involving the question as to whether the bank commissioner abused his discretion in declining to authorize the establishment of a branch bank at San Pedro on the ground that it was not for the "public convenience and advantage" to do so, as that term is used in the Banking Act (St. 1909, p. 88, § 9). The court said: "There is no showing herein, either by pleading or proof, of fraud, corruption, improper motives, or influences on the part of the respondent."

In the absence of such an issue in that case it was properly said, in quoting with approval from Union Transportation Co. v. Bassett, 118 Cal. 604, 50 P. 754, that: "This court held that, when subordinate boards or commissioners were by statute invested with discretion with respect to the exercise of their powers, courts would not interfere with such discretion, *in the absence of grave reasons tending to show that fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law had entered into or characterized the determination of such body.*"

[5] As suggested in the preceding quotation, when it appears that the act of an officer, board, or commission, abolishing a civil service position, was not performed in good faith, but that it was done arbitrarily with the purpose of circumventing and evading the law, then the act may not be considered a mere exercise of discretion. Such conduct is arbitrary, unauthorized, and will be vacated and set aside as void. It is contrary to the spirit of the Civil Service Act. Under such circumstances a peremptory writ of mandamus will isssue reinstating a civil service employee who has been thus wrongfully and illegally displaced. Union Transportation Co. v. Bassett, 118 Cal. 604, 50 P. 754; Landsborough v. Kelly, 1 Cal.(2d) 739, 744, 37 P.(2d) 93, 96 A.L.R. 707; 16 Cal. Jur. 810, § 28; 38 C.J. 690, § 258.

[6, 7] It was the province of the trial court to determine under the pleadings in this case the motive of the appointive power which prompted the alleged abolishing of the office and the removal of the civil service employee. The trial court found that those acts were not done in good faith, but on the contrary that they constitute mere subterfuge performed with the unlawful purpose of circumventing and evading the Civil Service Act. There is substantial evidence to support those findings. That determination is, therefore, controlling on this court.

The judgment granting a peremptory writ of mandamus is affirmed.

17 Cal.App.2d 746

COOPER v. STEVENS.

Civ. 11157.

District Court of Appeal, Second District, Division 2, California.

Dec. 1, 1936.

1. Appeal and error ⚿930(1)

On appeal from judgment for plaintiff in personal injury action, on ground that plaintiff was guilty of contributory negligence as matter of law, appellate court would view evidence in light most favorable to plaintiff.

2. Appeal and error ⚿995

Appellate court will not make dubious calculations based upon evidence of time and distance and speed for purpose of upsetting verdict of jury as to facts.

3. Automobiles ⚿245(67)

Where person looks but does not see approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he can avoid injury to himself, question of his negligence is ordinarily one for jury.

4. Automobiles ⚿245(80)

In action for injury sustained by motorist who, when making left-hand turn at street intersection, was struck by automobile coming from the right, whether motorist was contributorily negligent *held* for jury.

◆

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Josephine L. Cooper against J. W. Stevens. From a judgment for plaintiff, defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Thomas B. Reed and L. G. Shelton, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a money judgment in favor of plaintiff for damages for personal injuries resulting from an automobile collision. The primary contention of the defendant is that under the evidence the plaintiff was guilty of contributory negligence as a matter of law.

[1] Viewing the evidence in the light most favorable to the plaintiff, it appears that the plaintiff entered the intersection of Big Dalton avenue and Merced from Big Dalton avenue and intended to turn to her left. The defendant was coming from her right on Merced. Before she entered the intersection, and just as she got to the property line, she shifted the gears of her car into second; she looked first to the right and could see nothing coming, then she started slowly into the boulevard still in second gear. Just as she got into the center of the street, and just before she made her turn, she looked again in all directions, and just as she was making her turn she saw the defendant's car. The plaintiff testified that she took a good survey of the situation before she started into the boulevard and then just as she got in the street she looked again. There was a hedge which obstructed the view before she entered the boulevard, but, when she got where she could look approximately 400 feet to the right on Merced, she looked that distance and did not see any car coming.

The defendant contends: "Mrs. Cooper's failure to make any attempt to look to the right from the time she started and her failure to see the defendant constitutes negligence as a matter of law." And he argues as follows: "She said she was traveling from 5 to 8 miles an hour and it was not to exceed 30 feet from the place where she had stopped to the center line of Merced. It therefore could not have taken her more than 5 seconds at the outside to traverse this distance. If she was going 8 miles an hour it couldn't have taken her more than 3 seconds to traverse this distance. Therefore as a matter of cold logic the defendant's automobile couldn't possibly have been farther away at the instant plaintiff started up than the defendant's car could travel in 5 seconds no matter how fast it was going in accordance with the greatest estimate placed thereon by the testimony. If the court wants to stretch a point and say that the mere fact that Tebo said the car was going 55 miles an hour when it passed his house supports an inference that it was going 55 miles an hour at all times, then it cannot be claimed that the defendant's automobile traveled more than 400 feet in 5 seconds."

[2-4] This court on appeal will not make dubious calculations based upon evidence of time and distance and speed (which evidence after all consists of mere opinions of witnesses) for the purpose of upsetting the verdict of a jury as to the facts.

Turner v. Clenell, 9 Cal.App.(2d) 736, at page 738, 50 P.(2d) 851. The plaintiff did look, did exercise some precaution for her own safety. Where a person looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance or for some other reason assumes he can avoid injury to himself, the question of his negligence or freedom from negligence is ordinarily one for the jury. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086. We find no merit in the defendant's contention.

The defendant also contends that the court committed prejudicial error in denying the defendant's motion for a nonsuit based upon the same ground, and that the court committed prejudicial error in giving certain instructions. We find no error in these respects, neither was there a miscarriage of justice.

Judgment affirmed.

I concur: WOOD, J.

17 Cal.App.2d 645

GLASS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 5647.

District Court of Appeal, Third District, California.

Nov. 25, 1936.

Hearing Denied by Supreme Court Jan. 21, 1937.

1. Courts 🔑169(1)

Action to rescind contract for purchase of land for $900 and to recover $665 paid under contract was within jurisdiction of municipal court, whether action at law for money had or received, or suit in equity to cancel and rescind contract and recover amount paid, since in either event, amount involved was less than $2,000 (Code Civ.Proc. § 89(a, c), as amended by St.1933, p. 1811).

2. Courts 🔑472(6)

Statute granting jurisdiction of certain actions to municipal court ipso facto deprived superior court thereof (Code Civ.Proc. § 89 (a, c), as amended by St.1933, p. 1811 and section 395, as amended by St.1933, p. 1840; Const. art. 6, § 5).

3. Appeal and error 🔑185(1)

Judgment rendered in action in superior court when jurisdiction was in municipal court would be reversed, though question of jurisdiction was not raised at trial or in opening brief, since judgment absolutely void on its face may be attacked anywhere, directly or collaterally (Code Civ.Proc. § 89 (a, c), as amended by St.1933, p. 1811, and section 395, as amended by St.1933, p. 1840).

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Martha W. Glass against the Bank of America National Trust & Savings Association. From a judgment in favor of the plaintiff, the defendant appeals.

Reversed.

Edmund Nelson, William C. Day, and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Garner White, of Inglewood, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1927 plaintiff, as buyer, and E. E. McCalla Company, as seller, assignor of defendant, entered into a contract in writing for the purchase and sale of a parcel of land in the county of Los Angeles for $900, payable in installments. Plaintiff, contending improvements were not made as provided in the contract, brought this action to rescind the contract and to recover the sum of $665 paid by her under the contract.

[1] Various points are urged for reversal, but we need not consider them as it appears when this action was commenced in September, 1934, and at all the times since, the jurisdiction of the subject-matter of this action was in the municipal court. The cause of action was either an action at law for money had and received to recover the sum of $665 paid thereunder or was a suit in equity to cancel and rescind a contract and to recover the amount paid. In either event, the amount involved being less than $2,000, jurisdiction is in the municipal court.

If this is an action at law, the jurisdiction is vested in the municipal court by section 89, subdivision (a) of the Code of Civil Procedure, Statutes of 1933, p. 1811, and if it is an action in equity to rescind a contract and recover money paid thereunder, the jurisdiction is vested in the municipal court by virtue of section 89, subdivision (c) of the Code of Civil Procedure.

[2] Also the territorial jurisdiction of this action is granted to the municipal court of Los Angeles county by section 395 of the Code of Civil Procedure as amended in 1933 (St.1933, p. 1840). The effect of such grant of jurisdiction to the municipal court was, ipso facto, to deprive the superior court thereof. Const., art. 6, § 5; Hopkins v. Anderson, 218 Cal. 62, 21 P.(2d) 560; Levee v. Harrier, 217 Cal. 523, 19 P.(2d) 981; Van Horn v. Justice's Court, 216 Cal. 235, 13 P.(2d) 704.

[3] The fact that the question of jurisdiction was not raised at the trial or in the opening brief is not material as "it is the universal rule that jurisdiction of the subject-matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction." Marin M. W. District v. North Coast W. Co., 178 Cal. 324, 173 P. 473, 474. "A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers." Forbes v. Hyde, 31 Cal. 342.

It therefore follows that the judgment appealed from must be reversed for lack of jurisdiction, and it is so ordered.

I concur: THOMPSON, J.

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17 Cal.App.2d 555

GLASS, City Finance Com'r, v. CITY OF FRESNO et al.

Civ. 10273.

District Court of Appeal, First District, Division 1, California.

Nov. 18, 1936.

1. Municipal corporations 🔑607

Municipality *held* to exercise governmental function in collecting and disposing of garbage, trash, and similar refuse (Const. art. 11, § 11).

2. Municipal corporations 🔑607

Collection and disposal of garbage are so intimately connected with preservation of public health that regulation thereof is proper exercise of police power.

3. Appeal and error 🔑901

Appellant has burden of pointing out wherein evidence does not sustain trial court's findings.

4. Municipal corporations 🔑63(1)

Considerations motivating municipalities in passing ordinances will not be inquired into.

5. Municipal corporations 🔑63(1)

Ordinances or by-laws enacted pursuant to competent authority will be supported by every reasonable intendment, and reasonable doubts regarding validity will be resolved in their favor.

6. Municipal corporations 🔑63(1)

Courts must uphold municipal ordinances and by-laws unless they manifestly transcend powers of enacting body.

7. Municipal corporations 🔑590

Constitution authorizing municipalities to make local, police, and sanitary regulations *held* to be self-executing and to contain direct grant of power from which city charter could in no manner detract (Const. art. 11, § 11).

8. Municipal corporations 🔑607

Ordinance providing for collection of garbage by city in its governmental capacity *held* not converted into revenue measure merely because charge of fee therefor might bring some incidental revenue to city.

9. Municipal corporations 🔑108

Evidence as to probable financial loss *held* to sustain finding that city, although charging fee for collecting garbage, did not intend to make profit therefrom, as regards contention that ordinance providing for collection of garbage should have been submitted to electors because involving operation of public or quasi public utility.

◆

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Suit by William Glass, as Finance Commissioner of the City of Fresno, against the City of Fresno and others. Judgment for defendants. The Church Company unsuccessfully sought an order setting aside the judgment and to be made a party to the suit, and it appeals.

Affirmed.

Lawrence W. Young, of Fresno, for appellant.

Claude L. Rowe, of Fresno, for respondents.

McNUTT, Justice pro tem.

The facts are stated in the opinion of the court.

Having become dissatisfied with, as unsanitary, the collection and disposal of garbage by private enterprise, the City of Fresno decided to itself undertake the work as a governmental activity. After it had embarked upon the performance of this service, suit was instituted by William Glass, as finance commissioner of the city, against the municipality and other defendant respondents to enjoin further work and to vacate the proceedings. The Church Company, a corporation, appellant here, as a taxpayer, moved the trial court for an order setting aside the judgment, and to be made a party to the suit, and it has appealed from the order of the trial court, to the end that the judgment rendered herein may be vacated.

Fresno, as a city, operates under a charter, section 108 whereof requires that, before the city may establish, acquire, or operate a public or a quasi public utility, an ordinance must be enacted by the affirmative vote of four members of the commission and be submitted to the electors of the city for its affirmance. The main contention made on this appeal is that the collection and disposal of garbage by a city constitutes the acquisition and operation of a public or a quasi public utility, and that in such work the municipality is not acting in the performance of a governmental function. The city, having resolved that garbage collection was a governmental function, and not the prosecution of work by it as a public utility, omitted to take the steps prescribed by the charter in the latter behalf, but merely, by a resolution and ordinance about to be adverted to, undertook to collect garbage in its governmental capacity rather than to permit the work to be further continued by the private enterprise.

In March, 1934, the city commission adopted a resolution favoring municipal ownership of garbage disposal and directing its proper officials to take over that work at the expiration of the then existing franchise. Some months of research followed with a view of ascertaining the best method of collection and disposal of garbage. After the city had refused to purchase the records and equipment of the old concern because it regarded the price demanded excessive, it adopted resolution No. 825 and Ordinance No. 2078, which provide, in substance, resolution 825, that public health and safety require the city to exclusively handle the disposition of the garbage, and declaring the intention of the city to exclusively dispose of the same within the city limits, in its governmental capacity. It is recited that the method theretofore in operation had proved unsatisfactory and detrimental to the health and welfare of the city, in that large accumulations of garbage and rubbish had caused influx of rats and other disease-carrying rodents, and that the proper sanitation of the city required that it collect and dispose of garbage. After such steps had been taken as were necessary to permit the city to dispose of garbage as a governmental enterprise—and those additional steps having been omitted which were necessary in the event such work was a utility rather than a governmental function—the city commissioner brought suit in the superior court to halt the operations, urging, as ground of illegality, that the commission, in voting to do the work, had not secured the vote of four members thereof in the enactment of the ordinance, and that thereafter no election of the electors of said city was held to approve the collection and disposal of garbage by the city.

The argument advanced against the method pursued is, in the main, that the city had gone into this work for a profit, and hence was not acting in its governmental capacity, but was acting as a utility, and to show that it was engaged in a profitable enterprise evidence of the receipts and disbursements of the private company was received, from which it appeared, so says the appellant, that the private concern had made 9 per cent. plus upon a capital investment of $96,881.24, and that, since the city had been authorized to expend $40,000 upon its equipment, it would be profiting to the extent of some 20 per cent. on its invested capital.

At the conclusion of the trial the court found: (1) That the city intended to collect a fee for collection; (2) that it was not true that the city was going to operate the system for profit; (3) that the city intended to operate the garbage collection system in its governmental capacity.

[1] If it appears that a municipality may, as a matter of law, collect garbage in the exercise of a governmental function, and that there was evidence before the trial court sufficient to sustain the findings above set forth, it would seem that, upon the merits, the judgment below should be sustained. It is well settled in this state that in collecting garbage, trash, and similar refuse and disposing of the same a municipality exercises a governmental function. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768. "In the collection and disposal of garbage a municipal corporation exercises governmental functions." Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108, 109. To the same effect is In re Santos, 88 Cal.App. 691, 264 P. 281. It has further been held that the authority of a city to perform such work is derived from section 11 of article 11 of the State Constitution. In re Zhizhuzza, 147 Cal. 328, 81 P. 955; In re Pedrosian, 124 Cal.App. 692, 13 P.(2d) 389.

[2] No citation of authority is necessary, though, of course, they are multitudinous, to establish that the collection and disposal of garbage are matters so intimately connected with the preservation of public health that the regulation thereof is the proper exercise of police power, and it would naturally follow as a corollary thereto that it would have the right to dispose of garbage itself, and it has been so held.

The ordinance pursuant to which this garbage collecting is undertaken provides that the city is to act in a governmental capacity, and further that, while certain fees are to be charged for the work, free collection of 60 cubic yards of rubbish monthly from its customers was provided for, which would be an extra cost to the city of not less than $10,000 a year.

The evidence in the case disclosed, through the examination of Mr. Glass, that the private company lost $29,000, more or less, the first nine months of its operation. In the franchise of the private company there was no provision for free collection of any rubbish such as is found in Ordinance No. 2078 (reporter's transcript, page 49, lines 23–26); and that the cost to the city of the free collections would be at least $10,000 a year. (Reporter's transcript, page 91, lines 1–4, and page 91, lines 13–22). The testimony of Mr. Glass, the plaintiff, further reveals that, upon starting this work, the city would, of course, be embarking upon a new enterprise, without any customers and without buying out the operating company, that it would be starting out just as had the Fresno disposal company, its predecessor, when "they lost $29,000 in the business." (Reporter's transcript, page 194, lines 11–19). In short, Mr. Glass testified that "financially and otherwise we will have disaster." (Reporter's transcript, page 195, lines 13–22.)

[3] That the trial court was justified in making the findings which appellant claims are without support in the evidence seems apparent from the following considerations: It can hardly be said that the city was undertaking the collection of garbage for profit in the face of the recitals in the ordinance that it was about to do the same in its governmental capacity. It is alleged in the answer as well that the city intended to collect "and dispose of garbage within the city of Fresno as a governmental function." (Clerk's transcript, page 19, lines 5–8.) The trial court found "that said Resolution No. 825 and said Ordinance 2078 set forth in detail the manner in which the City of Fresno, a municipal corporation, will collect and or dispose of garbage within the City of Fresno as a governmental function." (Clerk's transcript, page 44, lines 8–12.) The trial court found "the court finds that it is untrue that said City of Fresno intends to and/or is going to collect and/or dispose of garbage for profit." (Clerk's transcript, page 40, lines 24–26.) It is not pointed out by appellant wherein the evidence does not sustain the findings of the trial court, and this burden rests upon it. 2 Cal.Jur. 730.

[4-8] The argument is advanced that, notwithstanding the resolution and ordinance adverted to, it was the purpose of the commission to collect garbage for profit. The legislative enactments themselves contain recitals to the contrary, and there is evidence to the contrary, and it seems to be settled law that considerations which motivated municipal corporations to pass ordinances will not be impugned or inquired into. 43 C.J. 297. "An ordinance cannot be declared invalid because of the bad motives of the legislative body,

which enacted it." Ex parte Sumida, 177 Cal. 388, 170 P. 823, 824, where it is held, among other things, that "the title of the ordinance declares, and its terms show, * * * its purpose. * * * There may have been other designs in the minds of the board of trustees of the town in adopting the ordinance. But that question cannot be inquired into in this manner, nor can an ordinance be declared invalid because of the bad motives of the members of the legislative body which enacted it." Further it is held there can be no intent, not expressed in words, and no intent upon the part of the framers of an ordinance which does not find expression in their language. Ex parte Goodrich, 160 Cal. 410, 117 P. 451, Ann.Cas.1913A, 56; 18 Cal.Jur. 927; 43 C.J. 570. Where ordinances or by-laws have been enacted pursuant to competent authority, they will be supported by every reasonable intendment, and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances and by-laws unless they, manifestly, transcend the powers of the enacting body. 43 C.J. 570; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; In re Bruce, 54 Cal.App. 280, 201 P. 789. The power to regulate the collection of garbage comes directly from section 11 of article 11 of the State Constitution. In re Zhizhuzza, 147 Cal. 328, 81 P. 955. This provision "is self-executing and contains a direct grant of power." Denton v. Vann, 8 Cal.App. 677, 97 P. 675. The charter of Fresno could not in any manner detract from such power. 5 Cal.Jur. 576. Because the city charges a fee, and it may be hence argued that some incidental revenue would come to the municipality does not convert the ordinance into a revenue measure. Cornelius v. City of Seattle, 123 Wash. 550, 213 P. 17. Collection and disposal of refuse gathered by the city resulting in some small incidental revenue creates no municipal liability. Scibilia v. Philadelphia, 279 Pa. 549, 124 A. 273, 32 A.L.R. 981.

[9] In a word, the evidence elicited from the plaintiff who had urged, among other things, that the collection of garbage was to be undertaken for profit and that no submission to the electors of the city had been undertaken, as is necessary for the institution of a utility, to wit, that disaster, financial and otherwise, would result from the enterprise, justifies the findings which have been hereinabove set forth.

The plaintiff has not appealed, but counsel for appellant, former attorney for plaintiff, seeks to reverse the judgment below because the trial court denied the right of the taxpayer to interpose as a party, and denied, as well, his prayer that the proceedings looking toward the collection be vacated. In this behalf it may be said that if, upon the merits of the case as the same were developed by the immediate parties to the suit, it appears that the city had in a legal manner, and in the exercise of a governmental function, undertaken the collection of garbage, and that in so doing it was in all respects within the law, the presence or absence of the taxpayer appellant from the litigation becomes inconsequential.

The record (clerk's transcript, pages 48 and 49) shows that appellant challenges the judgment: (a) Insufficiency of the evidence to justify the decision and judgment; (b) the decision and judgment as against the law. The case of Madera v. Black, 181 Cal. 306, 184 P. 397, relied upon by appellant, involves a situation in which the city was denied the right to conduct a sewage system for profit, the reasoning of that case being that, since all persons in the tax unit were not receiving sewer service, the profits derived from the service and paid by the few taxpayers went into the general revenues of the city, and hence lightened the tax burdens on those who did not pay for sewer service. The circumstances of differentiation of the Madera and the instant cases are that the evidence before the trial court warranted the findings that the city was not collecting garbage for profit, that not only such was not its purpose, but that profit or an enhancement of the general revenues at the expense of some that were not receiving the service did not result.

The judgment should be, and therefore is, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

17 Cal.App.2d 732

GREEN v. SHERRITT (two cases).

Civ. 9959, 10080.

District Court of Appeal, First District, Division 1, California.

Dec. 1, 1936.

Rehearing Denied Dec. 31, 1936.

1. Attorney and client ⚷165

In action to recover compensation for legal services, fatal variance *held* to exist between complaint alleging absolute promise to pay definite fee, and proof showing that fee was payable on happening of either of two contingencies, and that happening thereof was prevented by compromise by client.

2. Attorney and client ⚷165

Plaintiff suing for compensation for legal services *held* entitled to recover on count in quantum meruit, though proof showed that fee was payable on certain contingencies, and that happening thereof was prevented by compromise by client.

3. Abatement and revival ⚷40

Although action to recover compensation for legal services was premature because filed on day before compromise settlement effected by client was consummated by deposit of papers necessary to terminate litigation, defense of prematurity *held* waived where not raised in answer.

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Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by L. C. Green against Maxwell A. Sherritt. From a judgment granting plaintiff partial relief, both parties appeal.

Affirmed.

Keyes & Erskine, of San Francisco, for appellant and cross-respondent.

Courtney L. Moore, and Francis P. Walsh, both of San Francisco, for respondent and cross-appellant.

GRAY, Justice pro tem.

The complaint, in two alternative counts, sought the recovery, upon an assignment, of $10,000 as compensation for legal services performed by Courtney L. Moore as attorney for defendant Maxwell A. Sherritt. The first count alleged that defendant, by a written contract, had employed Moore to defend him in a pending action until final judgment for a fee of $10,000; that Moore had fully performed his services and that a judgment of dismissal had been entered in that action on the same day on which the present complaint had been filed. The second count alleged that defendant had employed Moore to defend him in such action and that Moore had performed legal services of a reasonable value of $10,000. In answer to the first count, defendant denied an absolute promise to pay a fee of $10,000, and Moore's performance of the contract. He further affirmatively pleaded the terms of the contract and the circumstances under which the judgment of dismissal was obtained and, upon this basis, alleged that Moore was entitled only to a reasonable fee, to be fixed by mutual agreement, which had not yet been done, but that such fee was $1,000. As to the second count, the answer denied that the services rendered were of a reasonable value of $10,000 or any sum in excess of $1,000. A jury awarded plaintiff the sum of $7,500. Both parties appeal from the judgment entered on this verdict. Defendant claims that the judgment must be reversed because there is a fatal variance between allegation and proof and because the present action was prematurely brought. Plaintiff contends that the court erred in denying his motion for a directed verdict awarding the full contract fee of $10,000.

The evidence discloses the following facts: The action which Moore was employed to defend had been commenced previously by defendant's divorced wife to set aside a property settlement and to compel him to account for $50,000. In it, injunctions had issued impounding all of his assets in that amount. He had been represented by an attorney who had withdrawn on the third day of trial when an affidavit of poverty made by defendant in support of a preliminary motion was proven false by a broker's record which showed his then ownership of stocks. During a continuance granted defendant to enable him to get another attorney, he, after negotiations with Moore, executed the contract of employment. As to compensation, the contract provided that Moore was to receive, upon dissolution of the injunctions, $10,000 in money or in the securities impounded, or, if a judgment ordering an accounting was rendered and such accounting showed that defendant was not indebted in an amount equal to the securities impounded, Moore was entitled to a reasonable fee to be determined by mutual agreement. Before the resumption of the trial Moore and an assistant spent ten days in the study of the case and the preparation of a defense. On its resumption Moore after lengthy arguments was permitted to so amend the answer as to plead a new defense to the effect that the court should not set aside the property settlement, even if collusive, because it had been fully executed, and he was also allowed to reopen plaintiff's cross-examination. The actual trial consumed ten days and was followed by the preparation of exhaustive briefs. Thereafter the court orally directed defendant to account for $27,000 in bonds and $47,000 in cash, but upon Moore's insistence required findings before signing an interlocutory judgment. Due to the difficulty of their preparation, findings were never presented to the judge and so no interlocutory judgment was ever granted. The trial judge and opposing counsel each testified that Moore had skillfully and ably handled a complicated case. The latter felt that they had lost the case because the property settlement had not been annulled. The judge further testified that he had ordered the accounting solely because he was not satisfied with defendant's testimony that he had given $27,000 of bonds to plaintiff.

During the following six months, the parties at first through their respective attorneys as intermediaries and later directly between themselves, discussed a settlement. Through her attorney, whom she changed during the negotiations, plaintiff offered at different times to settle for $20,000 and $10,000 but defendant countered by an offer of $5,000. At her request defendant called upon plaintiff, and then renewed his offer of $5,000 which she agreed to consider. Defendant then arranged with his bank to pay plaintiff $5,000 upon her delivery of a dismissal and other papers necessary to a termination of the litigation, and caused the bank to notify her to that effect. Plaintiff's attorney continuously advised Moore as to the progress of the proposed settlement. Upon Moore's repeated inquiries defendant admitted the pendency of the negotiations but was secretive and evasive as to their progress and as to the amount involved. Moore prepared certain papers in connection with the settlement but was not permitted to directly participate therein. On June 6, 1934, Moore was advised that plaintiff had accepted defendant's offer of settlement and the present complaint was filed. However, the settlement was not consummated by a deposit of the necessary papers until the next day.

[1, 2] The first count of the complaint pleaded a written contract in which defendant absolutely promised to pay a definite fee of $10,000. Under the contract in evidence, the attorney's fee was payable upon the happening of either of two contingencies. Moore was entitled to $10,000 if as the result of his services, the injunctions were dissolved, or a reasonable fee to be determined by mutual agreement if a judgment of account was granted and an accounting showed that defendant was indebted in an amount less than the value of the impounded securities. The evidence further shows that Moore's performance and the happening of either contingency was prevented by defendant's compromise. As defendant claims, there is therefore a fatal variance between the allegations of the first count and the proof. Kirk v. Culley, 202 Cal. 501, 261 P. 994, 996. However, proof of the contingent contract and defendant's compromise support a recovery in quantum meruit as pleaded in the second count. Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86; Lessing v. Gibbons, 6 Cal.App.(2d) 598, 45 P.(2d) 258; Hall v. Orloff, 49 Cal.App. 745, 194 P. 296; Boardman v. Christin, 65 Cal.App. 413, 224 P. 97.

The authorities are divided as to the proper measure of an attorney's recovery when a client's compromise prevents the happening of the contingency upon which a specified fee is payable. Some hold that he can recover the specified fee but others hold that he is entitled only to the reasonable value of his services. 3 A.L.R. 472, 491; 40 A.L.R. 1529, 1539; Thornton on Attorneys at Law, vol. 2, p. 807; 6 C.J. 745. In Baldwin v. Bennett, 4 Cal. 392, an attorney, who had been employed for a fee contingent upon recovery of property, was held entitled to recover the full amount of the fee where the client settled the case. Upon the authority of this case, an attorney who had been employed at an agreed price to defend certain cases, but who was discharged without cause before the conclusions of the suits, was held in Webb v. Trescony, 76 Cal. 621, 18 P. 796, entitled to the full contract price. "It is true that an attorney upon his wrongful discharge under a partially performed contract may sue for damages and in some instances the full contract price may be allowed as a measure of such damages (Webb v. Trescony, 76 Cal. 621, 18 P. 796), but in the case at bar plaintiff below did not elect to avail himself of this right of action." (Kirk v. Culley, supra, 202 Cal. 501, at page 506, 261 P. 994.) "Had there been included in said contract a provision as to plaintiff's compensation, such provision upon his wrongful discharge would have measured the amount of his recovery. Kirk v. Culley, 202 Cal. 501, 261 P. 994; Webb v. Trescony, 76 Cal. 621, 18 P. 796." Elconin v. Yalen, 208 Cal. 546, 549, 282 P. 791, 792. "It is clear that plaintiff was discharged by the defendant without cause and before the full measure of service contemplated by the written agreement had been performed. Under these conditions, plaintiff would not be required to allege or prove the reasonable value of the services, which he was not permitted to perform, but would be entitled to recover the full amount called for in the contract. Countryman v. California T. Co., 35 Cal.App. 728, 170 P. 1069." McCully v. Gano, 116 Cal.App. 695, 698, 3 P.(2d) 348, 350.

At the conclusion of the testimony plaintiff moved for a directed verdict on the ground that the evidence showed the restraining orders had been released; that a judgment of dismissal had been entered and that defendant had settled the litigation. Obviously it was directed to the first cause of action, which sought a recovery upon performance of the contract, and not to the second count in quantum meruit. The motion was based upon the incorrect legal assumption that plaintiff was entitled to the fee because the contingency upon which its maturity depended had occurred through the defendant's compromise which had procured the release of the restraining orders and the judgment of dismissal. It did not assert that plaintiff was entitled to the full amount of the specified fee because that was the correct measure of damages to be applied under the count in quantum meruit. The motion was properly denied and plaintiff cannot now claim that its denial resulted in the application of an erroneous measure of damages. If plaintiff had desired that the jury be instructed as to this measure of recovery he should have submitted such instruction.

[3] The present complaint was filed the day before the accounting action was settled. Therefore, as defendant argues, plaintiff's cause of action had not yet accrued and this action was prematurely brought. Bartlett v. O. F. Savings Bank, 79 Cal. 218, 21 P. 743, 12 Am.St.Rep. 139; Cuneo v. Davis, 36 Cal.App. 351, 171 P. 1079. But it does not follow, as he further argues, that the judgment must be reversed for that reason. "It is well settled that the plea that an action has been prematurely brought is in the nature of a dilatory plea which must be specially pleaded in order to be available as a defense. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 573, 194 P. 1024; Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561." Verbeck v. Clymer, 202 Cal. 557, 562, 261 P. 1017, 1018. "The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived." Seches v. Bard, 215 Cal. 79, 81, 8 P.(2d) 835, 836. The answer does not contain any plea that the action was premature and therefore this defense was waived. Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561.

The judgments are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

17 Cal.App.2d 749

HUNTSMAN v. BOARD OF STATE HARBOR COM'RS et al.

LA FORCE v. SAME.

Civ. 10115.

District Court of Appeal, First District, Division 2, California.

Dec. 2, 1936.

Hearing Denied by Supreme Court Jan. 28, 1937.

1. Pleading 🔑8(4)

Testimony of employees of Board of State Harbor Commissioners suing for salary alleged to have been unlawfully withheld while they were working only part time, that they received no consideration for written contracts reducing number of working days per week, was a legal conclusion, and insufficient to support finding that such contracts were without consideration (St.1933, p. 712, § 14a; Civ.Code, § 1614).

2. Officers 🔑101

Employees of Board of State Harbor Commissioners, suing for salary alleged to have been unlawfully withheld while they were working only part time, had burden of proving that written contract reducing number of working days per week was without consideration (St.1933, p. 712, § 14a; Civ.Code, § 1614).

3. Officers ⚿101

Action commenced on December 28, 1934, by Board of State Harbor Commissioners' employees who signed written contract on July 1, 1932, reducing number of working days per week, for salary alleged to have been unlawfully withheld while they were working only part time, *held* barred by limitations, where last installment claimed, fell due on or before September 1, 1934 (St.1933, p. 712, § 14a; Civ.Code, § 3513).

◆

Appeal from Superior Court, San Francisco County; Edward P. Shortall, Judge.

Mandamus proceedings by Henry R. Huntsman and by J. H. La Force against the Board of State Harbor Commissioners and others which were consolidated for trial. From the judgments, the respondents appeal.

Reversed.

U. S. Webb, Atty. Gen. and Lucas E. Kilkenny, Deputy Atty. Gen., for appellants.

Ingemar E. Hoberg, of San Francisco (Carey Van Fleet, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

The respondents in the trial court, hereinafter called the defendants, have appealed from a judgment directing that a writ of mandamus issue commanding them, in effect, to pay to the petitioners in the trial court, hereinafter called the plaintiffs, certain sums in salary alleged to have been unlawfully withheld and not paid. One action, as to certain claimants, was commenced by Huntsman. Another was commenced by La Force in behalf of himself and his assignors. Both actions involve the same principles of law and differ only as to the persons interested, the amount involved, the particular position held by each. Before the trial both actions were consolidated, tried together, and appealed on one and the same record. No question of fact is involved, but many questions of law are presented. The defendants attack many findings made by the trial court and claim such findings are not supported by the evidence.

Heretofore the plaintiffs and their assignors were employees of the Board of State Harbor Commissioners which will hereinafter be referred to as the board. Each of said employees had acquired a complete civil service status and was employed on a fixed monthly compensation and, ordinarily, was engaged in the performance of his labor six days a week. They were all so engaged in operating, and it took all of them to operate, two dredges which the defendant board was operating at the port of San Francisco.

The several amounts claimed to be due to said employees they alleged accrued between July 1, 1932, and September 1, 1934, both dates inclusive. The defendants admit said sums were not paid, but they assert they were never earned because of the following facts: The funds of the board for conducting its operations at the port of San Francisco are largely obtained from tolls on the shipping in and out of said port. During the recent world-wide depression the shipping at said port became greatly reduced and the receipts in tolls were so decreased that for the fiscal year ending June 30, 1932, the board was confronted with a large deficit. With that fact before it, the board was bound to retrench. It could have legally laid off all the employees on said dredges or a part of them. § 14a. State Civil Service Act (St.1913, p. 1035, as added by St.1933, p. 712). However, looking at the interests of all of said employees it decided on a modified plan which was, after obtaining the consent of the employees, to reduce the number of working days per week. Therefore, it prepared and presented to the said employees a written contract and asked that it be executed by each of them. Later it was signed by every one of them. Omitting the signatures of the parties, said instrument was as follows:

"San Francisco, Calif.,
"July 1, 1932.

"Because of existing business conditions which have caused a substantial decrease in the revenues of the port of San Francisco, and made necessary a reduction in expenditures, including payrolls, and in order that employment may be spread as widely as possible among those at present employed by the port, rather than cause the laying off of many, we, the undersigned employees of the Board of State Harbor Commissioners, employed on a monthly basis, hereby agree to accept less than a full month, or full time employment, such time to be determined by the Board of State Harbor Commissioners, and we further agree to accept in full payment for services for the whole month, an amount to be arrived at by deducting from the full time monthly rate of pay an amount equal to one-twenty-eighth, or one-thirtieth, or one-thirty-first of the monthly salary of each employee, in accordance with the number of days in the month, for each working day upon which no service is required to be performed." On its face it purports to be a complete modification of the contract of hiring. But the plaintiffs contend it is invalid for two reasons.

[1, 2] In the first place they contend said contract was not supported by any consideration and that the trial court so found. The defendant board replies that said finding was not supported by any evidence. It asserts that over its objection and exception some of the plaintiffs were asked if they received any consideration. To that question they replied they had not. The defendant contends such answers were legal conclusions. The contention is well founded. The mode of laying off employees was, at first, prescribed by rule XVI enacted by the Civil Service Commission, hereinafter called the commission. That rule was in force during a part of the period involved in this action. Later section 14a of State Civil Service Act (Stats.1933, p. 712, c. 214) was adopted. Said statute is, for all the purposes of this case, a statutory enactment of rule XVI. The procedure prescribed by said rules of law provided a method which would result in laying off of all, or parts of, crews in such manner and order as would protect each employee in his rights of seniority and efficiency. According to the amount of funds available to the board for employing the plaintiffs or any of them, the financial interest of each individual depended on the facts (1) available funds; (2) seniority of the employee; and (3) efficiency of such employee. As to no single employee were these probative facts shown. The burden was on the plaintiffs. The contract being in writing a consideration is presumed. Civ.Code, § 1614.

[3] It is next claimed that the board should have followed the statute and should not have attempted to be and act in a manner altruistic; and that under the facts it did not follow the law. Perhaps not. But it asserts it obtained a valid contract by which it was entitled to do what it did. To that assertion the plaintiffs reply that the contract was not a wavier by the plaintiffs of their rights. Civ.Code, § 3513; Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A. (N.S.) 244, 20 Ann.Cas. 158. Conceding, without deciding the point, it must be remembered that the defendants pleaded an estoppel of the plaintiffs to assert that there was no waiver. The plaintiffs make no reply. We think the case clearly called for one. When the contract was being executed, every one interested knew all of the facts. One who ran could read. The defendant board was commanded to function. It was prohibited from running into debt. The plaintiffs saw before them a situation in which some, if not all, might be laid off. No one stopped to inquire or ascertain which ones. The board has now been placed in a position from which it may not retire nor go ahead—except to violate the official oath of every member thereof. But, whatever may be the rights and wrongs under this point involving the validity of the express contract of the parties, it is clear that the subject of the controversy is and was the legality of the layoff of the employees and their right to question it at the time this action was commenced.

In its answer the board pleaded as a defense a portion of section 14a of the State Civil Service Act as added by chapter 214, Statutes 1933, p. 712. The trial court made a finding against the board. The latter claims it was contrary to the evidence. We think it was. There is no conflict in the evidence. The only question is one of law. That question is not hard to solve. Similar questions had been presented many years before the enactment of a general civil service statute. We refer to the litigation entitled Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. The result of that action was that the defendant had to pay two salaries—one to the person discharging the duties and the other to Kate Kennedy, the person held entitled thereto. The State Civil Service Statute being general, it is clear that, in its execution, because of the possibility of errors being made by the human mind, the Legislature considered that many similar questions might arise. Hence, the reason for enactment of section 14a. While the instant case does not present the question of the payment of two salaries, it does present the question of unlawful deficits being incurred when, in the absence of such litigation, no deficit would have been incurred. In other words, if a timely objection had been made, the contract would have been rescinded, the plan abandoned, all crews discharged, and the public credit maintained. But, after the board had been placed in a position where it could not protect itself, and after the plaintiffs had taken full advantage of the purported contract, they now seek to repudiate said purported contract, to question it in its entirety, and to be paid for services which they never rendered. They may not now do so. Said section 14a in part provides as follows: "Any action brought against the appointing power or the Civil Service Commission by an employee laid off must be brought and served within one year, but in the event of such action said employee can not be compensated for the time subsequent to the date of lay off unless such action is filed and served within ninety days from the date of lay off." The last installment claimed to be due and payable fell due on or before September 1, 1934. No action was commenced prior to December 28, 1934. The last day on which such an action might legally be filed was December 1, 1934. That was nearly thirty days late as to the last item claimed. But it was nearly two years and one-half late as to the first item claimed in the first action. As to all items claimed in the second action the delays were longer. Under the uncontroverted facts, the finding on the defense of the statute of limitations should have been in favor of the defendant board.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

KEY NUMBER SYSTEM

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18 Cal.App.2d 15

PEOPLE v. BAUSELL.

Cr. 335.

District Court of Appeal, Fourth District, California.

Dec. 3, 1936.

1. Criminal law 🔑680(2)

Admission of extrajudicial inculpatory statements before admission of part of evidence which subsequently established corpus delicti *held* discretionary.

2. Receiving stolen goods 🔑8(3)

Proof of possession of stolen property together with suspicious circumstances is sufficient to justify conviction of receiving stolen property only if some evidence that the property was stolen by another is introduced to show accused did not commit larceny rather than crime charged.

3. Criminal law 🔑680(2)

To justify reception of evidence of extrajudicial statements or admissions of a defendant, prosecution is not required to establish the corpus delicti by proof of the clear and convincing character which is necessary to support a conviction, but slight or prima facie proof is sufficient.

4. Criminal law 🔑535(½)

To justify reception of evidence of extrajudicial statements or admissions of a defendant, the requisite preliminary element of corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from proven facts, and direct or positive evidence is not essential.

5. Criminal law 🔑535(2)

In prosecution for receiving stolen property, to justify reception of evidence of extrajudicial statements or admissions of accused, the requisite preliminary element of corpus delicti may be shown by evidence of a negative character.

6. Criminal law 🔑535(2)

In prosecution for receiving stolen property, evidence that dress was stolen from store and found in accused's possession under suspicious circumstances, that accused was not seen by clerk in store's dress department between time dress was last known to have been there and time dress was found in accused's possession, though department occupied small space and clerk was present throughout time in question, *held* sufficiently to establish corpus delicti to justify admission of extrajudicial inculpatory statements.

◆

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Gird Marion Bausell was convicted of receiving stolen property, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

Defendant was charged by information with having committed the offense of receiving stolen property. On arraignment he entered a plea of not guilty, waived a trial by jury, and was tried before the court, which found him guilty and pronounced judgment whereby he was sentenced to confinement in the state prison. He appeals from the judgment.

The sole contention which appellant here presents as ground for reversal of the judgment is that the trial court committed prejudicial error in admitting in evidence, over his objection, extrajudicial statements of appellant, in the absence of sufficient proof of the corpus delicti.

[1] Examination of the record discloses that evidence other than the inculpatory statements to whose admission appellant objected was produced during the trial and that thereby the following facts were developed: At approximately 4 p. m. of June 3, 1936, John Ortiz, who was an employee of the Famous Department Store in the city of Santa Ana, observed appellant walking along Bush street in said city. Appellant was then accompanied by a red-haired woman and Ortiz remembered that he had seen these same persons in the Famous store on April 28, 1936. At the time Ortiz first caught sight of appellant the former was on the opposite side of Bush street from the latter. Ortiz then walked across the street. Appellant turned, and on seeing Ortiz, said to his companion: "I will meet you at Harry's house." Appellant then crossed the street and walked ahead to the corner of the block. Ortiz followed appellant and, when the latter had arrived at the corner of the intersection, Ortiz called to appellant to stop. Appellant, however, continued to walk ahead and in a short distance began to run. Ortiz followed him into a near-by vacant garage, where he caught up with him. After they had arrived in the garage appellant dropped three dresses which were wrapped in appellant's coat that he was carrying. Ortiz ordered appellant to put on his coat, which he did, remarking at the time, "You haven't got a damn thing on me." The three dresses were subsequently identified as being the property of the J. C. Penney store in Santa Ana which is located across the street from the Famous Department Store. A witness who was an employee in the ladies' ready-to-wear department of the Penney store testified that she showed the three dresses which appellant had in his possession to three women at approximately 2:30 o'clock in the afternoon of June 3, and that it was not discovered that they had been stolen until after appellant's arrest. This witness also testified that she did not see appellant in the ladies' ready-to-wear department of the Penney store, which occupied a comparatively small space, at any time during the afternoon of June 3 after she had shown the dresses to the three women above mentioned, although she was present in the department at all times during the period that intervened between 2:30 o'clock and the time she discovered the dresses had been stolen. It may be remarked that not all of the above-narrated facts were established at the time appellant's inculpatory statements were admitted in evidence. The order of proof is, however, a matter entirely within the discretion of the trial court (People v. Watters, 202 Cal. 154, 157, 259 P. 442), and no point is made of the matter on this appeal.

[2] As herein stated, it is appellant's contention that the above-described evidence is not sufficient to establish the necessary fact that the crime of receiving stolen property had been committed in order to justify the admission in evidence of appellant's extrajudicial statements wherein he admitted that he had received the dresses from a woman and "had a good idea that they were hot." Appellant concedes that the evidence produced by the prosecution, other than that whereby his extrajudicial statements were proven, was sufficient to establish, first, that the dresses were stolen, second, that they were found in appellant's possession near the premises from which they were stolen within a short time after they were last seen in the store of the owner, third, appellant's possession of them was attended by suspicious circumstances. He contends, however, that there is no evidence other than his extrajudicial statements which in any respect tended to prove that some person other than himself had stolen the property and that therefore a necessary element of the crime with which he was charged, viz.: felonious reception, was lacking, hence the required proof of the corpus delicti was not made out and the admission of his extrajudicial statements was erroneous. With this contention we cannot agree. The case of People v. Jacobs, 73 Cal.App. 334, 238 P. 770, upon which appellant relies, is authority for the proposition that it is the rule in California that proof of possession of stolen property together with suspicious circumstances is sufficient to justify a conviction of the crime of receiving stolen property but that

the rule is not applicable unless there is some evidence that the property which is found in the possession of the accused was stolen by some person other than the individual charged with illicit reception. It is obvious that the limitation on the application of the rule is proper. The very nature of the crime of illicit reception furnishes ample reason for the existence of the limitation. The gist of the offense is that an accused shall have received the property from another with guilty knowledge. Possession of stolen property, even when accompanied by suspicious circumstances, does not of itself furnish sufficient proof of the corpus delicti, since such evidence points just as strongly to larceny by the accused as it does to his guilt of the crime of felonious reception, and the two crimes are inconsistent. Obviously, if a person is actually a thief he cannot possibly be guilty of receiving the very property which he himself stole.

Our disinclination to agree with appellant's contention that there was a failure of proof of the corpus delicti arises from the fact that we cannot concede that the record is entirely bare of proof that some person other than himself stole the property which was found in his possession. Evidence was produced which showed that the three dresses were displayed to three women about 2:30 p. m. of June 3d, that at no time between 2:30 p. m. and 4 p. m. of the above day was appellant seen in the particular department of the store where the dresses were kept, although the ladies' ready-to-wear department occupied a relatively small space, that at approximately 4 p. m. of the same day appellant was seen on a street near the store from which the dresses were stolen and at this time he was accompanied by a woman from whom he separated immediately after he observed the witness Ortiz.

[3-6] It is apparent that the circumstance that appellant was not seen in the ladies' ready-to-wear department of the Penney store in the comparatively short space of time that elapsed between the time that the dresses were exhibited to prospective female customers and the time when he was seen walking along a near-by street with his female companion is perhaps the only evidence which may fairly be said to point to the fact that the dresses were actually stolen by some one other than appellant. Admittedly, this evidence is not only circumstantial but is purely negative in character. Nevertheless, it is some evidence that tends to prove that some person other than appellant stole the dresses. It was shown that the ladies' ready-to-wear department of the store occupied a comparatively small space, that only two employees had charge of it, and that the employee who was available as a witness at the time of trial did not leave her post of duty between the time she exhibited the dresses and the time it was discovered they had been stolen. It is settled in California by a long line of decisions that, to justify the reception of evidence of extrajudicial statements or admissions of a defendant, the prosecution is not required to establish the corpus delicti by proof of the clear and convincing character which is necessary to support a conviction, but that slight or prima facie proof of the corpus delicti is sufficient. People v. Selby, 198 Cal. 426, 434, 245 P. 426; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Hill, 2 Cal. App.(2d) 141, 155, 37 P.(2d) 849; People v. Bonilla, 114 Cal.App. 219, 225, 299 P. 784; People v. Wilcoxin, 69 Cal.App. 267, 231 P. 377; People v. Alba, 52 Cal.App. 603, 199 P. 894. It is also settled that the requisite preliminary element of corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from proven facts. People v. Vicunia, 105 Cal.App. 145, 286 P. 1061; People v. Ford, 85 Cal.App. 258, 258 P. 1111. Direct or positive evidence is not essential. People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Hudson, 139 Cal.App. 543, 34 P.(2d) 741. Furthermore it should be noted that the prosecution in making a prima facie showing of the corpus delicti was not required to go further than to furnish proof that appellant himself did not steal the property. In other words, the nature of the particular offense of which appellant was accused is such that the corpus delicti may be shown by proof of a negative, and in such case evidence of a negative character is sufficient. People v. McWilliams, 117 Cal.App. 732, 4 P.(2d) 601; People v. Macbeth, 104 Cal.App. 690, 286 P. 448.

The judgment from which this appeal is taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

CASSARETTO v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10185.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1936.

Hearing Denied by Supreme Court Feb. 1, 1937.

1. Mechanics' liens 🔑**5**

Public Works Act must be read in light of entire scheme provided by law for protection of mechanics, materialmen, and others (Gen.Laws 1931, Act 6423, § 2).

2. Mechanics' liens 🔑**198**

Claim for balance due plaintiff for hauling sand for materialman, who sold sand to city and county for use in public improvements, *held* entitled to priority over claim of assignee of materialman, notwithstanding assignee's notice of assignment was given to controller prior to time plaintiff filed notice to withhold with controller (Gen.Laws 1931, Act 6423, § 2).

3. Mechanics' liens 🔑**5**

Public Works Act should be liberally construed to end that general purpose and object of act may not be defeated (Gen.Laws 1931, Act 6423, § 2).

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John Cassaretto, against the City and County of San Francisco and another. From an adverse judgment, plaintiff appeals.

Reversed.

H. W. Hutton, of San Francisco, for appellant.

Nat Schmulowitz, George B. Harris, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondent Canadian Bank of Commerce.

SPENCE, Justice.

Plaintiff sought to recover money held by defendant City and County of San Francisco pursuant to a notice to withhold filed by plaintiff with the controller. Said defendant had refused to make payment because of conflicting claims to the fund but consented to make payment to the party determined to be entitled thereto. Defendant the Canadian Bank of Commerce claimed the fund by virtue of an assignment from E. D. McCaddam, who was doing business under the name of Antioch Sand Company. The cause was tried by the court sitting without a jury and resulted in judgment against plaintiff and in favor of defendant the Canadian Bank of Commerce. Plaintiff appeals from said judgment.

The obligation of defendant City and County of San Francisco to pay the money in question arose out of the furnishing of sand to said city and county by said E. D. McCaddam, doing business as Antioch Sand Company, for use in making public improvements. Purchase orders were issued from month to month to the Antioch Sand Company specifying the amount of sand required. The sand was hauled by plaintiff from Antioch to its destination in said city and county under an agreement between plaintiff and the Antioch Sand Company. The amount remaining due to plaintiff from the Antioch Sand Company for hauling the sand was in excess of the amount remaining due from said city and county upon its agreement to purchase the sand from the Antioch Sand Company. The last delivery was made on August 25, 1933, and plaintiff's notice to withhold was filed on August 28, 1933. The claim of defendant the Canadian Bank of Commerce was based upon an assignment executed in its favor by Antioch Sand Company on May 1, 1933, notice of which assignment was given to the controller on May 2, 1933.

Numerous points are discussed in the briefs but, if it be assumed that respondent held a valid assignment, the controlling question is that of priority as between appellant as claimant under the notice to withhold and respondent as claimant under the assignment. Many of the cases cited by respondent involved controversies which arose before the effective date of the amendment to the so-called Public Works Act in 1925 (Stats.1925, p. 538, Deering's Gen. Laws 1931, Act 6423), and, if the provisions of that act as amended are applicable, said authorities are not in point. In section 2 of said act as amended are found the following provisions: "No assignment by the contractor of the whole or any part of the money due him or to be due him under the contract, or for 'extras' in connection therewith, whether made before a verified claim is filed as provided for herein or after said claim is filed, shall be held to take priority over claims filed under this section and such assignment shall have no binding force in so far as the rights of the claimants who file claims hereunder, or their assigns, are concerned."

[1-3] It is appellant's contention that said provisions are applicable under the facts before us and that appellant's claim is therefore entitled to priority over that of the respondent assignee. We are of the opinion that this contention must be sustained. The Public Works Act must be read in the light of the entire scheme provided by law for the protection of mechanics, materialmen, and others. Said act makes numerous references to the sections of the Code of Civil Procedure relating to that subject and it has been said by the Supreme Court in Globe Indemnity Co. v. Hanify, 217 Cal. 721, at page 730, 20 P. (2d) 689, 692, that it is "part of the Mechanics' Lien Law of the state." See, also, Sunset Lumber Co. v. Smith, 95 Cal. App. 307, 272 P. 1068. Reading together all of the provisions of the law on this general subject, we believe it is clear that the provisions of the Public Works Act above set forth were intended to settle the question of priority under the circumstances before us. If it may be said that there is any doubt on the subject, we believe it to be the duty of the courts to liberally construe these provisions to the end that the general purpose and object of these laws may not be defeated. 17 Cal.Jur. 17.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

17 Cal.App.2d 612

COLBY v. PIERCE.

Civ. 1643.

District Court of Appeal, Fourth District, California.

Nov. 20, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

Judgment ⟹388

Order dismissing action for want of prosecution constituted "final judgment," effective for all purposes when entered on minutes of court, and could not be vacated by trial court's ex parte order, entered without notice to parties, notwithstanding order was erroneous (Code Civ.Proc. § 582, and §§ 581 (amended by St.1935, p. 1954), 583 (amended by St. 1933, p. 853).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Lucille M. Colby against Harrison M. Pierce. From orders of the trial court entered after entry of order dismissing the cause for want of prosecution, the defendant appeals.

Orders reversed.

See, also, 59 P.(2d) 1046.

Swing & Swing, of San Bernardino, for appellant.

Miguel Estudillo, of Riverside, and Everett H. Smith, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from two orders made by the trial court after it had made and entered an order dismissing the cause for want of prosecution.

The record shows that on November 15, 1933, plaintiff commenced her action to recover damages from defendant, a physician, for malpractice occurring in April, 1933. The defendant appeared by demurrer on November 22, 1933. On October 16, 1935, there was a substitution of attorneys for plaintiff. On January 21, 1936, plaintiff filed her amended complaint. On February 18, 1936, defendant demurred to the amended complaint. No action was taken by either party to bring the first demurrer on for hearing.

On January 26, 1936, defendant served a notice of motion to dismiss the action for lack of prosecution under the provisions of section 583 of the Code of Civil Procedure, as amended by St.1933, p. 853. Supporting affidavits were served with the notice of motion. On February 4th plaintiff served counter affidavits in opposition to the motion. The motion to dismiss was heard, argued by counsel for both parties, and submitted on February 10th. It was granted by the trial judge and the order of dismissal was entered on the minutes the same day. On February 11, 1936, without notice to defendant or his counsel or the presence of either of them in court, the trial judge vacated his order of February 10th dismissing the action, and reopened the case for further hearing. On February 11th the clerk of the court notified both parties of the order made that day, and that the motion to dismiss and the demurrer had been set for hearing on February 17, 1936. On February 17th the motion to dismiss was denied and the demurrer ordered placed on the law and motion calendar of February 24, 1936. Defendant has appealed from the order of February 11, and the order of February 17, 1936. Both appeals are presented on a single record. No appeal was taken from the order of February 10th, and it is not before us for review.

It is now the settled law in California that where an action is dismissed under the provisions of section 583 of the Code of Civil Procedure, as amended in 1933 (and the provisions of certain other sections of the same chapter of that Code) the order of dismissal is the judgment in the case and becomes effective for all purposes when entered upon the minutes of the court. Southern Pacific R. R. Co. v. Willett, 216 Cal. 387, 14 P.(2d) 526; Finch v. Ekstrom, 115 Cal.App. 381, 1 P.(2d) 516; King v. Superior Court, 12 Cal.App.(2d) 501, 56 P.(2d) 268; Long v. Superior Court (Cal.App.) 58 P.(2d) 952; Colby v. Pierce (Cal.App.) 59 P.(2d) 1046. The last-cited case was a motion to dismiss the appeal in the instant case and probably establishes the law of the case in so far as the question of the order of February 10, 1936, constituting the final judgment in the action is concerned. The authorities just cited firmly establish the rule under which it must be held that the order of February 10th was a final judgment as it was entered on the minutes of the court. That it was an erroneous judgment is also settled by the case of Evans v. Superior Court (Cal.App.) 59 P.(2d) 159.

The cases of Robinson v. Southland Produce Co., 112 Cal.App. 106, 296 P. 303, and Fisch & Co., Ltd., v. Superior Court, 6 Cal.App.(2d) 21, 43 P.(2d) 855, are authority for the conclusion that a judgment of dismissal once having been entered cannot be vacated in the manner attempted by the trial court in the instant case. The order of dismissal having been made and entered, it became a final judgment. Even though it was an erroneous judgment, it was not void on its face. The trial court had jurisdiction to make it. It expressed and carried into effect the purpose and intent of the trial court of that date. Although it was an erroneous judgment, it was regularly rendered and entered and could only be attacked in one of the ways recognized by law and could not be vacated by an ex parte order of the trial judge and without notice to the parties. Stevens v. Superior Court (Cal.Sup.) 59 P.(2d) 988.

The case of Egan v. McCray, 220 Cal. 546, 31 P.(2d) 1041, does not conflict with the conclusions we have reached. In that case the order of dismissal was not made under any of the provisions of the Code of Civil Procedure pertinent to the instant case (section 582, Code Civ.Proc., section 581 as amended by St.1935, p. 1954, and section 583 as amended by St.1933, p. 853), and the Supreme Court was there of the opinion that a judgment had not been entered.

The order of the trial court made on February 11, 1936, and the order made on February 17, 1936, are both reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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17 Cal.App.2d 703

In re WEAR'S ESTATE.

Civ. 10318.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1936.

Hearing Denied by Supreme Court Jan. 28, 1937.

Executors and administrators ⊂=507(4)

Decree settling executor's account based on report of referee *held* erroneous where referee testified that he did not determine executor's alleged right under trust agreement with testatrix, whereby executor was to receive certain portion of property in consideration of having loaned money to testatrix, and court failed to determine executor's right under such trust agreement.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the Estate of Katie Richards Wear, alias, deceased, and in the matter of exceptions to the first account of Edward Rolkin, executor of the will of Katie Richards Wear, alias, deceased, by Theodore J. Miller, and others. From a decree settling the account, the executor appeals.

Reversed.

J. F. Riley, of San Francisco, for appellant.

James M. Hanley and William B. Hornblower, both of San Francisco, for respondents.

PER CURIAM.

This is an appeal by an executor from a decree settling his account.

The correctness of the account depends largely, if not entirely, on the question of whether the settlement thereof shall be controlled by certain written trust agreements entered into between the decedent and the executor some ten years prior to the decedent's death. The circumstances leading up to the execution of said agreements and relating to the subsequent operation of the trust relationship created thereby were as follows: In 1920 Mrs. Wear, the decedent, who was then Mrs. Richards, owned considerable property in and about Sonoma county. Much of it was situate in Agua Caliente, and consisted in part of a hotel and hotel cottages, against which there was a deed of trust, securing a promissory note for $27,800, and a mortgage securing a note for $3,525. The holders of these securities were demanding payment and threatening foreclosure, and Mrs. Wear was without funds to meet their demands. In that situation and on January 31, 1920, Mrs. Wear and appellant entered into a written trust agreement whereby appellant agreed to advance the necessary money to purchase the two notes above mentioned and the instruments given to secure payment of the same, in consideration of which Mrs. Wear agreed to pay said notes to appellant as provided therein; furthermore, she agreed that she would proceed to sell all of her properties in Sonoma county at a price satisfactory to appellant, and to apply all money received therefrom to the payment of said notes, unless appellant agreed to a different disposition of the proceeds of the sales. Continuing, the agreement provided that after said notes were liquidated all money received from said sales should be divided between them as follows: 75 per cent. to Mrs. Wear and 25 per cent. to appellant; and that if the lands were not sold within a period of six years from the date of said agreement, Mrs. Wear would convey to appellant an undivided one-fourth interest in the lands remaining unsold, free, and clear of encumbrance, unless the parties in writing agreed otherwise. The agreement concluded with the stipulation that nothing therein should be construed as preventing foreclosure proceedings by appellant in the event of default in payment of said notes. In confirmation of said agreement appellant put up the amount of cash necessary to purchase the notes, trust deed, and mortgage, and the same were assigned to him. Thereupon the parties proceeded to sell the properties and the proceeds of the sales were paid to appellant. On September 29, 1922, the hotel property was sold to Thomas H. Corcoran and wife, and in payment of the balance of the purchase price their note was taken for $40,000 secured by a deed of trust on the real property and a chattel mortgage on the hotel furnishings. The note, deed of trust, and mortgage were made out to appellant and delivered to him, and he executed and delivered to Mrs. Wear a written declaration that he held the same only as security for the money so advanced by him under the terms of the trust agreement. Thereafter numerous payments were made on the note by Corcoran, so that on December 31, 1927, the principal thereof had been reduced to $30,000. Mrs. Wear died on April 7, 1930, and at the time of her death the remaining unpaid balance on the Corcoran note was $26,000. Besides advancing the money necessary to acquire the outstanding obligations against the hotel property, appellant advanced other large sums to Mrs. Wear personally and for her use and benefit; and he kept an account book wherein he entered all of the items of receipt and disbursement relating to the operation of the trust, and this continued up to the time of Mrs. Wear's death. No final settlement of their accounts was ever had between appellant and Mrs. Wear, nor did they ever take any steps toward terminating the trust relationship.

Upon the death of Mrs. Wear appellant offered her will for probate and a contest was filed thereto. Pending the determination of the contest, appellant, who had been nominated in the will as executor, was appointed special administrator. The will was sustained; whereupon appellant, having been appointed executor, filed his final account as special administrator, and it was allowed and approved as filed. Approximately two years after his appointment as executor he rendered his account as such, wherein it was stated among other things, that the amount of money coming into his hands at the time of his appointment was $1,529.43; that the estate's interest in the unpaid balance of the Corcoran note, which at that time was $19,000, amounted to $8,740; and that the estate was the owner of an interest (without specifying the extent thereof) in three parcels of real property therein described. Two of the legatees under the will filed exceptions to the account, and especially to the items above enumerated, and it then became apparent that a determination of the issues thus raised with respect to the account could not be had until appellant's accounts as trustee were settled; whereupon, and on motion of the contestants, the court appointed a referee "to examine the accounts of said executor in his capacity as Trustee, as Special Administrator and as Executor, and swear witnesses on said examination and make a report thereon, subject to the confirmation of this court." In pursuance to such appointment the referee submitted his report, which was later supplemented by another report. In those reports he stated that the amount of cash coming into the hands of the executor at the time of his appointment was $5,395.75, and not $1,529.43 as claimed by the executor; also that the estate's interest in the Corcoran note was $19,000 and not $8,740 as claimed by the executor. But in his report, as well as in giving his testimony in court in explanation of it, he clearly stated that in arriving at the above conclusions he had ignored entirely the provisions of the trust agreement whereunder it was agreed that after the payment of the notes which appellant had purchased he was entitled to one-fourth of all moneys received from the sale of lands, and at the end of six years was entitled to a deed to an undivided one-fourth interest in the lands remaining undisposed of. The reason assigned by the referee in his report for having prepared the same without giving any consideration to the terms of the trust agreement was that he did not feel competent to decide the question of the legal rights of the decedent and appellant thereunder; and in giving his testimony in explanation of his report he made it clear that if it had been prepared so as to give effect to the terms of the trust agreement, a different result would have been reached. The following is his testimony in this regard:

"Q. Now, assuming the fact to be that on December the 31st, 1927—there is one other thing—you also did not take into consideration the agreement between Mr. Rolkin [the appellant] and Mrs. Richards by which under certain conditions he was to receive one-fourth of all moneys received, did you? A. I did not.

"Q. Had that been taken into consideration, the results of your findings would have been very different, would they not? A. Yes sir.

"Q. In other words, the findings as you have presented them, will have to be changed according to the ruling which the Court might make upon the application of that agreement—that is the fact? A. Yes, sir; I said in my report that I did not feel myself competent to rule on that question. * * *

"Q. Then, did you in your account after that time or in your calculations allow Mr. Rolkin any portion of the money received by him—that is, credit him with one-fourth of any portion? A. No, I did not credit him with one-fourth interest at any time.

"Q. At any time during any of your calculations? A. No.

"Q. Then, to go back to my other question, upon the interpretation of this agreement would depend very largely the conclusion which would be reached, would it not? A. Undoubtedly. * * *

"Q. If, as a matter of fact, the Court should find that Mr. Rolkin was entitled to a fourth interest in the land, your account would have to be changed? A. Yes, sir, it would. * * *

"Q. Now, the fact is that as you have stated in your report, you have left up to the Court the determination as to the interpretation of the agreement between those two parties? A. Yes, sir, exactly. * * *

"Q. That is that the report which you have rendered is incomplete in this, that upon what the Court determines the application of that agreement would be, would depend upon what your report would be? A. Exactly.

"Q. In other words, you did not take that into consideration at all and therefore your report is necessarily incomplete—that is the first one? A. Yes, sir. * * *

"Q. And that fully appears in every condition attached to the report that you rendered? A. Yes, sir.

"Q. And you left the determination of that point up to the Court because you felt you were not competent to pass on that question of law? A. Exactly."

And continuing, the referee stated that he would make the alternative calculations in the event the court ruled that the provisions of the trust agreement were controlling. But admittedly the court never did rule upon that question. Later it adopted the report as submitted and entered its decree of settlement accordingly. Moreover, the record discloses that subsequent to the submission of his reports made pursuant to his appointment by the court, the referee was employed by appellant to prepare a restatement of his account as trustee according to the provisions of the trust instrument, and the referee prepared such a report, but in doing so he departed from the method pursued by appellant in keeping the accounts in the book above referred to. In this respect the referee states in the beginning of his report: "In this restatement I have departed from the method pursued by you in the keeping of your accounts, and have first applied all moneys received by you for her benefit against the notes: after the liquidation of said notes all receipts have been apportioned as provided in the agreement of January 31st, 1920, viz. seventy five per cent to Mrs. Richards and twenty five per cent to yourself; her seventy five per cent being credited against all other sums advanced by you to her on various occasions. This procedure has been carried through to include your reports as Special Administrator and Executor of the estate of Katie Richards Wear deceased. * * *" And the result obtained by such restatement is set forth at the end of the report as follows: "At the time of death of Mrs. Katie Richards Wear, the amount due on the Corcoran note was $26,000.00. At the same time, assuming that the provisions of the agreement of January 1st, 1920, had been adhered to in the accounting, Mrs. Wear would be indebted to Mr. Rolkin, for moneys advanced by him and interest, in the sum of $21,560.73." In further explanation of the restatement of the account, the referee testified:

"A. Mr. Rolkin asked me to make up a new account crediting the note that Mrs. Wear had signed with all of the receipts that came to him for her benefit until those notes were liquidated. After that I was to credit all further advancements that he had made to Mrs. Wear with her proportion as stated in the agreement of January 31st, 1920, wherein Mr. Rolkin was to get twenty-five per cent and Mrs. Wear seventy-five per cent. I was to credit Mrs. Wear's seventy-five per cent to further advancements.

"Q. That means that under the first account that you have rendered to this Court you left the interpretation of that agreement up to this Court? A. Certainly."

And continuing, the witness stated that the method of calculation followed by him in the preparation of the restatement was the one which should have been followed by appellant under the provisions of the trust agreement; and if so followed a result would have been obtained different from the one reached in the reports prepared under the court appointment.

It would seem, therefore, as appellant contends, that in the foregoing state of the record, it was essential for the court to determine and find first how far, if at all, the terms of the trust agreement were controlling in the settlement of the accounts between appellant as trustee and the estate, before the executor's account could be properly settled; and respondents concede that no such determination and finding was ever made. In this regard they say that since the court made its finding that the trust relationship existed, all it was called upon to do then was to determine the correctness of the account as presented, the amount of cash and property that should be on hand, and the extent of appellant's interest therein, if any; and that the matter of determining the effect of the trust instrument of January 31, 1920, would come properly before the court at the hearing of the petition for final distribution. But respondents fail to explain by what process of calculation it was possible to correctly ascertain the amount of cash with which the executor should be charged or the extent of his interest in the remaining assets of the estate without first determining the legal question of whether appellant was entitled to the one-fourth share granted him under the terms of the trust agreement. Evidently the referee took the position it could not be done. It is our opinion, therefore, that in the absence of such determination, the decree of settlement does not rest on a sound basis.

It may be stated, however, in this connection, that we found no error in the court's ruling in disallowing the $300 fee claimed by appellant for services rendered in selling land under foreclosure proceedings, nor in the conclusion it reached as to the asserted oral settlement of December 31, 1927. Nor, assuming the terms of the trust agreement are in no manner controlling, can it be said that the court's findings are unsupported with reference to the amount of money coming into the hands of the executor at the time of his appointment, or as to the amount of the estate's interest in the Corcoran note. But, if upon further proceedings, it be determined that the rights of the parties, in the settlement of said accounts, shall be measured by the terms of said trust agreement, the findings as to these two latter items must necessarily be different.

For the reasons and upon the grounds stated, the decree of settlement is reversed.

KEY NUMBER SYSTEM

17 Cal.App.2d 738

FRAGUGLIA v. SALA.

Civ. 10216.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1936.

Rehearing Denied Dec. 31, 1936.

Hearing Denied by Supreme Court Jan. 28, 1937.

1. Assault and battery ⇨5

Defendant sub-boss while on garbage truck giving plaintiff, in box of truck sorting garbage, directions, did not commit assault, even though he reached for pitchfork, in absence of evidence disclosing purpose to attack plaintiff with pitchfork (Pen. Code, § 240).

2. Assault and battery ⇨13

Defendant sub-boss when stepping off of garbage truck in which plaintiff was sorting garbage retired to the wall, as regards liability for subsequent alleged assault (Pen. Code, § 240).

3. Assault and battery ⇨13

Where plaintiff whose duty required him to sort garbage in truck left truck and advanced with pitchfork raised toward sub-boss, defendant sub-boss was not bound to retreat, but was entitled to stand and defend himself and to act as reasonable man on circumstances as they then appeared to him.

4. Assault and battery ⇨43(6)

In action for assault and battery based on fight occurring after defendant sub-boss had left garbage truck in which plaintiff was working and was followed by plaintiff, plaintiff's instruction permitting jury to find that necessity for assault was of sub-boss' creation and prohibiting finding for defendant on ground of self-defense, if defendant voluntarily invited difficulty or provoked or commenced it, *held* either improper interpretation of evidence or inapplicable to evidence.

5. Assault and battery ⇨43(2)

In action for assault and battery, self-defense instruction making no reference to facts as they appeared to defendant but holding defendant bound by actual facts without regard to appearances *held* improper.

6. Trial ⇨252(8)

In action for assault and battery containing no evidence that defendant returned to combat, instruction addressed to one who returns to combat *held* improper.

7. Trial ⇨253(9)

In action for assault and battery, instruction addressed to subject of use of excessive force but failing to take into consideration all circumstances of case *held* improper.

8. Assault and battery ⇨13

Force that one may use in self-defense is that which reasonably appears necessary, in view of all circumstances of case, to prevent impending injury.

9. Assault and battery ⇨13

One who, in acting in self-defense, uses force in excess of that which he is privileged to use, is liable for so much of force used as is excessive.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Giuseppe Fraguglia against Angelo Sala. Judgment for plaintiff, and defendant appeals.

Reversed.

O'Gara & De Martini, of San Francisco, for appellant.

Anthony S. Devoto, of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment awarding damages for assault and battery the defendant has appealed.

The fight occurred about 6:15 on Friday morning, January 11, 1935, on the south side of Cornwall street, between Second avenue and Third avenue, in the Richmond district of San Francisco.

The plaintiff and defendant were stockholders and employees of the Sunset Scavenger Company. For several years they had worked together on the same garbage truck collecting garbage from customers. On the morning in question, it being his turn, Fraguglia had the job of remaining in the box of the truck and of spreading the garbage and separating and stowing away in barrels or blankets the bottles and waste paper and other salvageable material which he might find in the garbage brought in. The duty of gathering the garbage and depositing it in the truck rested upon Sala and three other men, Renati, Scocca, and Campi. Renati was the so-called "boss of the truck." Sala was second in command. Scocca was a regular member of the crew and usually drove the truck, besides gathering garbage. Campi was an extra man employed, not by the company, but by the other four to lighten their labors around Christmas time when their work was particularly heavy.

The truck was halted near an electric light supported by a bracket fixed to a wooden pole rising from the sidewalk on the south side of Cornwall street and located 104 feet 11 inches from the westerly line of Second avenue. The truck stood near and parallel to the edge of the curb, the front of the truck facing in an easterly direction. It was still dark, but the electric light supplied the light required.

Sala returned to the truck bearing his blanket of garbage and deposited his load in the box of the truck. Fraguglia was in the box of the truck at this time. Sala spoke to Fraguglia. The two parties differ as to what words were used by Sala and just what immediately followed. Fraguglia testified that Sala said: "Are you still on the truck?" Sala testified he said: "Do I have to come in and help you?" Further words passed as to which the parties likewise differ. Fraguglia grabbed a heavy, short-handled pitchfork used for spreading the garbage and which was in a barrel standing on the floor of the box of the garbage truck. Fraguglia claims Sala reached for the fork before he, Fraguglia, got it. Sala testified he did not reach for the fork and could not have reached it if he had tried. Sala also testified that Fraguglia cried out that he would kill Sala and made a jump and grabbed hold of the fork; that, having the fork, Fraguglia came after him to strike him, that he drew out of the way and Fraguglia sought to stick him in the stomach, whereupon he jumped down to the sidewalk. On the other hand Fraguglia testified that, taking the fork, he advanced toward Sala and ordered him to get down from the truck and that he had to tell him the second time to get down; that then Sala got down. Fraguglia testified Sala then looked in the tool box. Fraguglia in a short time, taking the pitchfork in his hand, went down. He testified he took the pitchfork with him for the purpose of protecting himself.

Sala's testimony is that after he landed on the sidewalk he started to go to gather garbage; that he heard the noise of Fraguglia's landing on the sidewalk, and turned and saw Fraguglia coming right after him with the pitchfork raised; that he faced Fraguglia who was but a few feet away and was coming after him near the front of the radiator of the truck. He also testified that Fraguglia struck at him with the pitchfork and the blow fell heavily upon Sala's left shoulder. At or about the same time Sala grasped with his left hand the handle of the pitchfork and with his right fist struck Fraguglia two or three blows in the face between the nose and the left ear, and Fraguglia fell to the pavement in front of the radiator, between the truck and the safety zone; he tied to take the pitchfork away from Fraguglia and told him twice to let go and Fraguglia refused; he did not strike or kick Fraguglia after he fell to the ground; he did not jab or poke him in the eye; and Renati and he together took the fork away from Fraguglia.

On the other hand, Fraguglia testified he walked down the steps of the truck to the pavement; that he looked to the rear of the truck for Sala and not seeing him he started to go toward the apartment house where Renati was when suddenly he saw Sala, about 3 feet away, rising up from a kneeling posture in front of the radiator; that Sala raised his hands and came toward him and he raised the pitchfork and told him to stand back; that he started to "retreat" and he tripped on the curb of the sidewalk; that as he was falling the pitchfork fell on Sala's shoulder; that only his right hand touched the sidewalk; that Sala grasped the handle of the pitchfork which Fraguglia still held onto with his left hand; and that Sala dragged him from the sidewalk to the place in front of the truck where he lay when Renati came; that Sala tried to take the pitchfork from him and told him to let go of the fork; that he and Sala were still struggling for the fork when Renati came and took it away from them; that after he came to rest in front of the radiator and before Renati arrived, Sala kicked him and struck with his fist and with his fingers extended poked or jabbed him in the eye; that he felt the pain at once; and that his eyes up to that time had been all right.

[1, 2] It will be noted that there is not a particle of conflict in the evidence on the following material facts. Sala was a subboss entitled to and in duty bound to give directions to those below him. Conceding that during the morning of the controversy he gave many different directions to the plaintiff, Sala was entirely within his rights. When standing on the truck and giving to the plaintiff the last direction the plaintiff became offended. Assuming, as contended by the plaintiff, that at about the same instant Sala reached for the pitchfork, the incident was immaterial. Being second in command he was entitled to reach for and use the pitchfork. The evidence does not disclose any purpose on his part to attack the plaintiff with the pitchfork. As to Sala, all of the incidents occurring when Sala was on the truck show no "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Pen.Code, § 240; People v. Bradbury, 151 Cal. 675, 676, 91 P. 497. Down to the time that Sala stepped off of the truck it is clear he had committed no assault. Furthermore, when he did step off of the truck such act was in the nature of retiring to the wall. People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L.R.A. 403.

[3] We pass then to the consideration of the facts involved in the second division of the controversy. On that particular morning it was the privilege and the duty of the plaintiff to remain in the box of the truck and sort the garbage. In doing so the plaintiff was entitled to use a pitchfork. Outside of the box of the truck he had no duty to perform with a pitchfork. Without disclosing his intentions or purposes, soon after Sala stepped off of the truck the plaintiff, with the pitchfork in hand, climbed out of the box and down off of the truck and, as stated by him, he was shortly confronting Sala, a space of only 3 feet separating them. At that time the plaintiff had the fork raised and was advancing when first observed by Sala. The latter was not bound to retreat but was entitled to stand and defend himself. From the moment Sala saw Fraguglia the question as to which one of the two made the next advance is not determinative of the rights of the parties. Sala was entitled to act as a reasonable man on the circumstances as they then appeared to him. People v. Sherman, 103 Cal. 409, 37 P. 388. It is clear therefore that Sala was entitled to a set of instructions giving a clear-cut statement of the law regarding self-defense.

[4] The defendant complains because the trial court gave, at the request of the plaintiff, instruction XVI. It was as follows:

"The law does not permit any person to voluntarily seek or invite a combat, or to put himself in the way of being assaulted, with the purpose that he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is set off and induced by the party, by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity being of his own creation, will not operate to excuse him.

"Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, and if you further believe from the evidence that he provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him on the ground of self-defense.

"In determining who commenced or provoked the difficulty, you should take into consideration all the facts and circumstances in evidence before you."

Conceding that the instruction as framed stated correct rules of law, the defendant earnestly contends that said instruction stated facts that do not appear in the record; that is, it was addressed to issues not involved in the action, and it was under the facts of the instant case highly prejudicial to the defendant. People v. Roe, 189 Cal. 548, 558, 209 P. 560. The case cited is directly in point. If the instruction as framed was intended to authorize the jurors to assume the evidence introduced proved or tended to prove that when Sala gave directions to Fraguglia about his work that Sala thereby did "voluntarily seek or invite a combat or put himself in the way of being assaulted with the purpose that he may have a pretext to injure his assailant," such was an improper interpretation of the evidence. The same remark holds true if it was intended that the same evidence would authorize the jurors to find that, by what Sala said or did while on the truck, the difficulty was set off and induced by him by his willful act, or that he voluntarily or of his own free will entered into an assault. The same remark applies to the sentence that authorized the jury on the same evidence to find that the necessity for the assault was of Sala's creation. If it was not intended to apply to the evidence as to what occurred on the truck it is manifest it did not apply to anything that had been introduced in the evidence. If the instruction was intended to apply to what occurred on the ground it was not pertinent to the acts of Sala.

The defendant contends that instruction XVII, given at the request of the plaintiff, was also a prejudicial error. It was as follows:

"(1) Whenever a person is assaulted by another, he has a right to defend himself, and may use sufficient force to repel the assault in order to protect himself from bodily harm. And when necessary to protect himself from bodily harm at the hands of an assailant, the person assaulted may use sufficient force in repelling the assault, even before the assailant actually commits a battery upon him. But the resistance must be no more than is necessary to accomplish this. If it be greater than is required for such purpose, it becomes in law excessive and without excuse or justification, making the party an aggressor; (2) nor can a person after an assault, follow up his assailant and attack him when in the act of retiring or retreating from the scene of the affray or while helpless upon the ground. Such a course would not be in self defense nor justifiable on any grounds.

"(3) The fact, if you find it to be a fact, that plaintiff was not free from fault, will not prevent you from rendering a verdict in favor of the plaintiff, if you further find that the resulting assault and battery on plaintiff by defendant was accompanied by greater force than was reasonably necessary for the purpose of self defense." (Numerals ours.)

[5] Nearly all of the instruction comprised in division 1 was addressed to the right of the defendant to defend himself. It makes no reference to the facts as they appeared to him. On the contrary it holds the defendant bound by the actual facts without regard to appearances. The defendant's objection to that portion of the instruction is well founded. People v. Thomson, 145 Cal. 717, 79 P. 435.

[6] The second division of the instruction is addressed to one who returns to the combat. There was no evidence whatever that Sala returned to any combat. That portion of the instruction was not addressed to any issue in the case.

[7-9] The third division of the instruction is addressed to the subject of the use of excessive force. It fails to take into consideration "all the circumstances of the case." In 4 American Jurisprudence, page 152, the author says: "Generally stated, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." The instruction is to the effect if the defendant used some force that was necessary and some that was unnecessary then he was a trespasser ab initio. That is a misconception of the law. We quote again from 4 American Jurisprudence, 153: "One who, in acting in self-defense, uses force in excess of that which he is privileged to use, is liable for so much of the force used as is excessive, and the other person has the normal privilege of defending himself against the use or attempted use of excessive force. In other words, to the extent that excessive violence and unnecessary force is used in repelling an assault, one becomes liable as trespasser and subject to an action for assault and battery. In determining whether the particular means used is or is not excessive, the amount of force exerted, the means or instrument by

which it is applied, the manner or method of applying it, and the circumstances under which it is applied are factors to be considered."

From what we have said it is apparent instructions XVI and XVII operated to deprive the defendant, Sala, of the sole defense which he attempted to prove. It follows that both were prejudicial. In this connection the plaintiff relies on the rule that all of the instructions are to be read together. He does not call to our attention any instruction given which tended to cure the errors complained of. We have not noted any that had such an effect.

Other points presented by the defendant need not, in view of what we have said, be passed upon.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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17 Cal.App.2d 721

PEOPLE v. GODINES.

Cr. 2891.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1936.

Hearing Denied by Supreme Court Dec. 28, 1936.

1. Criminal law 🔑1023(8)

Order denying motion in arrest of judgment is not an "appealable order" (Pen.Code, § 1237).

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Marriage 🔑58(7)

Only those frauds which are vital to marriage relation are sufficient causes for having marriage annulled.

3. Marriage 🔑58(7)

Misrepresentation by a Filipino that he is a Spaniard is fraud and constitutes cause for annulment of marriage (Civ.Code, § 60, as amended by St.1933, p. 561).

4. Marriage 🔑3

Ethnological status of parties *held* not ground for annulment of marriage where marriage was valid in state in which it took place (Civ.Code, § 63, and § 60 as amended by St.1933, p. 561).

5. Perjury 🔑11(8)

Allegation in verified complaint, seeking to have complainant's marriage with a Filipino annulled on ground of his misrepresentation, that complainant did not live with husband after being informed of his real racial heritage, *held* material and to form basis for perjury prosecution where false (Pen.Code, §§ 118, 1237; Civ.Code, §§ 63, 82, and § 60 as amended by St.1933, p. 561).

6. Perjury 🔑6

Perjury prosecution could be based on verified complaint containing false allegations regarding material matters notwithstanding complaint could have been filed unverified, since one taking oath that allegations in complaint are true is taking an oath in a case in which "oath may by law be administered" within statute (Pen.Code, §§ 118, 1237; Code Civ.Proc. §§ 437, 446, as amended by St.1933, pp. 1848, 1850).

7. Witnesses 🔑195

In perjury prosecution based on defendant's false statements in verified complaint, seeking to have marriage with Filipino annulled, that immediately after discovering husband's real racial heritage parties separated and had lived separate and apart ever since, Filipino's testimony contrary to statement in complaint *held* admissible, where at time of trial marriage had been annulled (Pen.Code, §§ 118, 1237, 1322).

8. Criminal law 🔑1169(1)
Witnesses 🔑195

In perjury prosecution based on defendant's false statements in verified complaint, seeking to have marriage with Filipino annulled, that immediately after discovering husband's real racial heritage parties separated and had lived separate and apart ever since, admission into evidence of letter written by defendant to her husband while marriage was still in effect *held* prejudicial error, notwithstanding at time of trial marriage had been annulled (Pen.Code, §§ 118, 1237, 1322; Code Civ.Proc. § 1881, as amended by St.1933, p. 1424).

* * *

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Florence Godines was convicted of perjury, and she appeals.

Reversed and remanded for new trial.

Ingall W. Bull and Franklin B. MacCarthy, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, Justice pro tem.

[1] Appellant, convicted of perjury, appeals from the order denying her motion for a new trial and from the order denying her motion in arrest of judgment. The appeal from the latter order must be dismissed; it is not an appealable order. Pen Code, § 1237; People v. Rico (Cal.App.1936) 58 P.(2d) 956. Because a communication from the appellant to her husband was admitted in evidence over her objection, however, the appeal from the order denying a new trial has merit. We are of the opinion, furthermore, that both the substance of the sworn statement, alleged to be false, and the statement itself were material and that a charge of perjury may properly be based thereon.

Early in July, 1935, appellant filed a complaint duly verified seeking to have her marriage with a Filipino annulled, on the ground that she had been induced to marry him by the fraudulent representation that he was of Spanish Castilian descent. There followed the statement that he had informed her immediately after the marriage of his real racial heritage and that the parties had then separated and had lived separate and apart ever since. The allegations of the complaint respecting the separation were those assigned in the information charging perjury as being false.

[2-4] Appellant argues that the allegations claimed to be false were immaterial and therefore, even if false, their utterance would not constitute perjury. We find them to be material. It is true that it is not every fraud which will serve as an excuse for having a marriage annulled; only those frauds which are vital to the marriage relation are sufficient causes. Mayer v. Mayer (1929) 207 Cal. 685, 279 P. 783; Marshall v. Marshall (1931) 212 Cal. 736, 300 P. 816, 75 A.L.R. 661; notes, 14 A.L.R. 121, and 75 A.L.R. 663. In view of the declared policy of this state that a white person and a Filipino may not marry (section 60, Civ.Code, as amended by St.1933, p. 561; Roldan v. Los Angeles County (1933) 129 Cal.App. 267, 18 P.(2d) 706), it seems clear that a misrepresentation by a Filipino that he is a Spaniard is a fraud that touches a vital spot in the marriage relation and constitutes, therefore, a cause for annulment. We should add that the marriage in question took place in New Mexico, where it was valid, and hence of itself the ethnological status of the parties was not a ground of annulment. Section 63, Civ.Code; McDonald v. McDonald (Cal.Sup.1936) 58 P.(2d) 163, 104 A.L.R. 1290.

[5] Where the reason an annulment is sought is that fraud induced the marriage, whether or not the parties cohabited after the fraud was discovered, is material. Section 82 of the Civil Code provides: "A marriage may be annulled for any of the following causes, existing at the time of the marriage: * * * Four. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife." While it might be argued that cohabitation would be a matter of defense, hence the allegations in the complaint respecting separation would be immaterial, our Supreme Court in Millar v. Millar (1917) 175 Cal. 797, 805, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184, strongly indicates, at least, that lack of cohabitation should be alleged in the complaint. We have concluded, therefore, that the allegations of appellant's complaint that she and the one, to whom she was married separated and continued to live so were material allegations.

[6] Appellant makes a further attack upon the foundations of the case against her by contending that, as the complaint could have been filed unverified, its verification was a voluntary, idle act, one of the consequences of which may not be a conviction of perjury. We find this contention supported neither by authority nor reason, and we are disinclined to remove further the sanctions of perjury from those who swear falsely by holding that one may with impunity verify a complaint which contains allegations known to be untrue.

There is nothing in the language of section 118 of our Penal Code to warrant the conclusion urged upon us. That section reads: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." Our dispute centers around the words "in any of the cases in which such an oath may by law by administered."

Instances may now and then be found where the statement is made that, at common law or under such statutory provisions as ours, perjury will not follow unless the oath is *required,* but we know of no case which justifies so strict a test. The test more accurately stated is that the oath must be either *authorized* or required. It is so stated in 48 Corpus Juris, 842. See, also, Silver v. State (1848) 17 Ohio, 365; People v. Fox (1872) 25 Mich. 492. The only case in California closely in point recognizes that the test is not, "Is the oath required?" but, "Is it authorized or required?" Reference is made to People v. Millsap (1927) 85 Cal.App. 732, 260 P. 378, decided by this court, which not only casts no doubt upon the correctness of our conclusion that false statements in a verified complaint may constitute perjury, but indeed affirmatively supports it.

The Millsap Case decided that one who had verified an answer where, by the terms of section 446 of the Code of Civil Procedure, verification was unnecessary, could not be found guilty of perjury because of false statements in the answer. We there stated (page 744 of 85 Cal.App., 260 P. 378, 383): "There is no more authority of law for an oath in such an excepted case than there is in any other case where an oath is not provided for." In arriving at its conclusion, this court took occasion to distinguish the case then before it from that of Lappley v. State (1919) 170 Wis. 356, 174 N.W. 913, 7 A.L.R. 1279, where plaintiff in error had been found guilty of perjury because he had verified a complaint containing a false allegation. Under the Wisconsin law there was no requirement that the complaint be verified. This court on the assumption that the Wisconsin law gave the added effect to a verified complaint over one not verified, which our Code does, found the Lappley Case consistent with other authorities, saying at page 743 of 85 Cal. App., 260 P. 378, 383: "Hence it may be said of the verification of a complaint, in the words of People v. Howard, supra [111 Cal. 655, 44 P. 342], that the oath is of consequence in the proceeding in which it is taken, and a charge of perjury can be based upon it." Again later, in response to the argument that the word "may" in section 118 of the Penal Code was permissive and not mandatory, and "hence under this section perjury may be committed where an oath is authorized or permitted, though not required," we stated at page 744 of 85 Cal.App., 260 P. 378: "This may be correct in cases where the law does in truth permit an oath and annexes some consequence to it, as in the case of a complaint in an ordinary civil action, which we have already discussed, but it is not correct to say as to the case before us that the law authorizes or permits any oath. The necessity for the verification of a pleading arises from the statute alone, and the question whether it is authorized or required is to be solved entirely upon the construction of section 446 of the Code of Civil Procedure." The verification of a complaint in a civil action is not required by section 446, supra, but it is authorized. The section (as amended by St.1933, p. 1850) contemplates the verification of a complaint and expressly gives legal sanction to its verification in requiring: "Except in justices' courts of Class B, when the complaint is verified, the answer must be verified." Section 437 of the Code of Civil Procedure, as amended by St.1933, p. 1848, also attaches legal authority to the verification of a complaint by requiring a more specific denial of its allegations than would be permitted in case of an unverified complaint. What an anomalous situation we would have if, by verifying his complaint, a plaintiff could *require* a defendant to answer under oath, specifically and truthfully, under penalty of perjury, yet the verification of the complaint would be a mere voluntary act, free from the fear of possible perjury charges. Such is not the law. One who takes an oath that the allegations in a complaint are true is not taking an oath merely not prohibited, but is taking an oath in a case "in which such an oath may by law be administered;" that is, within the meaning and contemplation of section 118, Penal Code.

[7] As was to be expected, much of the evidence at the trial was directed to the question, Did or did not appellant live with her husband after she learned that he was not of Spanish ancestry? The defendant and her witnesses denied that there had been cohabitation. In the main, the People's evidence consisted of contrary tes-

timony by the Filipino himself. His testimony was received over the objection of the defendant, and, as appellant, she now contends that its receipt was contrary to the provisions of section 1322 of the Penal Code, which opens with the statement: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties." At the time of the trial, however, the Filipino was no longer the husband of the defendant, and the prohibition of section 1322 of the Penal Code was not applicable. People v. Loper (1910) 159 Cal. 6, 112 P. 720, Ann.Cas.1912B, 1193. The addition to the section of the words "before or after marriage," inserted in 1933 (St.1933, p. 565) amid the exceptions to the general introductory statement, has not in our opinion, changed the conclusion announced in the case last cited.

[8] A different problem is presented, however, by the ruling admitting into evidence a letter written by appellant to her husband in March, 1935, while the marriage was still in effect. In view of the conflicting testimony on the subject of their living together, if it was error to admit this letter, full of admissions inconsistent with appellant's defense, the error was plainly prejudicial. That it was error is a conclusion required by the provision in section 1881 of the Code of Civil Procedure, as amended by St.1933, p. 1424 (the italics are ours): "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either during the marriage *or afterward,* be, without the consent of the other, examined as to any communication made by one to the other during the marriage." The case of People v. Mullings (1890) 83 Cal. 138, 23 P. 229, 17 Am. St.Rep. 223, applied the section in a criminal case after the marriage relation had ceased, due to a divorce. See, also, People v. Loper, supra. While we recognize the fundamental difference between a decree of divorce, whereby a marriage is dissolved, and a judgment of annulment whereby it is adjudged that a marriage was never valid, we are of the opinion that, within the meaning of the language we have quoted from section 1881 of the Code of Civil Procedure, there is a period "during the marriage" even in the case of an annulled marriage, and that after the annulment, a communication theretofore made by the wife to the husband may not be received in evidence over her objection. No authority to the contrary is cited to us and none has been discovered by us.

We have not discussed appellant's claim that the information is faulty in that it fails to allege in direct language that appellant had taken an oath before she swore to the verification, because that defect is one that can be cured by an amendment in the trial court.

The order denying appellant's motion for a new trial is reversed. The cause is remanded for a new trial.

We concur: YORK, Acting P. J.; DORAN, J.

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17 Cal.App.2d 615

WILKERSON v. CITY OF EL MONTE.

Civ. 11058.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1936.

Rehearing Denied Dec. 14, 1936.

Hearing Denied by Supreme Court Jan. 18, 1937.

1. Municipal corporations 🔑756

Statute relating to defective or dangerous condition in street is source of liability of municipalities in such cases (St.1923, p. 675).

2. Municipal corporations 🔑767

If depressions in street as constructed and maintained by city created defective or dangerous condition within statute, liability of city existed in favor of persons who in using street in careful manner sustained injury by reason of such condition, where city knew of condition, but, if condition was not defective or dangerous, city was under no liability (St.1923, p. 675).

3. Automobiles 🔑305(6)

In action against city by passenger who was injured when automobile struck depression in street at intersection, testimony of persons living in neighborhood as to their observations of mishaps to passing automobiles occasioned by striking such depression *held* properly admitted, where testimony was given as to approximate speed of automobiles, which were not high speeds, and as to action of automobiles when they struck depressions (St.1923, p. 675).

4. Automobiles 🔑305(6)

In action against city by passenger who was injured when automobile struck depression in street at intersection, testimony as to casualties around intersection without connecting evidence that they resulted from construction of street at intersection and without evidence as to conditions under which casualties occurred *held* erroneously admitted (St.1923, p. 675).

5. Negligence 🔑125

In cases of accident allegedly due to dangerous condition of premises, evidence of earlier accidents occurring at same place is properly received, as tending in some degree to prove that condition was dangerous and that accident may have resulted from such condition, and that one charged with duty of maintaining premises knew, or should have known, of condition.

6. Negligence 🔑125

In cases of accidents allegedly due to dangerous condition of premises, evidence of earlier accidents should not be received unless it is shown that physical condition of premises was substantially same at time of each accident, and where other factors enter into case, such as conduct of persons injured, unless showing is made as to circumstances and conditions under which the several accidents occurred.

7. Automobiles 🔑257

As respects liability of city to passenger who was injured when automobile struck depression in street at intersection, safety of crossing was to be judged by consequences of travel across it at ordinary and reasonable speed and in exercise of ordinary care (St.1923, p. 675).

8. Appeal and error 🔑882(10)

Counsel could not question on appeal ruling striking out testimony on his motion.

9. Municipal corporations 🔑818(9)

In determining whether given condition of street is safe or unsafe, as respects liability of city for injuries, court cannot entertain general inquiry into results of use of street by all persons who use it, since question is not whether accidents do or do not occur, but whether they occur under given conditions (St.1923, p. 675).

10. Evidence 🔑472(4)

In action against city by passenger who was injured when automobile struck depression at intersection, engineer's opinion that intersection was dangerous and highway contractor's opinion that construction was wrong and intersection was not safe for travel should have been excluded as invading province of jury (St.1923, p. 675).

11. Evidence 🔑493

If relation between facts and their probable result can be determined without special skill or training, facts must be given in evidence, and conclusions or inferences must be drawn by jury.

12. Appeal and error 🔑1050(1)

In action against city by passenger who was injured when automobile struck depression in street at intersection, errors in admitting evidence of earlier accidents without showing as to speed of automobiles involved, and in admitting experts' opinion that crossing was dangerous on account of manner of its construction, *held* prejudicial, where evidence whether intersection was dangerous was balanced (St.1923, p. 675).

13. Automobiles 🔑309(2)

In action against city by passenger who was injured when automobile struck depression in street at intersection, where charges against city were specific, instructions on general doctrines of negligence *held* error as tending to obscure issue and confuse jury (St.1923, p. 675).

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Ruth Wilkerson against the City of El Monte. Verdict and judgment for plaintiff, and defendant appeals.

Reversed.

William P. Haughton, City Attorney, and De Forrest Home, both of Los Angeles, for appellant.

Eldred E. Wolford, of El Monte, and Irving E. Read, of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action against the City of El Monte, a municipal corporation, plaintiff was awarded damages by verdict for injuries sustained while riding as a passenger in an automobile across a street intersection constructed and maintained by defendant municipality in an allegedly defective and dangerous condition. From the judgment entered upon the verdict the city appeals.

[1, 2] Where Nevada street crosses Amador street in said city, two depressions exist across Nevada street, being extensions of the gutters of Amador street across Nevada. The liability of the city depends upon the condition of these depressions. If, as constructed and maintained by the city, they created a defective or dangerous condition within the meaning of the Statutes of 1923, p. 675 (Deering's Gen.Laws, Act 5619), which statute is the source of liability of municipalities in such cases, there existed a liability of defendant city in favor of those persons, who, in using the street in a careful manner, sustained injury by reason of such condition of the street. If the condition was not defective or dangerous, the city was under no liability. It was sufficiently shown that defendant city had knowledge of the condition of the intersection.

It is unnecessary to describe in detail the nature of the depressions further than to say that they were such dips as are not uncommonly used for drainage across intersections, sloping gradually from each side to the bottom of the dip, and to a depth of from 6 to 9 inches. The maximum depth of the dips was in the middle or along the crown of Nevada street, and in each direction from the crown they gradually flattened away.

Plaintiff, while riding as a passenger in an automobile bound northward on Nevada, was forcibly thrown from her seat and severely injured when the car struck the dips. Neither she nor the driver of the car was familiar with the intersection. The speed of the car was shown to have been about 20 miles per hour.

[3, 4] Although there was no dispute in the evidence as to the nature of the depressions, the evidence from which the jury was required to determine whether the roadway at the intersection was safe or dangerous for travelers was such as to furnish support for opposing conclusions. Plaintiff relied largely upon evidence that accidents of a similar nature to that of plaintiff had been of frequent occurrence. The city relied upon evidence that the contours of the intersecting streets conformed to customary standards of design and construction for the disposal of surface waters on streets, and it relied also upon evidence of motorists who had made frequent use of the streets in question and who testified that the intersection could be traversed safely at ordinary speed. On behalf of plaintiff, persons living in the neighborhood testified to their observations over a period of years of mishaps to passing automobiles occasioned by their striking the depressions in question. In some cases where the cars had been actually seen by the witnesses as they crossed the intersection, testimony was given as to the approximate speeds of the cars which were not high speeds, and as to the action of the cars when they struck the depression. This testimony was properly admitted. But in other cases witnesses were allowed to testify to casualties of various sorts around the intersection upon the mere supposition and without connecting evidence that they resulted from the construction of the streets at the intersection and without evidence as to the conditions under which the casualties occurred. This evidence was erroneously admitted.

[5-7] In cases of accident due to the alleged dangerous condition of premises, it is proper to receive evidence of earlier accidents occurring at the same place. It tends in some degree to prove the condition to have been a dangerous one and that the accident in question may have resulted from such condition. It may also tend to prove that the one charged with the duty of maintaining the premises knew, or should have known, of the condition. Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132. But evidence along this line should not be received without some safeguards. It should be shown that the physical condition of the premises was substantially the same at the time of each accident. That fact was not disputed in the present case. And, where other factors enter into the case, such as the conduct of the persons injured in the use of the premises, evidence of the results of other accidents is of no value unless a showing is made as to the circumstances and conditions under which the several accidents occurred. In the present case the speed as which automobiles crossed the intersection was an important factor. A depression which would be safe to cross at slow speed might be exceedingly dangerous to cross at high speed. The safety of the crossing in question was to be judged by the consequences of travel

across it at ordinary and reasonable speed and in the exercise of ordinary care.

[8] One of plaintiff's witnesses said: "Well, cars going across there, drive across there, they all bounce up in the air and make a terrible noise." This evidence was allowed to stand against an objection and a motion to strike. The witness had previously testified: "Well, they all drive very fast across that corner." This statement was stricken out on motion of defendant's counsel who cannot now question the ruling. But, if the cars which suffered accidents were those which drove "very fast" across the corner, that fact should have been placed before the jury, as otherwise the jury may have concluded that the intersection was unsafe for cars traveling at reasonable speeds. This witness testified that milk bottles fell from a truck as it crossed the depressions, but she did not see the truck before nor at the time it crossed the intersection. The same witness related an occurrence when tools fell from a plumber's truck. She did not know whether the truck traveled near the center of the street where the depression was more pronounced or near the curb, nor did she testify as to the speed of the truck nor as to its actions upon striking the depressions. She also testified as follows: "Well, many cars take a bump when they hit those streets there, and they go up in the back and people seem to go to the top of the car, and I don't know whether they are hurt or not, but I know that they go to the top of the car. Q. You have heard them as they went by? A. I have." Yet it appears from her testimony that she had actually seen but one of the vehicles (the plumber's truck) crossing the intersection.

Another witness residing near the crossing testified to an occurrence some two years before when a car driven by a woman stopped in front of his house where she put two children "in the back seat again." This witness stated that both the children were injured in the bouncing of the car. He testified to another instance where a car stopped in front of his house, saying, "I noticed one case where two ladies were sitting in the rear seat and a man was driving and they stopped there because they had been thrown into the bottom of the car and they were both quite badly injured by the bumping of the car."

In the first instance the witness did not see the car until just as it came to a stop 150 feet away from the intersection, although he heard a noise. He concluded that the other car had been severely bumped in crossing the intersection from the fact that the women "were fixing their hats and gathering themselves together and adjusting things about themselves when I saw them."

[9] Another witness testified to having seen some children in a car which had stopped in front of her house. The children were climbing on to the rear seat of the car and were crying, from which she concluded that they had been injured in crossing the intersection. This witness did not see the car cross the intersection. She testified also to an occasion when some candy fell from a truck crossing the intersection and some milk bottles fell from another truck, the doors of which were open. Yet another witness testified to an occasion when a car containing four persons—two men and two women—stopped in front of her driveway some 250 feet south of the intersection; the rear window of the car was broken, there was glass in the back seat and in the hair of one of the women. This witness did not see the car before it came to a stop. She also saw another car cross the intersection and saw it bounce. She did not testify as to the speed of any of these vehicles. Yet another witness testified to having seen a woman being lifted from the rear seat of the car at a point a short distance south of the intersection. It did not appear that he saw the car cross the intersection or that he knew anything as to the speed at which it traveled. Other testimony was given of a general nature, consisting of conclusions of witnesses drawn from noises that they heard, that cars were bumped in crossing the intersection. All of this evidence was received apparently under the theory that the tendency was to prove that the condition of the intersection was a dangerous one. But, as we have pointed out, the speed of the cars was a factor that could not be disregarded if the evidence was to have any value. The mere fact that some automobiles bounced in crossing the depressions did not show that the condition of the intersection was either dangerous or defective, although, if it had been shown that they bounced in crossing at reasonable and ordinary speed, the evidence would have had a very considerable value. This vital element of the evidence was entirely lacking in the testimony which we have summarized. Where the evidence

tends to show only that accidents happened occasionally without any showing as to the conditions under which they happened, there is a wide departure from the theories under which evidence of other accidents is admissible. The court, in determining whether a given condition of a street is safe or unsafe, cannot entertain a general inquiry into the results of the use of the street by all persons who use it. The question is not whether accidents do or do not occur; it is whether they occur under given conditions, and the all-important condition in the present case was whether such accidents occurred when cars crossed the intersection at usual and reasonable speeds. We do not hold that evidence of other accidents would have been inadmissible if the conditions of such accidents had been different from those surrounding plaintiff's accident. It may be that it would have been proper to receive evidence of accidents to cars which had crossed the intersection at high speed, for such evidence would have tended in some degree to prove the speed at which the crossing was dangerous, but it was improper, and we think strongly prejudicial to the case of defendant, to receive evidence of the results of prior accidents without evidence as to the cause of such accidents. Evidence as to the results of accidents might easily have created false impressions in the minds of the jurors, for the accidents might have been due to the negligence of the drivers of the cars and not to the condition of the intersection.

[10] Plaintiff's witness, Finley, a surveyor and engineer, made a replica of the intersection which was used in evidence. The witness was asked this question by plaintiff's counsel: "Mr. Finley, have you an opinion as to whether or not the condition as it now exists at the intersection of Amador and Nevada Street is a dangerous one?" The question was objected to upon several grounds, among them being that it called for an opinion which would not be proper as expert testimony. The objection was overruled, and the witness replied that the condition was dangerous. The witness was asked whether in his opinion the condition of the crossing was a defective condition, and over objection he testified that it was a dangerous condition for travel at a speed greater than 18 or 20 miles per hour. Another witness for plaintiff, Charles Broughton, a contractor of highway construction, who had made certain tests and observations of travel over the intersection, was asked to state his opinion "regarding the method of construction of that intersection," and over objection answered, "It is constructed wrong." He was asked the further question whether in his opinion the intersection was constructed in a manner that was safe for motor vehicle travel on Nevada across Amador at a reasonable rate of speed, and answered over objection, "The construction is wrong and not safe for travel." The objections should have been sustained. The opinions went to the ultimate question of fact to be determined by the jury. The condition of the street had been fully described. The widest latitude had been offered plaintiff to prove what happened to automobiles when they crossed the intersection. There was no need for opinion evidence on the subject, and the opinions given by the witnesses Finley and Broughton clearly were invasions of the province of the jury. It is not proper to receive opinion evidence upon the ultimate question of fact which is to be determined by the court or a jury. In Sappenfield v. Main Street, etc., R. R. Co., 91 Cal. 48, 27 P. 590, 592, the witness had been allowed to testify that a coupling pin used in the drawhead of a street car was unsafe. In holding the evidence to have been erroneously admitted, the court said: "When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence."

[11] If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury. In Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 P. 210, 212, a witness had been allowed to testify that the method by which a horse had been hitched to a hitching post was not "a proper and safe one for the tying of horses." Under an ordinance involved in that case it was required that the animal should be "properly secured, either by hitching or being under the personal control of some person of suitable age." The court said: "In effect, therefore, the question was equivalent to asking the witness whether in his opinion

negligence was imputable to the driver, and hence to his employer. * * * And it was an invasion of the jury's province to seek to substitute the opinion of a witness as to defendant's conduct for that of the jurors themselves, who were capable and charged with the duty of observing and determining the relation between the facts and the consequences resulting therefrom." In Shafter v. Evans, 53 Cal. 32; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 P. 176, 49 L.R.A. 33, it was held improper to receive opinion evidence as to whether one condition was more safe or more dangerous than another. In People v. O'Brien, 122 Cal.App. 147, 9 P.(2d) 902, 904, the court sustained a ruling which barred opinion evidence that defendant could or could not distinguish right from wrong. After reviewing the authorities, the court said: "Not only by the courts of this state, but as well by courts of other jurisdictions, wherein the rule obtains by which testimony of the nature of that here under consideration is denied admission, the universal reason assigned therefor is that such evidence trenches upon the province of the jury in that it permits a witness to decide the very question upon which the jury alone is qualified to pass judgment."

We are of the opinion that expert testimony could not have been properly received to prove that the intersection in question was either dangerous or defective within the meaning of the statute.

[12] We do not doubt that the rulings of the court which we have discussed resulted in prejudice to defendant's case. A great deal of evidence was received bearing directly upon the question of safety with which automobiles could cross the intersection. Had the jury found that the intersection was a safe one, such finding would have found substantial support in the evidence. The issue was closely balanced, and that fact necessarily magnifies the importance of the evidence erroneously admitted which contributed to shifting the balance in plaintiff's favor. The evidence which was given in plaintiff's behalf concerning other accidents occurring at earlier dates was potent to persuade the jury that a condition existed which should have been remedied by the city, and we cannot say that there was not enough of this class of evidence erroneously admitted to furnish the weight to plaintiff's evidence which decided the issue in her favor. When there was added to such evidence the opinion of expert witnesses that the crossing was dangerous on account of the manner of its construction, the conclusion seems irresistible that the issue could not have been fairly decided by the jury. The result might easily have been different had the objectionable testimony been excluded. Upon a review of all of the evidence, we cannot avoid the conclusion that plaintiff received such an advantage in having the benefit of the evidence which we hold to have been improperly admitted that to sustain the judgment in her favor without a fair trial of the issue of defendant's liability would result in a miscarriage of justice.

[13] There is another point upon which we should give a ruling. The jury was instructed upon the general doctrines of negligence and contributory negligence. One of the instructions read in part as follows: "If you find from a preponderance of the evidence that the defendant was negligent in any manner proximately contributing to the happening of the accident and that there was no negligence on the part of the plaintiff, Ruth Wilkerson, contributing proximately thereto, then in so far as this question is concerned your verdict shall be in favor of the plaintiff and against the defendant. If you find from a preponderance of the evidence that the defendant was negligent and its negligence was the sole cause of the accident, then you will have no occasion to consider the question as to whether or not there was any contributory negligence on the part of the plaintiff. Your verdict in such case shall be in favor of the plaintiff and against the defendant."

Other instructions stated that defendant was not liable if the speed of the car in which plaintiff rode was the sole proximate cause of the accident, but that it could not be considered the sole cause if "some negligence however slight on the part of the City of El Monte" contributed proximately to the cause of the accident.

The liability of the city was predicated first upon proof of the dangerous or defective condition of the intersection. That fact having been established, there must have been shown a failure of the city to take action reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after receiving knowledge or notice of the same. The charges against defendant city were specific. They stood or fell with the proof of the particular acts of commission and omission charged in the complaint. No other acts could have been pertinent to the question of liability. The instructions on the general doctrines of negligence tended to obscure the issue and to confuse the jury, and it was error to give them. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768.

It is unnecessary to decide whether the error committed in giving these instructions, standing alone, would require a reversal of the judgment. In order to decide that question, we would have to consider all of the instructions given, some of which correctly stated the law, and this would serve no good purpose, since the other errors discussed require a reversal.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

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18 Cal.App.2d 11

REDWOOD CITY v. MYERS, City Clerk.

Civ. 10364.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1936.

Municipal corporations ⟹911

That city was included in county harbor district did not preclude city from constructing harbor improvements and issuing bonds for that purpose, where harbor district had not taken steps looking toward construction of harbor (St.1901, p. 27; St. 1931, p. 1483).

Original application by the City of Redwood City against B. E. Myers, as Clerk of the City of Redwood City, for a writ of mandate.

Application granted.

Albert Mansfield, City Atty., of Redwood City, for petitioner.

Kirkbride & Wilson, of San Mateo (William J. Locke, of Alameda, of counsel), for respondent.

STURTEVANT, Justice.

This is an original application by the petitioner asking for a writ of mandate directing the respondent, B. E. Myers, as Clerk of the City of Redwood City, to sign $266,000 bonds alleged to have been duly authorized by the petitioner. The petition appears to be regular in every respect and to show a full compliance by the petitioner with the provisions of an act entitled, "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof," approved February 25, 1901 (Stats.1901, p. 27). To the petition filed by the petitioner the respondent interposed a general demurrer. We do not understand him as claiming that the petition is insufficient in any respect, however, he calls to our attention that on August 14, 1931, a statute took effect entitled, "An act providing for the formation, government and operation of harbor districts, the calling and conducting of elections in such districts of harbor commissioners, defining their powers and duties, and providing for the issuance and disposal of bonds of such harbor districts, and providing for the assessment, levy and collection of taxes for the payment of such bonds and for the ordinary annual expenses of such harbor districts." Stats. 1931, p. 1483. He does not claim the said statute in terms created any specific district; but he does claim that San Mateo County Harbor District was thereafter organized under said statute. That claim is based on paragraph IX of the petition, which is as follows:

"That the City of Redwood City has authorized the sale of said bonds herein mentioned and is ready and willing to deliver the same to the purchasers thereof but that the respondent herein who is the Clerk of the City of Redwood City and who is required to sign said bonds by the provisions of the Act under which said bonds were issued has refused to sign the same upon the following grounds:

"1. San Mateo County has been organized as a port district under the provisions of an Act of the Legislature of the State of California (Stats.1931, page 1483 et seq.). San Mateo County Harbor District therefore has exclusive authority to manage, control and operate ports and all works and facilities situated within the District and to charge and fix the rates for wharfage and other harbor facilities.

That accordingly Redwood City has no authority to construct a harbor improvement or to issue bonds therefor as the exclusive authority for this purpose has now been vested in San Mateo County Harbor District.

"2. If Redwood City proceeded at this time to issue bonds and to spend the proceeds thereof for the purpose of constructing said harbor improvement, the jurisdiction over said improvement would nevertheless lie with the San Mateo County Board of Harbor Commissioners and the expenditure of municipal funds for harbor purposes would constitute an unlawful expenditure of public funds and an illegal delegation of the authority of Redwood City for an entirely separate and distinct public corporation, namely the San Mateo County Harbor District.

"3. The taxpayers of Redwood City should not be subjected to taxes for the construction of a harbor which should be constructed by the San Mateo County Harbor District, and all of the taxable property in said District should be subject to liability for the payment of such construction. Under the present scheme the City of Redwood City is being compelled to bear a burden of indebtedness which properly belongs upon the entire San Mateo County Harbor District.

"That the City cannot deliver said bonds until the same are signed by the respondent herein as Clerk of said City for the reason as set forth above, the Clerk is required under the Act under which said bonds were voted to sign the same."

Except the contents of paragraph IX, the petition is wholly silent on the subject of San Mateo County Harbor District. Said paragraph, it is clear, was an allegation of the claims of the respondent. However, it did not purport otherwise to allege any facts. Assuming solely for the purposes of this proceeding that it was alleged in said paragraph that San Mateo County is organized as San Mateo County Harbor District, that is as far as it can possibly be claimed that anything has been done by said county looking toward the creation of a harbor or the appurtenances of one. There is no allegation that San Mateo County Harbor District has ever exercised, or is now exercising, or performing, any of the functions of a harbor district.

The respondent contends a port district, incorporated to provide public terminal facilities for both sea and land commerce, is a municipal corporation. Without deciding the contention, it may be conceded for all of the purposes of this case. He then asserts there cannot be, at the same time within the same territory, two distinct municipal corporations *exercising* the same powers, jurisdictions, and privileges. 1 Dillon, Municipal Corporations (5th Ed.) p. 616. The rule contended for is perfectly sound, but the facts of this case do not bring it within the purview of said rule. From what has been stated above it does not appear that the powers, jurisdictions, and privileges of San Mateo County Harbor District are being exercised to any extent whatever. Continuing his argument on this point, the respondent divides it into two parts. In the first part he asserts because one or more cities may be included within the boundaries of an irrigation, levee, drainage, harbor, or like district does not invalidate the district or impair its exclusive powers over all the territory within the district, including the area of said cities. It is sufficient to remark that the petitioner does not make any claim to the contrary. The second part is that the similar powers of the city within such district can only be preserved by express statutory authority. The answer is they have been so preserved. As will be seen by a comparison of the several provisions of the act of 1931, the structures over which San Mateo County Harbor District may claim to possess powers are those "* * * owned and constructed by such harbor district." But the record does not disclose that said district has constructed anything.

The last point made by the respondent is that the City of Redwood City and the harbor proposed by it to be acquired and developed lie wholly within the San Mateo County Harbor District, and, therefore, the purposes for which the bonds herein are proposed to be issued are ultra vires and the bonds issued are void. That contention rests wholly on the legal effect the respondent contends for as growing out of and based on the propositions hereinabove discussed. It is clear, therefore, that there is nothing in the record supporting the contention of the respondent.

It is ordered that a peremptory writ of mandate issue as prayed for in the petition.

We concur: NOURSE, P. J.; SPENCE, J.

17 Cal.App.2d 641

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BENNETT et al.

Civ. 11159.

District Court of Appeal, Second District, Division 2, California.

Nov. 25, 1936.

Hearing Denied by Supreme Court Jan. 21, 1937.

1. Executors and administrators ⚿437(7)

Where action on note against several individual defendants was commenced August 8, 1933, and upon death of one defendant, plaintiff presented to executrix a verified claim for amount for which judgment was rendered and claim was rejected August 22, 1933, supplemental complaint which was filed February 9, 1934, *held* not barred because not brought within three months after date of service of notice of rejection of claim, where, before filing of amended supplemental complaint, executrix had ample notice of claim and opportunity to approve it and there was no miscarriage of justice (Probate Code, § 714; Const. art. 6, § 4½).

2. Mortgages ⚿354

Notice of sale under trust deed that sale would be made for cash, payable in United States gold coin, *held* not invalid on ground that terms could not be met because possession of gold was illegal, where congressional resolution authorized discharge of obligation to pay gold coin by payment of any legal tender, since its effect was to strike provision for payment in gold coin (31 U.S.C.A. § 463).

3. Holidays ⚿4

Steps which bank holding deed of trust took to bring about sale of property upon default of payment could not be classified as "banking business" within Presidential Proclamation proclaiming a bank holiday and prohibiting transaction of banking business, since President and Congress could not have intended to deny to bank privileges permitted to others in matter of foreclosures.

[Ed. Note.—For other definitions of "Banking," see Words & Phrases.]

◆

Appeal from Superior Court, Los Angeles, County; J. A. Smith, Judge.

Action by the Security-First National Bank of Los Angeles against Manerva D. Bennett, executrix of the estate of William H. Bennett, deceased, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Loren A. Butts, of Los Angeles, for respondent.

T. Frank Courtney, of Los Angeles, for appellant Manerva D. Bennett.

Walter E. Bennett, of Los Angeles, for appellants Myron E. Bennett and Mary W. Bennett.

George N. Foster, of Los Angeles, for appellants Marguerite H. Johnson, Pauline Johnson and Margaretha Johnson.

WOOD, Justice.

Defendants appeal from a judgment in which plaintiff was awarded the balance due on a promissory note secured by a trust deed after a sale of the property given as security.

[1] The action was commenced on August 8, 1933, against seven individual defendants who had signed the note. One of these defendants, William H. Bennett, had died May 4, 1933. Plaintiff presented to Manerva D. Bennett, executrix of the will of William H. Bennett, deceased, on August 8, 1933, its verified claim for the amount for which judgment was rendered. This claim was rejected by the executrix on August 22, 1933. An amended and supplemental complaint was filed on February 9, 1934, in which the death of William H. Bennett was alleged and the presentation and rejection of the claim to the executrix was set forth. It is now contended by defendants that the action is barred by section 714 of the Probate Code, which provides that suits must be brought against the executrix within three months after the date of service of notice of the rejection of the claim. In the case of Gregory v. Clabrough's Executors, 129 Cal. 475, 62 P. 72, 73, the action was commenced during the lifetime of the deceased and the point was made that "the suit was not revived against the executors for over three months after the claim was rejected." The court held: "Section 1498 of the Code of Civil Procedure [now section 714 of the Probate Code] can have no application to a case like the present, where the action was already pending when the claim was presented. All that is required of the plaintiff in such case is simply to present his claim." The facts of that case are not exactly similar to the facts of the present appeal, the difference be-

ing that one of the defendants in the present case died shortly before the commencement of the action. It can be said with equal justification that the section "can have no application to a case like the present." In Gregory v. Clabrough's Executors the court applied a liberal interpretation to the Code section. The point now presented is highly technical and does not affect the substantial rights of the parties. Before the filing of the amended and supplemental complaint the executrix had ample notice of the claim and opportunity to approve it. There has been no miscarriage of justice. Const.Cal. art. 6, § 4½.

[2] Defendants attack the proceedings by which the sale of the secured property was brought about. In the notice of sale it was stated that the sale would be made "for cash payable in United States gold coin at time of sale" and the point is made that by reason of various executive orders of the President of the United States and the Secretary of the Treasury authorized under the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, it was unlawful on and after May 1, 1933, for any person to hold, retain, or use gold coin, gold bullion, or gold certificates. On June 5, 1933, the Congress of the United States passed a joint resolution in which it was provided: "Every obligation, heretofore or hereafter incurred, whether or not any such provision [for payment in gold coin] is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." 48 U.S.Stats. c. 48, pp. 112, 113 (31 U.S.C.A. § 463). The validity of this resolution was sustained by the Supreme Court of the United States in the case of Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352. In Security-First National Bank of Los Angeles v. De La Cuesta (Cal.App.) 59 P.(2d) 542, 543, the court had before it for consideration the same point which is now presented. It was there held: "An offer to pay in gold coin made at the sale could have been discharged by payment in any legal coin or currency. All persons are conclusively presumed to have known these facts and to have been able to construe the notice of sale accordingly. The notice was not insufficient in fact nor was it legally void because of the provision for payment in gold coin."

[3] Defendants further attack the proceedings leading up to the sale by claiming that the plaintiff bank took certain steps necessary to bring about the sale during the period in which plaintiff bank was precluded from transacting banking business by the proclamation of the President of March 6, 1933. The declaration of default and the direction to sell was executed by plaintiff on March 7, 1933, and recorded by the trustee on March 8, 1933. The proclamation of the President preventing the doing of "banking business" contained a provision authorizing the Secretary of the Treasury to grant permission to banks to continue "usual banking functions" in a limited manner. Plaintiff contends that it was incumbent upon defendants to prove that plaintiff had not secured permission to continue banking "functions" under this provision of the proclamation and that defendants failed to make such proof. We find it unnecessary to pass upon this contention for we must hold that the steps which plaintiff took to bring about a sale of the property could not be classified as banking business within the terms of the proclamation, which provided in part: "Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said act and in order to prevent the export, hoarding or ear-marking of gold, or silver coin or bullion or currency, do hereby proclaim, * * * a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, exceptions as hereinafter provided, no such banking institution or branch shall pay out, export, earmark or permit the withdrawal or transfer in any manner or by device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever." This proclamation was before the court for consideration in Vidal v. Backs, 218 Cal. 99, 21 P.(2d) 952, 955, 86 A.L.R. 1134, and it was there said: "We have already seen that the

bank holiday was proclaimed * * * for the purpose of preventing the hoarding of gold, silver, and currency. It was * * * designed to close the banks and prevent the paying out of coin and currency." Nothing appears in the proclamation to prevent the action by the bank of which complaint is made. Many persons and corporations not in the banking business engage in the business of lending money on the security of real estate. Manifestly, such firms and corporations were not precluded by the proclamation from taking steps to bring about foreclosure sales. It would be unreasonable to hold that it was the intention of the President and the Congress to deny to banks the privileges permitted to others in the matter of foreclosures.

The judgment is affirmed.

I concur: CRAIL, P. J.

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17 Cal.App.2d 689

LEWIS v. CURRAN.

Civ. 5472.

District Court of Appeal, Third District, California.

Nov. 27, 1936.

Hearing Denied by Supreme Court Jan. 25, 1937.

1. Appeal and error ⇨1170(3)

Complaint in employee's action for employer's alleged negligence in failing to repair tractor so as to prevent clutch from sticking necessitating employee's use of tool in attempt to disengage clutch which tool caught and caused injury *held* not so defective as to require reversal (St.1933, p. 975, § 29(b); Const. art. 6, § 4½).

2. Appeal and error ⇨1002

Verdict of jury based on conflicting evidence is binding.

3. Master and servant ⇨104, 127

Instruction that, if tractor clutch was in habit of sticking and such fact was known to employer, or in exercise of ordinary care should have been known and it was necessary to use some tool to disengage clutch and only tool furnished employee was tool which employee used, failure of employer to repair tractor so as to prevent clutch from sticking and failure to supply employee with reasonably adequate tool to disengage clutch would constitute negligence, *held* proper.

4. Master and servant ⇨276(4)

In employee's action for injuries sustained when struck by crank bar being used to disengage sticking clutch of tractor, evidence *held* to justify jury's conclusion that employer's negligence in failing to repair tractor and in failing to furnish proper tool to disengage clutch was proximate cause of injury (St.1933, p. 975, § 29(b).

5. Damages ⇨132(14)

$10,000 damages for injuries, including loss of sight of eye, deep gash across cheek, broken cheekbone, and broken nose, *held* not excessive.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Glenn Lewis against James Curran. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sherwood Green, of Madera, and Edward Kellas, of Fresno, for appellant.

James W. Campbell and G. L. Aynesworth, both of Fresno, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Action for damages in which the plaintiff had judgment, and from which judgment the defendant appeals.

For many years the defendant has been a grain farmer in the county of Madera, with an annual pay roll exceeding $2,500, thus bringing him within the provisions of the Workmen's Compensation Insurance and Safety Laws (St.1912, p. 831, as amended), even though the defendant had not complied with the provisions of that act.

After proceedings were had before the Industrial Accident Commission, and an award was made in favor of the plaintiff, the plaintiff began this action based upon subdivision (b) of section 29 of the laws just referred to (St.1917, p. 857, as amended by St.1933, p. 975). That section provides that, if any employer shall fail to secure payment of compensation, any injured employee, or his dependents may proceed against such employer by filing an application for compensation with the commission, and in addition thereto may bring an action against such employer for damages. The section then specifies that the action shall be prosecuted in accordance with the provisions of the Code of Civil Procedure. The subdivision of the section also provides that "it shall be presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof shall rest upon the employer, to rebut the presumption of negligence. In such proceeding it shall not be a defense to the employer that the employee may have been guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant."

The plaintiff had been an employee of the defendant for some years preceding the receipt of the injury upon which this action is based. It appears from the record that during the year 1933 the plaintiff was directed to overhaul a certain "Best 60" tractor, and thereafter to operate it during the seeding season of 1933. After overhauling the tractor, the plaintiff was put in charge as the operator thereof. After plowing for about three weeks, the plaintiff was injured. The injury to the plaintiff was occasioned in the following manner: A spark-plug wire came off of the No. 1 cylinder of the engine. The pulling power of the tractor being so lessened, the tractor would not pull the load of five plows. Plaintiff attempted to stop the tractor and disengage the clutch, but the same would not release. The plaintiff then took a crank bar, a steel bar about two and one-half inches in length and about one inch in diameter, and thrust it against the moving back plate of the clutch to break it loose, and in so doing the bar was caught in the clutch and thrown against the plaintiff's face, injuring his right eye to such an extent that the plaintiff has lost the sight thereof. The jury returned a verdict of $10,000, and the court allowed an attorney fee of $500 as provided in the subdivision of the section cited, supra. We may state that the amount of the award of the Industrial Accident Commission is by the laws, supra, allowed as a credit against any such judgment.

[1] Upon this appeal it is urged that the second amended complaint fails to state a cause of action. This attack is directed against paragraph 11 of the complaint, which reads as follows: "That within two years last past, at the special instance and request of defendant, plaintiff performed work and labor for defendant upon defendant's farm in the County of Madera; that plaintiff was required by defendant to operate a certain tractor commonly known as a 'Best 60,' but because of defendant's negligence and carelessness said tractor was not operating properly and was badly in need of repairs; that while plaintiff was so operating said tractor, and by reason of the fact that said tractor was out of repair, the clutch upon said tractor stuck, and plaintiff, in an attempt to disengage said clutch and stop said tractor from operating, used the crank bar and, by reason of the fact that said tractor was out of repair, said crank bar was caught in the machinery and it flew back and hit plaintiff in the face and broke and burst plaintiff's right eye ball, cut a deep gash across plaintiff's right face and cheek underneath the right eye, broke plaintiff's right cheek bone in two places, and also broke plaintiff's nose; that plaintiff thereby entirely lost the sight of his right eye; that by reason of the injuries so received, plaintiff has been unable to work since the day of the injuries, and will be permanently disfigured and injured; that defendant has full knowledge of the fact that said tractor and said clutch had been for a long time, and then were in need of repair."

An examination of the transcript reveals that the theory upon which the action was tried brought home to the appellant full knowledge of every phase of the case upon which the plaintiff relied, and that the defendant likewise had a full and complete opportunity to present his defense to every part thereof. The paragraph which we have quoted may not be technically as full and complete as it might have been made, but it does exhibit the fact that the action was based upon the defective condition of the tractor which was allowed to remain and be operated in that condition by the negligence of the defendant in not having necessary repairs made thereto. The record shows fully that the action was tried upon the theory that the tractor was defective, and on the part of the appellant it was urged that, notwithstanding the alleged defective condition of the tractor, the injury to the plaintiff was caused by his independent, negligent act in attempting to disengage the clutch by striking it with an iron bar which was ordinarily supplied and used for cranking the engine. It is evident from the record and the testimony introduced that the defendant was not misled in any particular by reason of any defective pleading in this action. Under such circumstances, section 4½ of article 6 of the Constitution comes to the assistance of the plaintiff in specifying that no judgment shall be reversed, etc., for any error as to any matter of pleading, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

In the operation of the tractor it became the duty of the plaintiff to disengage the clutch, which the testimony shows had been allowed to remain for several days in a defective condition. There is much testimony in the record and cited by appellant for our consideration, that the tractor might have been stopped and thereafter the clutch disengaged without the use of the iron bar, and that to some extent the sticking of the clutch might be obviated by washing the same with gasoline. In this respect, however, the testimony fails to show that washing with gasoline would allow the clutch to be disengaged where the lining of the clutch was defective or considerably worn. The testimony in this case shows that the lining of the clutch was considerably frayed, and on one side of one of the discs was practically worn out. The testimony of the plaintiff may be summarized as follows:

After the tractor was partially repaired, and on November 2, 1933, while the plaintiff was operating the same in seeding operations upon appellant's ranch, the spark-plug wire came off on No. 1 cylinder of the engine. The plaintiff attempted to stop the tractor, but the clutch on the tractor stuck and he was unable to stop the tractor's forward movement, so he used the crank bar in attempting to disengage the clutch. The clutch was badly out of condition and repair and needed refacing. This method had been used to release the clutch for some time. A week or so before the accident the plaintiff had notified the appellant that the clutch was out of repair. Instead of repairing the clutch, the appellant suggested that the tractor be operated until all the seeding was done, and then he would have the tractor repaired. In order to repair the clutch it was necessary to procure and install new facings which would take about two days and a half. In repairing the tractor in the first instance, the plaintiff was advised by the appellant not to put in any new parts, but to get the tractor in shape so that it would run through the seeding time; that the tractor was not in good condition. The plaintiff also testified that under the circumstances, in order to shift gears or try to stop a tractor in that condition, there is some probability of getting hurt; there was not enough space to release the center plate; therefore the tractor, when you tried to release the clutch, would not stop. The sticking of the clutch was not caused by dust; that before using the crank bar and attempting to release the clutch the engine had been throttled down as low as it would go; that when the clutch is stuck you cannot get the gasoline in between the plates. The plaintiff did not stick the bar down through the hole, or anything of that sort; the clutch was exposed and there was no guard over it; the guard is to protect one from coming in contact with the flywheel; that the clutch had stuck several times, and each time he had been successful in releasing the same by striking it with the iron bar; that other operators had used the same means. The witness then explained that the fibers of the clutch peel off and get between the disc and the main plate, and for that reason the clutch will not release. Four witnesses who had been called to testify on the part of the appellant testified on cross-examination that, if the clutch sticks, it is evident that something is wrong, either dirt or sand in it, or that it is out of condition; that worn lining, crumbling or rolling away, would affect the operations of the clutch.

[2] As against this testimony, several witnesses testified that the plaintiff did not use the proper means of disengaging the clutch or stopping the forward movement of the tractor. However, such testimony only raises a conflict, and under such circumstances we are bound by the verdict of the jury. The verdict of the jury shows that it accepted the version of the occurrence given by the plaintiff. Under subdivision (b) of section 29, supra,

the burden of proof is upon the appellant alone, the presumption being that he was negligent, and it is no defense that the plaintiff may have been guilty of contributory negligence or assumed the risk or hazard complained of.

[3] The court instructed the jury as follows (which we think a correct statement of the law applicable to the foregoing facts): "You are further instructed that if you find from the evidence that the clutch upon said tractor was in the habit of sticking while said tractor was in operation, and that this fact was known to the defendant, or in the exercise of ordinary care should have been known to defendant, and it was necessary to use some tool or appliance in order to disengage such clutch, and you further find that the only tool or appliance with which the plaintiff was furnished or supplied to disengage said clutch was the tool, if any, which the plaintiff used, and you further find that ordinary care required defendant to repair said tractor and clutch, then and in that event you are instructed that the failure of defendant to repair said tractor so as to prevent said clutch from sticking, and the failure, if any, to supply plaintiff with tools and appliances reasonably adequate and proper to disengage said clutch, would constitute and be negligence."

The correctness of this instruction does not appear to be challenged by the appellant.

[4] Accepting the testimony given on the part of the plaintiff, the jury was fully authorized in concluding that the negligence of the appellant was the proximate cause of the injury suffered by the plaintiff, and directly contributed thereto.

Appellant specially calls our attention to the cases of Soria v. Cowell Portland Cement Co., 99 Cal.App. 108, 277 P. 1061, and Spivok v. Independent Sash & Door Co., 173 Cal. 438, 160 P. 565. Neither of these cases appear to us to support the contentions of the appellant. In the Soria Case, supra, it is expressly held that the defense of contributory negligence is expressly denied by the statutes, and, further, that, although the defendant had provided a certain means of passing around a part of the machinery known as the conveyor, yet a part thereof was left unguarded, and that this constituted negligence, for which the defendant was held liable.

[5] In the Spivok Case, supra, a stairway had been provided for the use of carpenters, but, instead of using the stairway, it appears that the plaintiff used a stepladder which was too short, and in attempting to climb upon a canopy, instead of grabbing hold of a stanchion, took hold of some loose form lying upon the canopy, and being loose, allowed the carpenter to fall backwards and receive certain injuries. The court held that the injury was caused by the sole negligence of the plaintiff. That case is readily distinguishable from the circumstances with which we are dealing. In the Spivok Case a safe means was provided for the use of carpenters in passing from one floor to another. In the instant case the testimony, if believed by the jury, sufficiently shows that the appellant furnished a defective tractor for the use of the plaintiff, and, in addition, furnished no means whatever for disengaging the clutch, which stuck repeatedly, and of which condition there is testimony to the effect that the appellant was advised. The judgment does not appear to be excessive.

Finding no reversible error in the record, the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.App.2d 682

SUND v. PAUL.

Civ. 10910.

District Court of Appeal, Second District,
Division 1, California.
Nov. 27, 1936.

1. Trial ⟹142

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence, result is determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Breach of marriage promise ⚷34
Release ⚷58(6)
Trover and conversion ⚷66

In actions for conversion of jewelry and mink coat allegedly given to plaintiff by defendant and for breach of marriage promise, with defenses including bills of sale and general release executed by plaintiff, which plaintiff claimed were obtained through fraud, duress, and unlawful detention of her person, plaintiff's evidence *held* insufficient for jury.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Actions by Cora Irene Sund against Capton Michael Paul, also known as Michael Iogloevitch and Captain Michael Paul. From judgments for defendant on directed verdicts and orders denying motions for judgments notwithstanding the verdicts, plaintiff appeals.

Affirmed.

Vincent A. Marco and Courtney & Courtney, all of Hollywood, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

YORK, Acting Presiding Justice.

This appeal arises out of two cases, one for conversion of personal property and the other for breach of promise of marriage, both of which were consolidated in the trial court and tried together before a jury. At the close of the evidence, the court instructed the jury in each case to return a verdict for the defendant. This action of the trial court is denominated as error by appellant. Respondent contends that the only question involved in this appeal is whether there is such a conflict in the evidence that the matter of the alleged conversion of the personal property and the alleged breach of contract to marry on the part of respondent should have gone to the jury; and claims that, in the absence of such conflict, the action of the trial court in directing a verdict in both cases cannot be censured.

The record shows, as far as the pleadings are concerned, that on January 11, 1935, plaintiff filed her complaint for conversion of personal property; defendant answered putting in issue the ownership of the property involved, except one diamond bracelet and one mink coat, and in that connection set up hæc verba two bills of sale to these articles executed by plaintiff, and further alleged, as a defense to this cause of action, the unchastity of plaintiff with one Mitchell Dressner on or about April 4, 1933. On January 31, 1935, plaintiff by affidavit denied the genuineness of the bills of sale, alleging execution thereof by means of fraud, duress, and threats of injury to her character.

On the same date on which said complaint for conversion was filed, plaintiff filed her action for breach of promise of marriage, to which defendant filed his answer, alleging unchastity of plaintiff; that plaintiff voluntarily ended the engagement by an instrument in writing, attached to answer as an exhibit; that she also executed a complete release of all claims which she might have had against defendant, also attached as an exhibit; and further alleged that plaintiff sought to reassume her contractual relations with defendant, as evidenced by telegrams and letters which were attached to the answer. Plaintiff by affidavit filed January 31, 1935, denied the genuineness and due execution of the instruments attached to the answer, alleging they were obtained from her by means of fraud, duress, and unlawful detention of her person.

The evidence shows that the parties to this action met in the summer of 1931 and became engaged to be married in 1933; that plaintiff had in her possession certain articles of jewelry and a mink coat which she claims were gifts to her from the defendant. With the exception of a diamond bracelet and the mink coat, defendant claims that these pieces of jewelry were loaned by him to plaintiff while she was working for him in an antique shop which he operated in New York City, and that, as to the bracelet and the mink coat, plaintiff executed bills of sale for these, when defendant's sister bought them from her for the sum of $400, which instruments are part of the record. In April, 1933, defendant while in New York City suggested to plaintiff that she fly to New York from Los Angeles. She shipped the jewelry to herself there in care of defendant's sister and arrived in New York in the afternoon of April 2, 1933, but did not see defendant at any time during her stay, although she did communicate with him by telephone.

Plaintiff testified that at 2 a. m. of April 4, 1933, after spending the evening in a café operated by defendant's brother, she returned to her apartment accompanied by one Mitchell Dressner; that shortly after their arrival at her apartment, defendant's brother and sister, accompanied by two men unknown to plaintiff, entered the apartment; that one of the men took her by the arm, placed her in a chair at a writing desk, pulled out a piece of paper, put pen and ink in her hand, and stood behind her with his hand on her shoulder; that this man and his companion said they were detectives and showed her their badges, and "they told me they would take me to the women's prison there for having a man in my room, that * * * I just wouldn't have a chance under New York laws." During this time, Mr. Dressner was in the bedroom of the apartment using the telephone, and that at the dictation of defendant's sister, plaintiff wrote the following note: "Dear Paul: For reasons best known to myself I hereby declare our engagement broken off. Cora Sund."

The next day she accompanied defendant's sister to the Chase National Bank in New York, at which time the sister was in possession of the box of jewelry and, at her request, plaintiff signed two bills of sale, one for the diamond bracelet and one for the mink coat, for a consideration of $400, and turned the fur coat over to defendant's sister. She also at that time executed a general release in favor of defendant. Plaintiff testified that she signed all three documents without being allowed to read them; that defendant's sister held them "all folded up, one line on each showing, the dotted line." Within a short time thereafter, plaintiff returned to her home in Minnesota.

It was shown on behalf of defendant that when the witnesses, above referred to, gained entrance to plaintiff's apartment on April 4, they found plaintiff and Mitchell Dressner in a compromising situation; that plaintiff voluntarily wrote and signed the note to defendant, hereinbefore set out. The defendant's sister testified that plaintiff voluntarily executed the bills of sale and the release at the Chase National Bank on April 6, 1933. There was introduced in evidence many letters and telegrams of plaintiff in which she sought the forgiveness of defendant for the wrong she had done him.

[1, 2] The only conflicting evidence in the record is in regard to what took place at plaintiff's apartment on April 4th. Although the cases do not appear to be in agreement as to what principles should govern the trial court on a motion for a directed verdict, it was held in the Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579, 580: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'"

We believe that upon the authority of the cited case the court was justified in instructing the jury in each case to return a verdict for the defendant.

The judgments appealed from are affirmed. The orders denying motions for judgments notwithstanding the verdicts are, and each of them is, affirmed.

We concur: DORAN, J.; DESMOND, J. pro tem.

7 Cal.2d 744

GILLUM v. JOHNSON, State Treasurer, et al.*

S. F. 15685.

Supreme Court of California.

Nov. 25, 1936.

Amended and Rehearing Denied

Dec. 21, 1936.

1. Mandamus 🔑121

Employer who forwarded money representing tax on employer and employees under Unemployment Reserves Act to Unemployment Reserves Commission *held* entitled to peremptory writ of mandamus requiring commission to pay money to credit of unemployment fund in state treasury, even if law be ultimately ineffective (St.1935, pp. 1226, 1227, §§ 1, 2; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.).

2. Constitutional law 🔑48
States 🔑122

Unemployment Reserves Act *held* not unconstitutional in authorizing state unemployment fund to be credited to federal unemployment trust fund as authorizing deposit in banks outside the state, since it must be assumed that federal approval of state act was such that state act could constitutionally operate and that national banks in the state would be designated for deposit of state funds (St.1935, pp. 1230, 1231, 1243, §§ 22, 24, 93; Const. art. 11, § 16½; Federal Social Security Act §§ 903, 904, 42 U.S.C.A. §§ 1103, 1104).

3. United States 🔑81

State unemployment funds deposited in federal unemployment trust fund are a continuing appropriation for specific purpose, and federal government does not obtain title to money but holds it in trust for state Unemployment Reserves Commission which is bound to administer money in accordance with Unemployment Reserves Act (St.1935, pp. 1230, 1231, 1243, §§ 22, 24, 93; Const. art. 11, § 16½; Federal Social Security Act §§ 903, 904, 42 U.S.C.A. §§ 1103, 1104).

4. States 🔑122

Fact that state unemployment funds deposited in federal unemployment trust fund must be deposited with national bank does not destroy their character as a deposit within constitutional provision that state moneys may be deposited in any national or state bank within state, since funds are moneys in state's custody and are subject to such deposit within the law (St.1935, pp. 1230, 1231, 1243, §§ 22, 24, 93; Const. art. 11, § 16½; Federal Social Security Act §§ 903, 904, 42 U.S.C.A. §§ 1103, 1104).

5. States 🔑130

Unemployment Reserves Act which authorizes deposit of state unemployment funds in federal unemployment trust fund *held* not unconstitutional as authorizing withdrawal of money from state treasury without an appropriation made by law, since all moneys received by Unemployment Reserves Commission are set apart as a continuing appropriation for specified purposes (St.1935, pp. 1230, 1231, 1243, §§ 22, 24, 93; Const. art. 4, § 22; art. 11, § 16½; Federal Social Security Act §§ 903, 904, 42 U.S.C.A. §§ 1103, 1104).

6. States 🔑136

Constitutional requirement that all money in state treasury, however appropriated, shall be drawn upon warrants duly drawn thereon by controller, is a mandatory provision which Legislature may not disregard and by which all parties dealing with money in state treasury are bound (Const. art. 4, § 22).

7. Constitutional law 🔑70(1)

Matter of classification is primarily one for legislative determination.

8. Constitutional law 🔑205(2)
Statutes 🔑79(1)

Classification in Unemployment Reserves Act which makes act applicable to employers having eight or more employees and which exempts certain lines of employment in its application to employees *held* not so arbitrary or unreasonable as to require judicial condemnation (St.1935, p. 1226; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.; Const. art. 1, § 21; art. 4, § 25, subd. 19).

9. Master and servant 🔑10

Establishment of unemployment insurance system is within state's reserved power, since, if state may care for those in need when actual need is present, to anticipate necessities of the future is a reasonable governmental policy.

10. Evidence 🔑5(2)

Supreme Court judicially knows that unemployment for several years past has presented serious, and at times very acute, problems for state and national governments.

11. Constitutional law 🔑70(3)

Supreme Court could not say whether some other plan of unemployment insurance than that adopted by Legislature, which did not conflict with Constitution, would be preferable or that experience might demonstrate economic fallacy of particular plan promulgated, since, if constitutional restraints do not prevent, legislative power is present (St. 1935, p. 1226).

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*Rehearing denied 63 P.(2d) 810.

12. Statutes ⚷51

Legislature had power to adopt as part of state unemployment insurance plan certain provisions of federal law on same subject (St.1935, p. 1226; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.).

13. States ⚷4

Supreme Court would not delay decision on constitutionality of Unemployment Reserves Act until question of validity of Federal Social Security Act had been passed upon by United States Supreme Court, since, if contributions under state act are not timely collected and deposited in federal trust fund, no credit on federal exactions can be received, and since funds deposited do not belong to United States, if federal act should be held invalid, state could reclaim funds (St.1935, p. 1226; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.).

14. Internal revenue ⚷2(3)

Pay roll tax imposed by Federal Social Security Act as affecting employers is an excise tax and not a direct tax, and as affecting employees it is either an income tax or an excise tax, and tax does not violate rule as to required uniformity, nor is credit allowed on account of payment of like exactions under state law prohibited, as respects constitutionality of act (Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.; Const.U.S. art. 1, § 9, cl. 4; Amend. 16).

15. Constitutional law ⚷46(1)

Supreme Court *held* not required to pass upon constitutionality of Federal Social Security Act before being justified in compelling Unemployment Reserves Commission to pay money, which had been transferred by an employer, to state treasurer, since court's decision would not be final, and federal government has power to levy and collect excise taxes imposed and to grant credits for payments made under state law (St.1935, p. 1226; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.; Const.U.S. art. 1, § 9, cl. 4; Amend. 16).

16. States ⚷4

Federal Social Security Act *held* not coercive as requiring state to enact employment compensation law in conformity with federal plan, since matter is purely one of state's concern, and especially where California Act was passed before federal law was enacted (St. 1935, p. 1226; Federal Social Security Act § 1 et seq., 42 U.S.C.A. § 301 et seq.; Const.U.S. Amend. 5).

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In Bank.

Mandamus proceeding by Claude C. Gillum, doing business under the name and style of Hotel Claremont, against Charles G. Johnson, State Treasurer, and others.

Peremptory writ ordered to issue in accordance with opinion.

Hugh K. McKevitt, of San Francisco, and Charles W. Fisher, of Oakland, for petitioner.

Athearn, Chandler & Farmer, Cullinan, Hickey & Sweigert, and John C. Wood, all of San Francisco, amici curiæ.

U. S. Webb, Atty. Gen. and John J. Dailey, Deputy Atty. Gen., for respondents.

John L. McNab, of San Francisco, for Unemployment Reserves Commission of California.

Allen G. Wright, of San Francisco, amicus curiæ.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondents, in so far as their official duties may be involved, to comply fully with the State Unemployment Reserves Act (Stats.1935, p. 1226), and with the Federal Social Security Act, Public No. 271, 74th Congress, 49 Stat. 620, § 1 et seq. (42 U.S.C.A. § 301 et seq.).

The petitioner is the proprietor of the Hotel Claremont in the county of Alameda. As such, he is the employer of eight or more persons in the state of California. In accordance with the state act he forwarded to the Unemployment Reserves Commission of this state nine-tenths of 1 per cent. of the wages paid to his employees, and forty-five hundredths of 1 per cent. deducted from the wages of his employees during the same period, said sums representing the tax on the employer and the employee under the state act. The petitioner alleges that the respondent commission received the moneys but refuses to pay the same to the state treasurer as required by the state act, notwithstanding the demand of the respondent state controller that it do so; that the respondent controller has notified the petitioner that, even if said funds be paid to the state treasurer, he (the controller) will refuse to audit and draw warrants for the amounts for deposit as required by the federal act.

The state act was approved by the Governor on June 25, 1935, and is entitled: "An act to establish a system of unemployment reserves for this State, and making an appropriation therefor." Section 1 (page 1226) sets forth the basis of and reasons for the enactment of the statute, viz., that experience has shown that large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable, and which is detrimental to the interests of the people of the state as a whole; that the benefit to all persons resulting from public and private enterprise is realized in the final consumption of goods and services; that it is contrary to public policy to permit the supply of consumption goods and services at prices which do not provide against that harm to the population consequent upon periods of unemployment of those who contribute to the production of such goods and services; that experience has shown that private charity of local relief cannot alone prevent the effects of unemployment and that, if the state awaits the coming of excessive unemployment, it can neither create immediately the organization necessary to orderly, economical and effective relief, nor bear the burden of relief without disrupting its whole system of ordinary revenues and without jeopardizing its credit; that, in order to meet in some measure the situation shown to be created by excessive unemployment, this act is designed to accumulate a reserve to assist in protecting the public against the social effects of unemployment which may be created in future years.

Section 2 (page 1227) provides that the statute is enacted as a part of a national plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions; that the imposition of the tax provided by the act upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of the act; that "therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited"; that, whenever the legislation enacted by the United States government is repealed, amended, affected, or otherwise changed in such manner that the contributions required by the act or some portion thereof cannot be thus credited, then upon the date of such change the provisions of this act requiring contributions and providing for payment of benefits shall cease to be operative and any assets in the unemployment fund or unemployment administration fund shall in the discretion of the state treasurer be held in the then existing depositaries or otherwise in the state treasury; that, in the case of the unemployment administration fund, such moneys may thereafter be dealt with by the state treasurer pursuant to the conditions of the grant thereof to the state by the United States government or agency thereof.

The state act is administered by the Unemployment Reserves Commission of five members, appointed by the Governor, by and through the State Department of Employment also created by the act, of which department the commission is the governing body. Two major funds are created, the "Unemployment Fund" and the "Unemployment Administration Fund."

The unemployment fund consists of all contributions and moneys paid into and received by the fund as provided in the act and of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon the moneys belonging to the fund.

The unemployment administration fund consists of all moneys received by the state or by the commission for the administration of the act. This fund shall be in the state treasury and shall be handled as other state moneys are handled, except that it shall be expended solely for the purposes of the administration of the act and except also that any balances therein shall not lapse at any time but shall remain continuously available to the commission for appropriate expenditures. All federal moneys allotted or apportioned to the state by the Federal Social Security Board or other agency for the administration of the state act are to be paid into the unemployment administration fund.

The obvious distinction between these two funds is that the unemployment fund and its earnings are to be used solely for the payment of benefits provided in the act and this fund is not subject to diminution for administration purposes; whereas the unemployment administration fund is intended to be used for purposes other than the payment of benefits and contributions to that fund consisting of allocations from the federal government, presumably at least in part from the 10 per cent. of the federal excise tax which is not credited on contributions under the state act, and moneys received otherwise than in the exaction of the tax, state or federal.

The state act requires contributions from the employers subject thereto of nine-tenths of 1 per cent. of their pay rolls in 1936, 1⁸⁄₁₀ per cent. in 1937, and 2⁷⁄₁₀ per cent. in 1939 and thereafter. The employees subject to the act are required to contribute from their wages one-half of 1 per cent. in 1936, and 1 per cent. beginning January 1, 1937, and thereafter. The employer is required to deduct the employees' contribution from his wages and transmit both to the unemployment fund. The state commission is authorized to exempt from the payment of contributions certain employers who adopt an approved guaranteed employment plan or an approved private unemployment benefit plan.

The following types of employment are not included in the taxable pay rolls: (1) Employees who did not perform the greater part of their work in this state; (2) agricultural labor; (3) domestic service in a private home; (4) service performed as an officer or member of the crew on a vessel on the navigable waters of the United States; (5) service performed by parents, minor children, or spouses of employers; (6) service by government employees; (7) service for certain nonprofit organizations; and (8) service for which an unemployment compensation system is established by the United States.

An eligible employee is defined as every person employed by an employer subject to the provisions of the act in an employment subject to the act. An employer is defined as every individual, trust or estate, partnership, association, joint-stock company or corporation, subject to a pay roll tax levied by the United States government, if the tax levied by the state act, or any portion thereof, may be credited against such pay roll tax.

The term "benefits" is defined to mean the money allowance payable to an employee as compensation for his wage losses due to unemployment as provided in the act. The term "total unemployment" is defined to mean the condition caused by the inability of an employee, who is capable of and available for work, to obtain suitable employment when such condition causes total loss of wages. Partial unemployment means any temporary reduction in working hours below the normal working hours per week, and which results in loss of wages. Normal working hours are then defined.

The act defines "suitable employment" as employment in the employee's usual employment or employment for which the employee is reasonably fitted, but is not suitable (1) if vacancy in it is created by strike, lockout, or other labor dispute; (2) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; and as a condition of such employment the individual will not be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

An employee is not eligible for benefits for either total or partial unemployment, (1) if he fail to give notification of unemployment, as provided in the act, or unless such notification is waived by the commission; (2) if he is physically unable to work or not available for work when called upon by his employer or by the district public employment office; and (3) if he has suitable employment.

An employee is not eligible for benefits for total unemployment based on passed weeks of employment, (1) if he left his employment because of a trade dispute and continues out of employment by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; (2) if he attended school or college during the last preceding session thereof and has been employed by his employer only during the customary vacation period; (3) if without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office; (4) if he has not been a resident of this state for one year immediately preceding the beginning of unemployment or has not been gainfully employed in the state for twenty-six weeks within such one-year period, with an exception not necessary to note. Benefits become payable after January 1, 1938, for unemployment occurring after that date. For total unemployment the rate of benefits is 50 per cent. of the average weekly wage but not exceeding $15 nor less than $7 per week;

for partial unemployment the difference lost to the employee between the eligible employee's actual wages for the week and the weekly benefits to which he would be entitled if totally unemployed.

The foregoing is not a complete résumé of the state act, but it is set forth sufficiently in outline to note its general scope and effect.

The purpose of the Federal Social Security Act (49 Stat. 620 [42 U.S.C.A. § 301 et seq.]) is expressed in the title: "An act to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes."

We are here concerned only with those provisions of the act which relate to unemployment compensation—called unemployment insurance in the state act. Briefly in this respect the federal act imposes on employers an excise tax of 1 per cent. of wages paid by them in 1936, 2 per cent. of wages paid in 1937, and 3 per cent. of wages paid in 1938 and thereafter, in respect to employment in the United States, including Alaska and Hawaii. With certain exceptions the federal tax is collected from each employer who has eight or more persons in his employ on any one day in each of twenty different weeks during the calendar year. The pay roll for 1936 will determine who is liable and also the amount of the tax that will be payable in January, 1937.

If a state has no unemployment insurance law meeting the standards set up by the federal act, the full amount of the federal tax, without any deduction, is paid into the general fund of the United States treasury in like manner as ordinary internal revenues. If a state has such a law and the same has been approved by the Federal Social Security Board, employers subject to the state tax may deduct from the federal tax 90 per cent. of their contributions made to the state for the taxable year, provided such state contributions have been paid prior to the filing of their federal returns. The act sets up in the Federal Treasury a fund called the "Unemployment Trust Fund." All contributions made by employers and employees under the state act and paid into the state "unemployment fund" are required to be deposited in the unemployment trust fund and are thereafter subject to requisition by the state commission as to the full amount thereof for the payment by the state commission of benefits for unemployment relief within the state. The Secretary of the Treasury is authorized to invest the moneys in the unemployment trust fund, but only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. In making such investments the unemployment trust fund is treated as a single fund, but a separate bank account is kept showing the amount of deposits from each state and this account is credited, from time to time, with the proportionate earnings from investments so made by the Secretary of the Treasury.

Under the provisions of title 3 of the federal act (sections 301–303 [42 U.S.C.A. §§ 501–503]) an appropriation of $4,000,000 is authorized for the fiscal year ending June 30, 1936, and the further sum of $49,000,000 each year thereafter, for the purpose of assisting the states in the administration of their unemployment compensation laws. These funds are certified by the Social Security Board for payment to each state having an approved unemployment compensation law on the basis (1) of the population of the state; (2) of the estimated number of persons covered by the state law and of the cost of administration of such law; and (3) of such other factors as the board finds relevant.

The provisions of titles 3 and 9 of the federal act (sections 301–303, 901–910 [42 U.S.C.A. §§ 501–503, 1101–1110]) make it plain that the purpose of the federal legislation was to encourage and bring about a uniform system of unemployment compensation throughout the United States. Those provisions are held out as an inducement to the states to enact unemployment compensation laws in accordance with certain general standards provided in the federal law, but leaving the actual operation of unemployment insurance and generally the numerous details in connection therewith, including the payment of benefits, to the states under their own laws.

The Legislature of this state anticipated the enactment of the federal statute and passed the state act (approved June 25, 1935) before the effective date of the federal law (August 14, 1935). The federal bill was in the process of enactment but had not become law when our Legislature was considering the enactment of the state law on the subject. The Legislature took notice of the terms of the pending bill, generally, and caused the state law to conform to the requirements of the federal law if the same should be enacted. Soon after the state law went into effect the provisions thereof were approved by the Social Security Board.

The purpose of the present proceeding is threefold: First, to compel the respondent Unemployment Reserves Commission created by the state act to pay into the state treasury to the credit of the unemployment fund the moneys which it has received from the petitioner pursuant to the terms of the act; secondly, to compel the respondent state treasurer, when he receives said funds, to deposit the same to the credit of the unemployment trust fund in the federal treasury; and thirdly, to compel the respondent state controller to draw his warrant for the sums to be so deposited.

[1] As to the respondent commission, there can be no doubt of its duty to pay over to the state treasurer the contributions which it has received from employers pursuant to the requirements of the state act. The commission acknowledges and asserts the validity of the federal-state plan of unemployment insurance as provided for in the two enactments and has raised no tenable point with reference to the regularity of the payment to it by the petitioner. Article 3 of the state act (St.1935, pp. 1230–1232 §§ 19–33) plainly contemplates that the state treasurer shall be the custodian of the unemployment fund, that contributions thereto made by employers should be paid into that fund without delay, and that the commission shall file an account with the department of finance and the state controller not later than the close of each month. There is no authority in law for the commission to retain this money, and the peremptory writ should issue requiring its payment to the credit of the unemployment fund in the state treasury. Even if the law under which the payments were made to it be ultimately ineffective, there is no authority for the commission to retain them indefinitely.

The respondent treasurer makes no point that it is not his duty to deposit the moneys paid into the unemployment fund to the credit of the unemployment trust fund in the Federal Treasury, if such deposit is constitutionally authorized.

The respondent controller has assumed an attitude which requires a consideration of the challenged provisions of the state act and also of the effect of the federal statute. He submits a return through the Attorney General consisting of a general demurrer to the petition alleging that the state act is in violation of numerous provisions of the State Constitution, particularly section 16½ of article 11, section 22 of article 4, section 21 of article 1, and subdivision 19 of section 25 of article 4. Amici curiæ in support of the controller's position present the same points and in addition argue that the federal act is unconstitutional.

[2-4] It is first insisted that to require the transfer of moneys in the state unemployment fund to the Secretary of the Treasury to the credit of the federal unemployment trust fund would be contrary to the provisions of section 16½ of article 11 of the State Constitution. That section provides: "All moneys belonging to, or in the custody of, the State, or any county, city and county, city, town, municipality or other public or municipal corporation, within this State may be deposited in any national bank or banks within this State, or in any bank or banks organized under the laws of this State, in such manner and under such conditions as may be provided by any law adopted by the people under the initiative or by a two-thirds vote of each house of the Legislature and approved by the Governor and subject to the referendum; provided, that the laws now governing the deposit of such moneys shall continue in force until such laws shall be amended, changed or repealed as in this section authorized; and provided, further, that the State or any county, city and county, city, town, municipality or other public or municipal corporation, issuing bonds under the laws of this State, may deposit moneys in any bank or banks outside this State for the payment of the principal or interest of such bonds at the place or places at which the same are payable."

Section 903 of the federal act (42 U.S.C.A. § 1103) requires that all moneys received in the state unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the "unemployment trust fund" established by section 904 (42 U.S.C.A. § 1104). The section last mentioned sets up that fund in the Treasury of the United States and further provides: "The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose."

Section 22 of the state act (St.1935, p. 1230) provides that all contributions paid under the state act shall upon collection be deposited in or invested in the obligations of the "unemployment trust fund" of the United States government or its authorized agent so long as said trust fund exists, notwithstanding any other statutory provision to the contrary, and that the commission shall requisition from the unemployment trust fund necessary amounts from time to time. Under section 24 of the state act (page 1231) the state treasurer is the custodian of the unemployment fund and the unemployment administration fund except when moneys in the unemployment fund are in the federal unemployment trust fund.

It is readily observed that, if the language of the federal act were to be so construed as to require without condition that the money in the state unemployment fund be deposited in the Treasury of the United States, or in any bank outside of the state, such requirement would be in violation of the provisions of the State Constitution. But the federal act provides the means by which such violation may be avoided, namely, by deposit in a national bank in this state designated by the Secretary of the Treasury for that purpose. Since the state act has been approved by the proper federal authority, it must be assumed that such approval carried with it an approval of the state act as it could constitutionally operate in this state and that some national bank or banks in this state would be designated for deposit of the state unemployment funds. When a federal reserve or a member bank within this state is so designated and the unemployment fund is deposited therein by the respondent treasurer, there is no violation of the section of the State Constitution referred to. It must be conceded that the moneys so contributed under the act are not public moneys in the sense that they are subject to appropriation other than as provided in the act. The funds thus raised are in their nature a continuing appropriation for a specific purpose. See Daugherty v. Riley, 1 Cal.(2d) 298, 34 P.(2d) 1005. The balances therein do not revert to the general fund at the end of the fiscal year and under both the state and federal acts constitute trust funds to be administered by the state commission and subject to its call at all times. Although these funds are required to be deposited in a federal reserve or member bank in this state, the federal government does not obtain title to the money but holds it in trust for the beneficiary—the state commission, which in turn is bound to administer it by the payment of benefits without diminution for administration purposes. The fact that these funds must be deposited with a national bank should not destroy their character as a deposit as contemplated by the State Constitution. Being moneys "in the custody" of the state, they are subject to such deposit within the law.

[5] It is next contended that such deposit is nevertheless contrary to the provisions of section 22 of article 4 of the Constitution which provides in part: "No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller." As above stated, the provisions of the state act constitute a continuing appropriation of the unemployment fund for the specific purpose for which its accumulations are to be used, and section 93 of the state act (page 1243) specially provides that all moneys made available by or received by the state under the federal act shall be paid into the special unemployment service account in the unemployment administration fund, "and all such moneys are hereby appropriated without regard to fiscal year, and shall be expended in accordance with law." It thus appears that all moneys received by the state commission are set apart as a continuing appropriation for the purposes specified and the provisions of the Constitution with reference to appropriations are therefore satisfied.

[6] The additional requirement of section 22 of article 4 of the State Constitution that all money in the state treasury, however appropriated, shall be drawn "upon warrants duly drawn thereon by the Controller," is mandatory. The Legislature may not disregard it and all parties dealing with money in the state treasury are bound by it. No good reason has been advanced why compliance with it should not be observed or why such compliance would unduly burden the operation of the statutory plan.

[7, 8] The question raised under section 21 of article 1 and subdivision 19 of section 25 of article 4 is whether the classification of persons subject to the state tax is

such a classification as the Legislature is empowered to make. The employers so classified are those who are subject to the pay roll tax imposed by the federal government, namely, employers having eight or more employees, with employees in certain lines of employment exempted. Obviously the charge that the whole plan of federal-state unemployment insurance as outlined in the two statutes is unworkable would seem to have more merit if it were made to apply to employers of every sort without regard to the nature of the employment or the number of employees. The difficulties of enforcement and administration might thus be so greatly multiplied as to destroy the plan entirely. It is well established that the matter of classification is primarily one for legislative determination, and no argument has been advanced which would compel the conclusion that in its taxing features the classifications laid down are so arbitrary or unreasonable as to require judicial condemnation. This conclusion must especially apply to classifications under the state act; namely, those engaged in employment where the industry or business engages eight or more employees. It was deemed necessary to draw the line somewhere in order that the plan be not to cumbersome and unwieldy. Similar classifications for purposes of administration have been properly made in section 8 of our Workmen's Compensation Law (St.1917, p. 835). Whether the benefit paying feature of the pooled fund plan of our state law will meet the tests laid down in the Railroad Retirement Act Case (Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468), wherein the scheme of pooling the contributions of all carriers and treating all as one employer and conferring benefits on those who had not contributed to the fund was held to be in violation of the due process clause, need not now be forecast, for the reason that our statute would appear to be a valid taxing statute, and if in the disbursements of benefits thereunder such payments must under the law be made to those employees who had contributed to the fund or whose employers had so contributed (as provided in the unemployment insurance statutes of Utah and Wisconsin), our statute would nevertheless be valid under section 111 thereof (St.1935, p. 1245) as to those who had so contributed and inoperative as to those who had not. Our statute seems to be flexible enough to be operative under a plan of separate employment reserves, even if the pooled fund features of the statute be stricken. If this be not so, the statute could still remain as a taxing statute and be amended as to its spending features, in such manner as to meet successful federal constitutional objections. In other words, it seems to us that the fact that in some instances certain unemployed persons who had not contributed to the fund may have been improperly made eligible to receive benefits should not be permitted to destroy the plan, assuming that such contribution be finally deemed essential under federal decisions.

[9-12] As to the broader constitutional question, it may not be doubted that it is within the reserved power of the state to establish an employment insurance system. The preamble and findings of the Legislature in the state act are in consonance with what the court may judicially know, namely, that unemployment for several years past has presented serious and at times very acute problems for state and national governments. Vast sums of money have been expended for the relief of the unemployed and others whose need for subsistence has been caused by misfortune and indigence resulting from what has been recognized as an abnormal period of depression. Those vast sums have been obtained for the most part by pledging the credit of the state and nation through the issuance and sale of bonds and other securities. History discloses that financial panics, periods of depression, or hard times are recurrent. After much investigation, research, and thought upon the subject, the Legislature has determined that it is wise and prudent policy to provide in advance some measure of security as against the lean years which the future may bring forth. If it be within this reserved power of the state to care for those in need when the actual need is present, and as to this there can be no question, it would seem to be likewise true that to anticipate the necessities of the future is not only a reasonable but a wise and salutary governmental policy. Whether the plan now projected is the best that could be devised is not the question. Economic theorists have divergent views on the subject, but it is not for the court to say whether some other plan would be preferable or that experience may demonstrate the economic fallacy of the particular plan promulgated. If constitutional restraints do not prevent, the legislative power is present. We now discover no insuperable obstacle to the accomplishment of the plan so far as the State Constitution is concerned. And there appears no

lack of power in the Legislature to adopt as a part of the state plan certain provisions of the federal law on the same subject. In re Burke, 190 Cal. 326, 212 P. 193.

[13] It is suggested by the respondent commission that, for the purpose of the present proceeding, this court assume that the federal act is in conformity with the provisions of the Constitution of the United States. It has also been suggested that the decision herein be delayed until the question of the validity of the federal statute has been passed upon by the Supreme Court of the United States, a course which may at times be appropriately followed.

We are not disposed to follow the second course suggested for reasons which seem to be persuasive. It appears from the petition that there are in California approximately 16,000 employers and 1,200,000 employees subject to the requirement of contribution under the state act for the year 1936; that the aggregate of these contributions for this year is about $15,000,000. If these contributions be not timely collected under the state act and deposited in the federal trust fund, no credit on the federal exactions can be received by those required to contribute under the state act, in which event both federal and state exactions without deductions would have to be paid. Although the statutory penalty for nonpayment of the federal tax is only one-half of 1 per cent. per month and the penalty for nonpayment of the state exactions is only 1 per cent. per month from the time the payments become due, it nevertheless seems desirable now to place the employers of the state subject to the tax in position to receive the credits allowed on account of payment of contributions under state law if they desire to avail themselves of such right to credit. This, too, without any lasting prejudice to the contributors under the state law. If the federal statute in so far as it relates to unemployment insurance be held invalid by the court of last resort, the state act covering the same subject matter would probably fall with it under section 2 thereof.

Some anxiety is expressed by amici curiæ lest the contributions made under the state act be lost to them or to the state in the event the federal act be invalidated. We think no serious apprehension in that regard need be entertained. The same question arose in the state of New York immediately following the approval, on April 15, 1936, of the Unemployment Insurance Law of that state by the New York Court of Appeals. Chamberlin, Inc., v. Andrews, 271 N.Y. 1, 2 N.E.(2d) 22. [Note: Since the preparation of this opinion the Supreme Court, on November 23, 1936, by an equally divided court and without opinion, affirmed the judgment of the New York Court of Appeals in the Chamberlin Case, 57 S.Ct. 122, 81 L.Ed. ——.] Assurances were then tendered by the Secretary of the Treasury recognizing the trust character of deposits made pursuant to state laws and stating that, if the federal act should be held invalid, the Secretary would honor requisitions by any state agency to the extent of its balance in the federal trust fund. While these assurances may not be said to have the binding force of a statute or judgment in the premises, there appears to be no good reason why this course could not or should not be followed. The funds so deposited do not belong to the United States. The beneficial title thereto is in the state or in the state agency depositing the same, which in turn is trustee for those who had made the contributions, or for the beneficiaries under the state act.

[14, 15] In support of the position of the respondent controller, amici curiæ take the position that before a peremptory writ herein be justified it is necessary that this court pass upon the constitutionality of the Federal Social Security Act. Their theory seems to be that, since the state act declares that it shall become effective only upon the enactment by the United States government of legislation providing for a pay roll tax applicable in all the states, it must be assumed that a valid federal law on that subject would be enacted, and that, if no valid federal law has been enacted, the state law has not gone into effect. Accordingly, amici curiæ have ably presented their contentions that the federal law is invalid for the many reasons advanced by them. It is well known that the enactment of the Federal Social Security Act and of unemployment insurance statutes in fifteen states [Alabama, California, Idaho, Indiana, Massachusetts, Mississippi, New Hampshire, New York, Oregon, Rhode Island, South Carolina, Texas, Utah, Washington, but see Johnson v. State (Wash.) 60 P.(2d) 681, and Wisconsin], and in the District of Columbia, has given rise to many federal constitutional questions. They cannot all be resolved with certainty by reference to cases determined by the Supreme Court of the United States. Whatever we might say on

that subject would not be final. For the purposes of this case we might well assume that, since Congress has spoken on a matter generally within its power, its action in that respect is the law of the land until set aside by the court of last resort. But it is not necessary to proceed alone on that assumption for the reason that we arrive at the same ultimate conclusion without it. Certain it is that the pay roll tax imposed by the federal act is the kind of tax which is authorized under federal law. As affecting employers it is an excise tax, or a tax on the right to do certain things, and as such is not a direct tax prohibited by clause 4 of section 9 of article 1 of the Federal Constitution. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312; Thomas v. United States, 192 U.S. 363, 24 S.Ct. 305, 48 L.Ed. 481; Patton v. Brady, 184 U.S. 608, 22 S. Ct. 493, 46 L.Ed. 713; McCray v. United States, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78, 1 Ann.Cas. 561; Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226; Nicol v. Ames, 173 U.S. 509, 19 S.Ct. 522, 43 L.Ed. 786. The tax on the employee is either an income tax and as such is authorized by the Sixteenth Amendment, or is a tax on earnings for personal services and as such is an excise tax authorized even without the Sixteenth Amendment. Springer v. United States, 102 U.S. 586, 26 L.Ed. 253. The rule as to the required uniformity (geographical uniformity) is not violated, for "it operates with the same force and effect in every place where the subject of it is found." Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 252, 28 L.Ed. 798; Knowlton v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969. And there would appear to be no infirmity in the federal statute by reason of the credit therein allowed on account of the payment of like exactions under state law, as is done in the case of federal and other inheritance taxes. Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511.

It is clear, therefore, that the federal government has the power to levy and collect the employer excise taxes such as have been imposed for general revenue purposes and to grant the credits for payments made under state law.

It is unnecessary to explore further the intendments of the federal act to determine whether its purpose is to coerce the states to enact an employment compensation law in conformity with the federal plan. It is enough for present purposes that the contingency on which the state act was to become effective, namely, the enactment by Congress of a pay roll tax against which all or any part of the contributions required by the state act may be credited, has taken place. In other words, the federal act answers the description of federal legislation the enactment of which would put the state act into operation.

[16] As to the alleged coercive features of the federal act, it is plain that there is no coercion of the employer or taxpayer in a state in a matter purely of state concern, such as was condemned as being in violation of the Fifth Amendment in the Hoosac Mills Case involving the validity of the Agricultural Adjustment Act (7 U.S.C.A. § 601 et seq.) (United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A. L.R. 914), and other cases to like effect relied on by amici curiæ. If there is any coercion by the federal government, it is coercion of the states themselves, which as to California is not apparent, for the reason that, as above noted, the state act was approved by the Governor on June 25, 1935, and the federal act was not approved by the President until August 14, 1935. It is difficult to perceive how the alleged federal coercion could apply to a state act passed before the federal law was enacted. Rather it would seem that the State Legislature recognized the necessity and salutary effect of joint action by state and national lawmaking bodies and enacted the state law with the hope and expectation of the enactment of a federal law as outlined in the bill then pending in Congress.

The magnitude of the federal-state plan and the complexities of its operation indicate that many questions may hereafter arise, particularly with reference to the administration of its trust by the respondent commission. Enough has been said for present purposes.

The order about to be made will be made on the assumption that the deposit by the respondent state treasurer of the state unemployment funds will be made in a national bank within this state to be designated for such deposit by the Secretary of the Treasury of the United States.

Let the peremptory writ as to all of the respondents therefore issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

EDMONDS, J., not having been present at the argument of this case, does not participate in the decision.

17 Cal.App.2d 674

HAYMAN v. CITY OF LOS ANGELES et al.

Civ. 10992.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1936.

Hearing Denied by Supreme Court Jan. 25, 1937.

1. Municipal corporations 🔑218(8)

Certificate as to service of notice of discharge of civil service employee of city *held* insufficient as proof that notice was given because of failure to state manner in which service was claimed to have been made.

2. Municipal corporations 🔑218(8)

Order of city civil service commission, purporting to sustain employee's discharge, *held* invalid where certificate of service of notice of discharge was defective.

3. Municipal corporations 🔑218(3)

Continuing to attempt to cause dissension among employees of division by circulating handbill, protesting against book of rules adopted by city board of public works for conduct of employees of such division, *held* not insufficient grounds for discharge of civil service employee of city.

4. Evidence 🔑83(1)

Presumption of law is that official duty has been properly performed.

5. Evidence 🔑83(2)

Presumption was that dismissal of civil service employee of city was not groundless.

6. Mandamus 🔑143(2)

One who seeks remedy of mandamus to compel his reinstatement to a civil service position from which he has been dismissed must act promptly.

7. Mandamus 🔑143(2)

Proceeding for writ of mandate to compel reinstatement of civil service employee of city, which was filed nine months after notice of discharge, *held* barred by laches, in absence of valid excuse for delay, where position had been filled and there was no vacant position in department to which discharged employee could be assigned.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Willie W. Hayman against the City of Los Angeles and others for a writ of mandate. From a judgment on the pleadings directing the peremptory writ of mandate to be issued, defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., and Frederick Von Schrader, Asst. City Atty., both of Los Angeles, for appellants.

C. B. Conlin and E. R. Simon, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

The peremptory writ of mandate directed to be issued by the judgment, which was granted on the pleadings, ordered respondents City of Los Angeles, Civil Service Commission of said city, and the Board of Public Works of said city to restore and reinstate petitioner to a position theretofore held by him under the classified civil service of the City of Los Angeles as a motortruck driver in one of the city departments.

It was shown by the petition that on March 1, 1935, petitioner was served with notice of suspension for thirty days. On March 7, he demanded in writing an investigation of the grounds of his suspension, and on that day he received from the Civil Service Commission a letter acknowledging receipt of his demand for an investigation and notifying him that at a meeting held March 6, an order had been made that an investigation of his suspension should be made. The letter also stated, "At the same meeting there was submitted Notice from the Board of Public Works of your discharge to be effective March 1st." On March 8, he was notified in writing by the Civil Service Commission as follows: "With further reference to your recent request for an investigation into suspension from the position of Motor Truck Driver, Bureau of Engineering, Commissioner Sunday is making that investigation and asks that you be in this office for an interview at 11:00 a. m. on Monday, the 11th." Petitioner appeared at the office of the commission on March 11. On March 14, he received notice that, after an investigation of his suspension and discharge, a resolution was adopted sustaining the discharge.

In the petition it was alleged that the letter of March 14, notifying him that his discharge had been sustained by the commission was the only notice of any kind which plaintiff had ever received notifying him of his discharge, and that no other notice thereof had ever been delivered to him personally and none had been left at his last-known place of residence. If these allegations were true, there was a failure to comply with the provisions of the city charter which lay down the procedure to be followed in discharging a civil service employee. The charter provides as follows: "* * * No person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he can not be found. Upon such filing such removal, discharge or suspension shall take effect."

By their answer respondents set out a copy of a notice of the discharge of petitioner from his position, dated March 1, 1935 (which, incidentally, is the same date as the date of the notice of suspension), signed by the city engineer, by E. G. Evans, personnel director, attached to which notice, as set out in the answer, was a certificate reading as follows: "I hereby certify that a copy of the foregoing statement was served on said ——— on the 6 day of March, 1935, at 11:25 o'clock (a. m.) ~~(p. m.)~~ personally. (If person cannot be found strike out ~~'personally'~~ and fill out the following:) by leaving same at (his) ~~(her)~~ last known place of residence, to-wit: 1706 E. 22nd St. ——— for the reason that (he) ~~(she)~~ could not be found. [Signature] O. C. Sutton." While there was a general denial by answer that petitioner had not received notice of the discharge, that answer was qualified by the specific allegations of the answer which relied upon the foregoing certificate as evidence of the service of notice.

[1] The trial court held that the certificate was insufficient, as proof of the giving of notice, to comply with the charter provision which we have quoted. We entertain the same view. A proper construction of the charter provision which requires certification is that the certificate should show in what manner the service was made, whether personally or by leaving the same at the last-known place of residence of the employee. The certificate in question was fatally defective in this respect. It will be noticed also that it was defective in failing to contain the name of the employee or the city in which the premises "1706 E. 22nd St." were located. Whether the latter defects rendered the certificate void need not be decided. Its nullity as evidence of service is sufficiently shown by the failure to state the manner in which service was claimed to have been made.

[2] That the filing of a proper certificate is jurisdictional was decided in Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682, 684. It was there said, in construing the same charter provision of the City of Los Angeles: "A vital and inseparable portion of the written notice provided for in section 112(a) of article 9 of the city charter is the certification to be attached thereto showing the required service thereof upon the person affected by the discharge; and it is only upon the transmission of such notice with its appended certification that the discharge or suspension of a civil service employee provided for in said section becomes effectual for any purpose." Respondents appear to contend that petitioner was properly discharged because he had actual notice of his discharge through a letter from the Civil Service Commission dated March 7, 1935, notifying him that there had been submitted from the Board of Public Works a notice of petitioner's discharge, to be effective March 1, and that, in response to a notice from the commission, petitioner appeared before the commission for an interview on March 11. However, petitioner could not have been discharged by a notice from the Civil Service Commission, and his appearance before the commission on March 11 was in response to a notice that he should then submit to an interview, not in connection with his discharge, but in connection with his suspension. Upon this point we quote further from Shannon v. City of Los Angeles, supra: "The oral statement made to the petitioner by the respondent Backus to the effect that he was discharged was ineffectual for any purpose, since mere knowledge of a fact regarding which formal notice is expressly required cannot be held to be a substitute for such service. Chaplin v. Superior Court, 81 Cal.App. 367, 253 P. 954. Neither would the transmission by said Backus to the board of civil service commissioners of the written notice of the petitioner's discharge, however regular in the form of such notice, become effectual to accomplish such discharge unless and until the further provision of the charter re-

quiring service of such notice and designating the form and method of such service should have been complied with." Not only was it held that the giving of notice as required by the charter is mandatory and jurisdictional and that actual knowledge is not a substitute for written notice, but it was further held that until there has been a valid discharge, an essential part of which is proper certification of service of the statement of grounds of discharge, the Civil Service Commission is without authority to make any valid order in the premises. The order of the commission purporting to sustain petitioner's discharge was therefore without effect.

[3-5] Another reason assigned by the trial court for the judgment was that the grounds set forth in the statement of discharge were wholly insufficient and did not constitute a legal cause for which petitioner could be discharged. The grounds stated in the notice of discharge were as follows: "Continuing to attempt to cause dissension among employees of the Refuse Collection Division by circulating a handbill protesting against the book of rules adopted by the Board of Public Works for the conduct of employees of said division." In the answer of defendants is found a copy of the handbill alleged to have been circulated by petitioner, from which it appears that petitioner, as president of Los Angeles City Motor Vehicle Operators' Benefit Association, was soliciting all city truck drivers to join the association and to co-operate in an agitation regarding wages, pay for overtime work, provision for locker rooms and baths, compensation with which to purchase insurance, and further to protest the rules of the Department of Public Works governing operators of city trucks. In the notice of discharge the acts of petitioner were characterized as a continuance of attempts to create dissension among the employees. It is the position of petitioner that his discharge was groundless; that nothing was contained in the statement which tended in any way to show his unfitness to continue in his employment nor anything that was detrimental to the service. He characterizes the statement of the reasons for his discharge as a mere subterfuge to conceal an arbitrary and capricious action of the city engineer in dismissing him. He seeks to justify his activities upon the ground of his constitutional right of freedom of speech and assembly. The right which is involved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. Such is not only the right but the duty of the city and its several departments. In the exercise of this duty, they must be allowed a wide discretion and their acts are not subject to review by the courts until they have reached the point of illegality. We do not see how it could be said that it appears from the pleadings in the case that the action of the city engineer was capricious and arbitrary and that petitioner was dismissed without cause. If petitioner's activities had a tendency to create dissension and unrest among the city employees and to interfere with the enforcement of reasonable rules of conduct prescribed by the Board of Public Works, it is not for the courts to declare that a dismissal based upon these facts would be without cause and therefore without authority under the charter of the city. The grounds stated for petitioner's discharge were not legally insufficient. The implications from the facts stated in the notice of discharge tend to deny rather than to support petitioner's claim that the action was arbitrary. The presumption of law is that official duty has been properly performed, and such presumption is applicable to impute good faith to the action of the city engineer in dismissing petitioner. There was no showing before the court that the dismissal was groundless; the presumption is to the contrary and the facts stated were, in our opinion, sufficient, if borne out by an investigation of the Civil Service Commission, to have warranted an affirmance of the dismissal. The judgment in petitioner's favor therefore cannot be sustained upon the ground that the attempted dismissal was without cause.

[6, 7] Respondents by their answer alleged that "continuously since March 14, 1935, petitioner's former position as motor truck driver in the division of engineering has been filled by one or more other employees, and there is no vacant position as motor truck driver to which petitioner could be assigned." They rely upon this allegation of the answer and upon the fact that the petition for writ of mandate was not filed until December 9, 1935, some nine months after petitioner had notice that he had been discharged, as establishing laches

on the part of petitioner which bar him from the right of reinstatement. No facts were alleged in the petition which would excuse a delay of nine months in the institution of this proceeding. It was alleged that at various times petitioner demanded that he be reinstated, but it was alleged also that defendants at all times refused to reinstate him. He was not encouraged to believe that he would be reinstated nor was he dissuaded from resorting to legal action by any promises or any conduct of defendants. The law is well settled that one who seeks the remedy of mandamus to compel his reinstatement to a civil service position from which he has been dismissed must act promptly. MacMullan v. Kelly, 19 Cal.App. 700, at page 709, 127 P. 819, quoting from Merrill on Mandamus, § 87; Doan v. City of Long Beach, 130 Cal.App. 526, 20 P. (2d) 777; Harby v. Board of Education, 2 Cal.App. 418, 83 P. 1081; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 P. 69; Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; Kramer v. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216. In none of these cases was as short a period as nine months held to be so excessive as to bar the relief sought upon the ground of laches. But in these cases our courts have cited with apparent approval decisions of New York courts holding delays of from four to eight months to be excessive. To the same effect are People ex rel. King v. City of Chicago, 147 Ill.App. 591, and People ex rel. Holty v. City of Chicago, 148 Ill.App. 96. But the defense of laches involves much more than the element of delay. It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of laches. Unless prejudice results from the delay the defense is not established, but, if prejudice has resulted, the one whose prompt action would have forestalled it can avoid the responsibility only by showing that he sought his remedy promptly. It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for. It appears from the answer of defendants that ever since petitioner's discharge his position has been filled by one or more of the other city employees, and that there was at the time of the filing of the petition no vacant position in the department to which petitioner could be assigned. If petitioner should be reinstated, he no doubt would lay claim to the salary which he would have earned except for his discharge, or for so much thereof as he might be able to claim under charter provisions which require the filing of claims with the city within six months after the accrual of the demand. Whatever he might receive would be for services which he had not rendered but which had been performed by others, who had been compensated therefor. The city would thereby be prejudiced. In this connection see Donovan v. Board of Police Commissioners, supra, 32 Cal.App. 392, at page 400, 163 P. 69. It is precisely for such reasons as these that unnecessary and unexcused delay will bar relief which, if applied for promptly, would have been granted. The rule is founded in sound public policy and its application prevents inequity and injustice. It is applicable to the facts disclosed by the pleadings in the present case. We do not hold that a delay of nine months in filing the petition convicts petitioner of laches as a matter of law. Each case where the defense of laches is asserted must be judged upon its own facts. But we do hold that there was such a delay in the institution of this proceeding as, if unexcused, would preclude plaintiff from obtaining the relief he seeks. Upon the pleadings as they now stand, a statement that petitioner has acted promptly would be unsupported in law or in fact. The facts as alleged show that his action has been dilatory. For this reason the judgment must be reversed. Petitioner should be allowed an opportunity by an amended petition to show some valid excuse for his delay in instituting this proceeding. If he should be unable to do so, he will not be entitled to a judgment reinstating him to the position from which he has been dismissed.

The judgment is reversed.

We concur: **YORK**, Acting P. J.; **DORAN**, J.

18 Cal.App.2d 1

DOWDALL v. GILMORE OIL CO., Limited.

Civ. 5608.

District Court of Appeal, Third District, California.

Dec. 2, 1936.

Hearing Denied by Supreme Court Jan. 28, 1937.

1. Trial ⚷203(1)

Where there is conflict, each party is entitled to have law given jury which is applicable to his theory of case and testimony of his witnesses.

2. Trial ⚷260(1)

Instructions on points which have been sufficiently covered by other instructions may properly be refused although they are correctly drawn and applicable to the evidence.

3. Trial ⚷260(8)

Refusal to grant instruction embodying oil company's theory that it was not liable for injuries sustained by prospective purchaser on return trip from looking at oil station, on ground that oil company's agent who had driven purchaser to look at station was not acting in scope of his employment on return trip if, prior thereto, agent and purchaser had abandoned purpose of trip and had gone on pleasure trip for their own entertainment, *held* not error where instructions given clearly presented question whether return trip was within scope of agent's employment.

4. Trial ⚷295(1)

Entire charge given jury must be examined, and if charge is fair and complete as a whole it is sufficient.

5. Appeal and error ⚷1064(1), 1067

Error in giving or refusing instructions does not warrant reversal unless it affirmatively appears that such error resulted in miscarriage of justice.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Desmond R. Dowdall against the Gilmore Oil Company, Limited. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Jerome D. Peters, of Chico, for appellant.

Ware & Ware, of Chico, and Horton & Horton, of Los Angeles, for respondent.

PULLEN, Presiding Justice.

The question here involved is as to the propriety of refusing to give an instruction offered by defendant and the giving of an instruction submitted by plaintiff. For a proper understanding of the controversy it is necessary to briefly set forth the facts.

John F. Griffin was the branch manager of the Gilmore Oil Company with headquarters in Chico. For about ten days prior to July 23, 1934, Griffin had been discussing with plaintiff the feasibility of plaintiff leasing and operating an oil station in Oroville, known as Henderson service station. By prearrangement Griffin went to Paradise on the afternoon of July 23d, and there met plaintiff and Eric D. Beilby, and the three then drove to Oroville in an automobile of defendant and operated by Griffin to look over the Henderson station, arriving there about 9 o'clock p. m., having made the trip from Paradise by what is known as the Clark grade. While in Oroville they discussed the proposed deal, and about 11 or 11:30 o'clock that night they left the Henderson service station, and at the suggestion of Griffin went to Mealey's Italian Village, a few miles from Oroville, partly to get something to eat and partly that the prospective buyer of the oil station could meet the Mealeys, who, Mr. Griffin said, could help him in building up his trade if he decided to make the deal. While at Mealeys they had some sandwiches and a few glasses of beer and indulged in a few dances. Upon leaving Mealeys about 3 o'clock a. m. Griffin drove back through Oroville and took the Chico-Oroville highway, which intersected the road to Paradise known as the Neal grade, which was the route by which they had determined to return and which, although longer than the route via the Clark grade, was paved and in better driving condition. While on the Oroville-Chico way and before coming to the intersection of the Neal grade, the automobile struck a concrete abutment which resulted in the death of Griffin and caused the injuries to plaintiff for which he sues in this action.

It is the contention of defendant that their agent, Griffin, after the time he arrived at Mealeys, was not acting within the course or scope of his employment, because Griffin and plaintiff had abandoned such business and were engaged in a pleasure trip of their own, and the trip following the leaving of Mealeys was a part of such pleasure trip and entertainment.

As a second defense it is alleged that plaintiff, when he entered the automobile on leaving the Mealeys, knew the driver Griffin had worked all of the previous day and had had no sleep or rest during that day and up to 3 o'clock on the morning of that day and by reason thereby and by reason of the liquor consumed, knew or should have known that Griffin was unable to drive an automobile with the same degree of skill and care as an ordinary man in normal condition, and that by reason of fatigue and lack of sleep would in all probability become drowsy, causing him to be an unfit driver. The action was tried before a jury which resulted in a verdict in favor of plaintiff.

It is first claimed the court erred in refusing to give the following instruction requested by appellant relating to the defense in respect to the return trip: "If you believe from the evidence in this case, that the plaintiff and the said John F. Griffin went on a trip on June 23, 1934, and left Paradise in Butte County, California, for the purpose of attending to business of the defendant, Gilmore Oil Company, a corporation, and for any reason, afterward abandoned that business and went on a pleasure trip for entertainment of their own, and that subsequently said John F. Griffin undertook to drive the plaintiff to his home, and that he was so engaged at the time of the accident, then I instruct you that the said John F. Griffin was not at the time of the accident engaged within the scope of his employment, and under such circumstances the defendant Gilmore Oil Company, a corporation, would not be liable for any negligence of the said John F. Griffin, or for any tort that he might commit."

It is next claimed the court erred in giving the following instruction requested by plaintiff, dealing with the return trip: "If you believe from the evidence in this case that the plaintiff and John F. Griffin were on a trip in Butte County, California, for the purpose of attending to business of the defendant Gilmore Oil Company, Ltd., a corporation, and for any reason afterwards abandoned that business and went on a pleasure trip for entertainment of their own, yet nevertheless, if you find that thereafter the said John F. Griffin undertook to drive the plaintiff home, and that to so do, after having taken the plaintiff to Oroville on the business of said Gilmore Oil Company, Ltd., was within the scope of the employment of John F. Griffin, then you will find that on the drive home from Oroville, John F. Griffin was acting within the scope of his employment."

Thirdly, appellant contends that the court gave no instruction covering defendant's theory as to the nature of the return trip.

[1] It is not here the contention of appellant that there was no sufficient evidence to support the implied finding of the jury that upon the return trip Griffin was still acting in the scope of his employment, but that there was evidence both ways, and where there is a conflict each party is entitled to have the law given the jury which is applicable to his theory of the case and the testimony of his witnesses. There is no doubt but what this is the correct rule and is clearly set forth in Bickford v. Pacific Electric Ry. Co., 120 Cal.App. 542, 8 P.(2d) 186, 189, where the court said: "A litigant requesting it is entitled to proper instructions presenting his theory of the case based upon the pleadings and proof. And, if the parties to an action rely upon different theories, instructions should be given, when requested, as to each."

[2] The rule is well settled, however, that instructions on points which have been sufficiently covered by other instructions may properly be refused although they are correctly drawn and applicable to the evidence. Libby v. Dunston, 72 Cal.App. 494, 237 P. 565. Having in mind, therefore, that the defendant's requested instruction, which was refused, dealt with the supposition that Griffin and plaintiff had abandoned the business of the company and were on a pleasure trip of their own, and that while on such pleasure trip the injuries occurred, we find the jury were instructed in an instruction requested by appellant, and designated No. 27: "If the said plaintiff and the said John F. Griffin on the morning of July 24, 1934, were on a trip for their own pleasure, or on the business of said John F. Griffin or of plaintiff, and not on the business of the defendant Gilmore Oil Company, a corporation, and at the time of the accident they were thus engaged, the plaintiff is not entitled to recovery against Gilmore Oil Company, even though the injuries received by him were due entirely to the negli-

gence and carelessness of the said John F. Griffin, and the said John F. Griffin at the time was driving and operating an automobile belonging to the Gilmore Oil Company."

Likewise is appellant's instruction No. 26, which was given to the court: "If a servant abandons or departs from the business of his master and engages in some manner suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be a servant's individual and exclusive business, and while so engaged negligently commits a tort, the master is not answerable although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to the master."

We also find other instructions bearing upon that issue given by the court as follows: "The master is not responsible for the negligence of his servant while the servant is pursuing his own ends exclusively, even though the injury complained of could have been committed without the facilities afforded to the servant by his relation to his master."

Instruction requested by defendant, No. 24, and given: "The test of the master's responsibility for the act of his servant is whether or not the act was done in the prosecution of the business that the servant is employed by the master to do, or in the execution of the authority given by the master, and for the purpose of performing what the master has directed."

Instruction No. 25, requested by defendant, and given by the court: "One who is riding in an automobile with another as a passenger, as distinguished from a guest, may, prior to the end of the journey in the automobile, cease to be a passenger and become a guest, if, at some point in the journey, he ceases to make any return to, or to confer any benefit upon the driver of the car, other than the pleasure of his company, and he continues to ride in the automobile at the invitation, either directly or by implication of the driver, and continues to enjoy the hospitality of the driver, and continues so to ride either for his own pleasure, or on his own business."

Likewise, instruction No. 46 informed the jury they must first find the negligence of Griffin occurred not only while Griffin was in the employ of the defendant but also while acting in the scope of his employment. In appellant's requested instruction No. 7, which was given, among other things the jury were told that, in order to find for the plaintiff, Griffin, at the time and place of the collision, must have been in the employ of the defendant and acting in the course or scope of his employment. An instruction also was given which defined scope of employment as meaning, "while engaged in the services of the master or while about his business."

[3, 4] With respect to the questioned instruction No. 39 given at the request of respondent, we do not believe that in view of all of the other instructions given that the jury could have been or were in fact misled, and we believe that the question was left to the jury as to whether the action taken by Griffin was within the scope of his employment. They were clearly told therein that it was necessary for them to first determine whether or not the trip home was within the scope of Griffin's employment. It is an elementary rule that the entire charge given the jury must be examined, and, if the same as a whole is fair and complete, such is sufficient. 24 Cal.Jur. p. 875, and Cal.Jur. Supp. vol. 10, p. 710 et seq.

[5] A careful reading of the entire record does not show any miscarriage of justice, and in order to justify a reversal it is necessary that such miscarriage of justice shall affirmatively be made to appear.

In the case of Haney v. Takakura, 2 Cal.App.(2d) 1, 37 P.(2d) 170, 174, it is said: "It is not sufficient that the court is able to say that it cannot be determined whether there has or has not been a miscarriage of justice. For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must affirmatively be of the opinion that there has been a miscarriage of justice."

Believing, therefore, that the jury were fully and properly instructed and that no miscarriage of justice occurred, the judgment should be affirmed. It is so ordered.

I concur: THOMPSON, J.

18 Cal.App.2d 20

PEOPLE v. WAITS.

Cr. 2917.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

Criminal law ⇨772(4)

Where prosecution's testimony showed that sex perversions and lewd acts on child under age 14 were committed at particular times and defendants relied on alibi, instruction that it was wholly immaterial on what day or night such offenses were committed *held* prejudicial error (Pen.Code, § 288a, and section 288, as amended by St.1933, p. 1028).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Nelson Waits was convicted for committing sex perversions and lewd acts upon child under age fourteen, and he appeals.

Reversed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

This appeal is from a judgment of conviction after trial by jury of the offenses set forth in sections 288 (as amended by St. 1933, p. 1028) and 288a of the California Penal Code.

Viewing the evidence most favorable to the respondent, the essential facts are:

April 7, 1936, between the hours of 10:30 a. m. and 1 p. m., appellant, according to respondent's witnesses committed the acts prohibited by sections 288 and 288a of the Penal Code. Appellant relied upon an alibi, producing testimony that at 9 a. m. on April 7th he was at the office of the Federal Works Project, met three men and went to a meeting, after which at 12 o'clock noon he reported for work and worked until 5 p. m., for which he received pay from the federal government.

Appellant predicates prejudicial error upon the following instruction by the trial court: *"The court instructs the jury that it is wholly immaterial on what day or night the offense was committed, provided you believe from the evidence that it was committed, and that the same was committed within three years prior to the filing of the information in this case."*

The instruction correctly states the law with reference to the statute of limitations, but is erroneous as to the defense of alibi. In light of appellant's alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected as the time of commission of the offenses. People v. Morris, 3 Cal.App. 1, 10, 84 P. 463. It was, therefore, prejudicially erroneous for the trial court to instruct the jury, as set forth, supra, that it was wholly immaterial on what day the offenses were committed.

The judgment appealed from is reversed.

We concur: CRAIL, P. J.; WOOD, J.

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18 Cal.App.2d 47

KINGS LABORATORIES, Inc., v. YUCAIPA VALLEY FRUIT CO. et al.

Civ. 1599.

District Court of Appeal, Fourth District, California.

Dec. 7, 1936.

As Amended Dec. 21, 1936.

1. Contracts ⇨138(1)

Neither party to illegal contract can recover in reliance thereon.

2. Action ⇨27(1)

Action is contractual in nature, where party must disclose illegal contract to establish his case.

3. Contracts ⇨138(1)

Cross-complaint, alleging execution, cross-complainant's reliance on and plaintiff warehouseman's breach of contract for storage of peaches at illegally reduced charges, and asking judgment for difference between cross-complainant's damages because of deteriorated condition of fruit and amount due plaintiff on contract, stated cause of action for breach of contract, not tort, so as to preclude recovery by cross-complainant, though alleging that breach occurred because of plaintiff's negligence in failing to maintain proper temperature (St.1919, pp. 314–317, §§ 1–6).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Kings Laboratories, Inc., against the Yucaipa Valley Fruit Company, and others, in which named defendant filed a cross-complaint. Judgment for cross-complainant, and plaintiff appeals.

Reversed.

Karl F. King, Lester G. King, Byrne & Coughlin, and Martin J. Coughlin, all of San Bernardino, for appellant.

U. F. Lewis, of Redlands, for respondents.

BARNARD, Presiding Justice.

The plaintiff, a public warehouse company engaged in the business of storing fruit, is a public utility subject to the regulation and control of the Railroad Commission of the state of California, and a rate of seven cents a box for the storage of fresh fruit had been authorized by that commission. In August, 1929, the plaintiff stored a quantity of fresh peaches for the defendant and, at the solicitation of the defendant, agreed to reduce its charge from seven cents to five cents per box. The peaches were removed early the next month and sold. The plaintiff brought this action to collect the amount of the storage charges and the defendant filed what it calls a counterclaim, in fact a cross-complaint, seeking damages because of the deteriorated condition of the fruit. The trial court denied recovery to the plaintiff and entered judgment for $1,500 in favor of the defendant. From this judgment, the plaintiff has appealed.

The appellant's main contention is that the judgment in favor of the respondent cannot stand since its cause of action is based upon an illegal contract. The alleged illegality consists in the fact that the reduction in the charge for storage, solicited by the respondent and given by the appellant, was in violation of the provisions of the Food Warehousemen Act. Stats. 1919, p. 314. The first three sections of this act are such as to bring the appellant within its terms. Sections 4 and 5 make it unlawful for any food warehouseman to discriminate between those desiring to avail themselves of the storage facilities offered or to grant or allow any reduction or deduction in rates for storage without the approval of the Railroad Commission, and make it unlawful for any person, firm, or corporation to solicit or receive or attempt to obtain any such reduction in established rates. Section 6 of this act provides that: "Every contract, expressed or implied, made by any person, firm or corporation in violation of the provisions of section four or section five of this act, is declared to be illegal and to be utterly void and no recovery thereon shall be had."

[1] It is well settled that a recovery cannot be had by either party in reliance upon an illegal contract. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L.R.A.(N.S.) 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; Haruko Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345; McRae v. Heath, 60 Cal.App. 64, 212 P. 228; Von Kesler v. Baker, 131 Cal.App. 654, 21 P.(2d) 1017. The respondent contends that this rule has no application here for the reason that this is an action for damages for a tort and not for a breach of the contract.

[2] Where a party must disclose an illegal contract to establish his case the action necessarily is contractual in nature. Wise v. Radis, 74 Cal.App. 765, 242 P. 90. In Rushing v. Pickwick Stages System, 113 Cal.App. 240, 298 P. 150, 151, the court said:

"In determining whether an action is on the contract or in tort, the character of the action is to be determined by the nature of the grievance rather than by the form of the pleadings. Ft. Smith & W. R. Co. v. Ford, 34 Okl. 575, 126 P. 745, 746, 41 L.R.A.(N.S.) 745; 1 Cor.Jur. p. 1015. 'If the complaint states a cause of action in tort and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence or breach of a contract.' 1 Cor.Jur. p. 1016. We had occasion to consider this same question in Nathan v. Locke [108 Cal.App. 158], 287 P. 550, 551 [291 P. 286], where we said: 'Illustrations of the latter class of actions are those for damages arising out of the contract relations between bailor and bailee, carrier and passenger, master and servant, innkeeper and guest, etc. In such cases the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relations between the parties are merely for the purpose of showing that the plaintiff was not a trespasser or that he was lawfully in the position or situation at the time the defendant's breach occurred."

In Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993, 994, a carrier and passenger action, the court said:

> "It is true that in many instances a person who has been injured may elect to sue either in tort or in contract, but this action is clearly based upon the injury and not upon the agreement of carriage."

In Chapman v. State, 104 Cal. 690, 38 P. 457, 458, 43 Am.St.Rep. 158, where coal was lost as a result of negligence in keeping a wharf in good repair, in passing upon the claim that the action was in tort, the court said: "But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract." In Morse v. Steele, 149 Cal. 303, 86 P. 693, the complaint, after setting up a contract to care for animals and performance on the part of the plaintiff, alleged negligence in taking care of the animals and damage by reason thereof. A contention that the cause of action was in tort, and not for breach of contract was held untenable. In Stark v. Wellman, 96 Cal. 400, 31 P. 259, 260, damages were sought because a package was lost through the negligence of the defendant who had agreed to properly care for it. It was argued that this part of the action was in tort and the court said:

> "This contention cannot be sustained. It is true, the owner of property injured by the tortious act of another may sue for the injury in tort, without noticing a contract with the wrongdoer, of which the wrongful act is a violation. * * * But there can be no question that he may sue for the breach of his contract, as was done in this case. The duty which the defendant is charged with having violated is expressly derived from the contract."

[3] In its cross-complaint the respondent herein alleged that it "contracted with plaintiff for and plaintiff agreed to receive * * * and to place promptly in cold storage * * * and to keep safely in refrigeration at a proper degree of temperature to prevent decay and keep at a marketable condition," a quantity of peaches; that the respondent promised to pay five cents per month per box for such storage; that "relying upon the covenants and agreements so made" the respondent delivered certain boxes of peaches to the appellant upon its platform; that the appellant did not promptly place said fruit in its cold storage rooms, did not place the fruit in cold storage rooms in such a manner that there would be a proper circulation of cold air around and through the same, and did not so manage its refrigeration plant as to maintain a proper and uniform degree of temperature necessary to keep said fruit in a marketable condition; that said failure to maintain a sufficient temperature was caused by the gross negligence of the appellant in failing to store the fruit in proper time and in proper manner and in failing to give proper attention to the operation of its system; that the respondent performed each and all of the terms of its agreement upon its part to be performed except that it had refused to pay for the storage of the fruit; and that by reason of the appellant's failure to promptly place the fruit in cold storage in such a manner that a proper circulation of cold air could be maintained around and about the same, and to properly operate its refrigeration system and equipment the fruit was damaged. The prayer is for a named amount and that the respondent be given judgment for the excess over any amount that might be awarded the appellant upon its claim for storage.

The manager of the appellant company testified that officers of the respondent asked him to store these peaches as the market was glutted, their own warehouse was filled, and there would be a complete loss to the growers unless temporary arrangements for storage could be made; that he told them that the appellant was in no position to offer such storage as its machinery was being repaired and for the further reason that its plant was adapted solely to the storage of apples; that they urged him to help out the growers as the peaches would spoil; that after several conversations he told them he would do the best he could to accommodate the respondent and the growers; that they told him they could not pay the standard price of seven cents per box for storage but would pay five cents; and that he told them that since this was a matter of accommodation he would accept five cents per box. This evidence was not contradicted and respondent's manager testified that he went to the appellant's place of business to see if it was possible to secure storage as his own company did not have sufficient space, and that "I questioned whether he would be able to hold them in that small room. And he said if he could get his other machine going so that he could run both machines, he had a circulation, or rather, a return on the brine every 16 minutes, and he could just cool anything. So I didn't question him further." He further testified that the appellant agreed to keep the temperature at between 33 degrees and 35 degrees, and that, in order to keep peaches in cold storage, it is necessary to have a circulation of air by some mechanical means and some way to keep the air pure, in addition to maintaining a temperature of 33 degrees to 35 degrees. A number of other witnesses testified that some means of forcing a circulation of air is absolutely essential in order to keep peaches in cold storage.

It appears, without conflict, that the appellant's facilities were not intended for the storage of peaches and had never before been so used; that the respondent persuaded the appellant to take the peaches more or less as a community service; that the respondent knew that the facilities and equipment were not of a kind which all of the experts testified was essential in order to keep peaches from spoiling; that respondent's manager had doubts as to whether peaches could be kept in this warehouse on account of its lack of proper facilities; and that he relied on the statement of appellant's manager that he could "just cool anything."

If it be assumed that an action in tort could have been maintained, we think it sufficiently appears, both from the cross-complaint and the evidence, that the respondent's action was based upon a breach of the contract rather than upon any breach of a general duty imposed upon the appellant by law. The respondent alleged the making of the contract, reliance upon it, its breach, and asked judgment for the difference between its damages and any amount due the appellant upon the contract. It relied upon a duty arising from a special contract under peculiar conditions, and the gravamen of the complaint is a breach of the contract to do three separate things which are said to have been necessary to keep the fruit in a marketable condition. The nature of the action is not changed by the allegation that the breach of the contract occurred by reason of the appellant's negligence. In our opinion this is "substantially an action for damages on account of the alleged breach of a contract," and the respondent, having relied upon and proved an illegal contract, may not prevail.

The judgment is reversed.

Each party to pay their own costs on appeal.

We concur: MARKS, J.; JENNINGS, J.

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18 Cal.App.2d 57

LANE MORTG. CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 11158.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1936.

Hearing Denied by Supreme Court Feb. 4, 1937.

1. Appeal and error ⚷381

Sufficiency of a surety on an undertaking on appeal is in sound discretion of trial court, in view of all of the circumstances presented.

2. Appeal and error ⚷381

In determining whether surety on undertaking on appeal is sufficient, though all his assets are held in joint tenancy, court will consider such circumstances as age of surety, his occupation, health, amount of assets held in joint tenancy, and amount of undertaking.

3. Appeal and error ⚷931(1)

Finding of trial court that surety on undertaking on appeal whose assets were held in joint tenancy with wife was insufficient would not be disturbed, where circumstances of surety as to age, condition of health, occupation, etc., were not presented to appellate court, since it would not presume error in trial court.

◆

Petition for writ of mandate by the Lane Mortgage Company against the Superior Court of the County of Los Angeles and the Honorable Douglas L. Edmonds, Judge, to require acceptance as sufficient to stay execution an undertaking on appeal, to which the respondent demurs.

Demurrer sustained, and writ denied.

C. H. Scharnikow, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, D. DeCoster, Chief Deputy Co. Counsel, and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is a petition for a writ of mandate requiring respondent to accept as sufficient to stay execution an undertaking on appeal. A demurrer has been filed to the petition.

The material facts alleged in the petition are:

That a judgment in the sum of $12,718.49 was rendered by the superior court against the petitioners, from which they appealed. Thereafter an undertaking on appeal executed by Maude E. Lane and E. J. Cook in double the amount of the judgment was filed. An exception was taken to the sufficiency of the sureties. Respondents after a hearing refused to accept E. J. Cook as a sufficient surety, since all of his assets were held in joint tenancy with his wife, who had not executed the bond.

This is the sole question for us to determine:

Is a surety on an undertaking on appeal insufficient if all his assets are held in joint tenancy with his spouse who does not execute the bond?

[1] The sufficiency of a surety on an undertaking on appeal is a matter lying in the sound discretion of the trial court in view of all of the circumstances presented. Jameson v. Chanslor-Canfield, etc., Oil Co., 173 Cal. 612, 615, 160 P. 1066.

[2] Circumstances may be such that a surety whose assets are all held in joint tenancy would be sufficient on an undertaking on appeal, while under other conditions a surety, all of whose assets are held in joint tenancy, would be insufficient. For example, assume a surety twenty-five years of age, in good health, engaged in a nonhazardous occupation, owning in joint tenancy assets of a clear value of $100,000, executing an undertaking on appeal in the sum of $500. Clearly such a surety would be acceptable; while, if we assume a surety of ninety years of age, in ill health, engaged in an extrahazardous occupation, all of whose assets of the value of $100,000 are held in joint tenancy, executing an undertaking on appeal in the amount of $90,000, it is equally plain that it would not be an abuse of discretion for the trial court to decline to accept the surety as sufficient.

[3] In the instant case there is not presented to this court the various circumstances as to the age, condition of health, occupation, etc., of the surety, Mr. Cook. Therefore, since this court will not presume error in the trial court, we cannot say there was an abuse of its discretion in holding the surety insufficient.

For the foregoing reasons the demurrer to the petition is sustained and the writ is denied.

We concur: CRAIL, P. J.; WOOD, J.

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17 Cal.App.2d 710

In re AZEVEDO'S ESTATE.

ANDRADE et al. v. AZEVEDO.

Civ. 10319.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1936.

1. Executors and administrators 🔑88

Representative of an estate is chargeable for his own debts to estate as for so much money in his hands, unless it appears that debt is uncollectible.

2. Executors and administrators 🔑88

Debt of administrator to decedent's estate, which was barred by statute of limitations, was not chargeable against the administrator.

3. Limitation of actions 🔑142

New promise to pay debt barred by limitations is unenforceable unless made to creditor or to one legally authorized to contract in his behalf.

4. Limitation of actions 🔑142

Allegation in administrator's petition for letters of administration listing administrator's debt to decedent's estate as an asset of estate if deemed sufficient to constitute a new promise *held* insufficient to avoid limitation against enforcement of debt, since promise was unenforceable because not made to a party authorized to contract in behalf of the estate.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Manuel Francisco Azevedo, deceased, wherein Inez Andrade and another filed exceptions to the final account of J. F. Azevedo, as administrator of the estate of Manuel Francisco Azevedo, deceased. From the decree of settlement after exceptions were disallowed, Inez Andrade and another appeal.

Affirmed.

Manuel F. Sylva, of San Francisco, for appellants.

E. H. Christian, of Oakland, for respondent.

KNIGHT, Justice.

Certain heirs of Manuel Francisco Azevedo, deceased, filed exceptions to the administrator's final account, and the exceptions were disallowed; whereupon they took this appeal from the decree of settlement.

The controversy arises over the refusal of the court to charge the administrator with the amount of an outlawed debt. The circumstances relating to the debt are set forth in an agreed statement of facts embodied in the bill of exceptions, and are as follows: The administrator is a surviving son of the decedent, and during the decedent's lifetime the administrator borrowed $565 from him. Part of it, $400, was borrowed more than two years prior to the decedent's death, and the remainder, $165, within two years preceding his death. Neither loan was evidenced by any writing. In his final account the administrator charged himself with $165, but claimed that the balance of $400 was barred by the statute of limitations.

[1, 2] It is well settled that the representative of an estate is chargeable for his own debt to the estate as for so much money in his hands, unless it appears that the debt is uncollectible. 11B Cal.Jur., secs. 1100, 1106, pp. 554, 560; Sanchez v. Forster, 133 Cal. 614, 65 P. 1077. The court properly held in the present case, therefore, that the outlawed debt, being legally uncollectible, was not chargeable against the administrator.

Appellants contend, however, that subsequent to the death of the decedent the administrator acknowledged the debt in writing which gave rise to a new promise sufficient to remove the debt from the operation of the statute of limitations. This contention is based upon an allegation in the administrator's verified petition for letters of administration to the effect that part of the estate of the decedent consisted of "the sum of $565 loaned and advanced by decedent to petitioner, together with interest, the exact amount of which is at this time unknown to petitioner." Later, it appears, the administrator failed to mention said indebtedness in his inventory, and appellants sought his removal on that ground. As a result of the removal proceedings the court ordered a new inventory to be filed, pursuant to which order the administrator filed two amended inventories, each setting forth the following item: "Indebtedness of J. F. Azevedo, to decedent for money loaned amounting to $565, appraised at $165."

[3, 4] There is a disagreement between the parties to the appeal as to whether the allegation in the petition for letters of administration is legally sufficient to constitute a new promise to pay the debt, but whether it is or is not makes little difference, because, assuming it is, the promise is nevertheless unenforceable for the reason that it was not made as the law requires to the creditor himself, nor to any one legally authorized to contract in his behalf. Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609; Visher v. Wilbur, 5 Cal. App. 562, 90 P. 1065, 91 P. 412. As said in the case last cited, in quoting from Wood on Limitations, Third Edition, section 79, under the modern rule that an acknowledgment or promise must be such as fairly raises an implied promise to pay the debt, it follows as a matter of course that the acknowledgment or promise must not only be made by a person legally competent to contract, but must also be made to the creditor himself or some person duly authorized to act for him in that regard, so that a new contract, resting upon the old one for its consideration, may be set up in reply to the statute if it is pleaded by the defendant; and if it is made to an agent of the creditor, in order to make it operative it must appear that the debtor at the time knew that the person to whom the acknowledgment or promise was made was acting as the agent of the creditor. Adhering to the foregoing rule, it was

held in the case of Roper v. Smith, 45 Cal. App. 302, 187 P. 454, that such a promise or acknowledgment contained in a petition by the debtor to the probate court was legally insufficient to take the debt out of the statute of limitations for the reason that the probate court was without authority to contract on behalf of the creditor; and likewise in Visher v. Wilbur, supra, it was held that such a promise or acknowledgment made by the debtor of a deceased person to an heir, even though the latter was afterwards appointed the administrator of the estate, did not have the effect of removing the bar of the statute of limitations because at the time the promise or acknowledgment was made the heir was not qualified to enter into a contract for the estate.

Therefore, under the foregoing authorities, even though it be deemed that the allegation in the petition for letters of administration was legally sufficient to constitute a new promise, it must be held that the promise is unenforceable because it was not made as the law requires to a party authorized to contract in behalf of the estate; and that being so, the court did not err in holding that the administrator was not chargeable with the amount of the outlawed debt referred to in said allegation.

The decree appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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18 Cal.App.2d 22

PEOPLE v. BROCKWAY.

Cr. 2930.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1936.

Criminal law ⚷1182

Where on appeal from conviction for embezzlement clerk's transcript was filed October 19, 1936, reporter's transcript was filed November 5, 1936, and case was ordered on calendar for December 4, 1936, and due notice given, but no briefs were filed and no requests made for extension of time, and defendant made no appearance, judgment was affirmed (Pen.Code, §§ 424, 1253).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Lester H. Brockway was convicted of embezzlement, and he appeals.

Affirmed.

Goldman & Goldman, of Los Angeles, for appellant.

The Attorney General, for the People.

PER CURIAM.

This is an appeal from a conviction of the crime of embezzlement of public moneys in violation of section 424 of the Penal Code, a felony. The clerk's transcript was filed October 19, 1936. The reporter's transcript was filed November 5, 1936, and the case was ordered on the calendar for December 4, 1936, and due notice given. No briefs have been filed and no requests for extension of time have been made. Defendant has made no appearance. Under authority of section 1253 of the Penal Code, the judgment is affirmed.

Judgment affirmed.

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18 Cal.App.2d 23

PETROLEUM SUPPLY CO. v. JAHNS et al.

Civ. 11202.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1936.

Appeal and error ⚷773(2)

Where appellant failed to file brief for thirteen days after order granting extension of five days, following failure to file brief within time of prior extension, appeal was dismissed for want of prosecution.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by the Petroleum Supply Company against C. M. Jahns and others. From the judgment, Merril J. Brown appeals.

Appeal dismissed for want of prosecution.

Roland T. Williams, of Los Angeles, for appellant.

R. Dechter, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This case comes before us on an order to show cause why the appeal should not be dismissed for want of prosecution. The clerk's transcript was filed September 15, 1936, and the case was ordered on the calendar of this court for December 11, 1936. On October 16th an order was made extending the time within which appellant might file his opening brief to and including October 25, 1936. No brief having been filed by November 12th, the appellant was ordered to show cause on November 20th why the appeal should not be dismissed for want of prosecution, and due notice was given. At the hearing counsel for appellant asked for further time to prepare and file appellant's brief and to be relieved from the default. At the hearing an order was made relieving the appellant from his default and granting additional time within which to prepare and file his brief, upon condition, however, that he file the brief within five days. Thirteen days have passed since the order was made and the condition has not been complied with. It is therefore ordered that the appeal be dismissed for lack of prosecution.

Appeal dismissed.

I concur: WOOD, J.

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17 Cal.App.2d 755

PEOPLE v. DAL PORTO.

Cr. 1495.

District Court of Appeal, Third District, California.

Dec. 2, 1936.

Rehearing Denied Dec. 17, 1936.

Hearing Denied by Supreme Court Dec. 31, 1936.

1. Habeas corpus 🔑21

Habeas corpus proceeding is only proper proceeding by which to raise question of sufficiency of preliminary examination to show probable cause for existence of conspiracy to commit a crime (Pen.Code, §§ 809, 872, 1487, subd. 7).

2. Criminal law 🔑1031(1)

Question of sufficiency of preliminary examination to show probable cause for existence of conspiracy to possess and operate unregistered and unlicensed still could not be raised on appeal from conviction of the conspiracy charged (Pen.Code, §§ 182, 809, 872, 1487, subd. 7; St.1935, p. 1126, § 4).

3. Conspiracy 🔑47

Existence of conspiracy need not be proved by direct evidence that the parties actually met together and agreed to undertake performance of an unlawful act and may be established by circumstances (Pen.Code, § 182).

4. Intoxicating liquors 🔑176

In prosecution involving possession or operation of unregistered and unlicensed still, question of whether still has been registered and whether accused holds license to operate it is matter of defense, even though information must charge fact that still was unregistered and that no license was issued (St.1935, p. 1126, § 4).

5. Conspiracy 🔑47

Evidence *held* to sustain conviction of conspiracy to possess and operate unregistered and unlicensed still (Pen.Code, § 182; St.1935, p. 1126, § 4).

6. Intoxicating liquors 🔑224

Operation of still is special privilege and not a right, and one exercising such privilege has burden of establishing that he has legal right to do so (St.1935, p. 1126, § 4).

7. Criminal law 🔑1186(4)

In prosecution for conspiracy to possess and operate unregistered and unlicensed still, any error in admitting extrajudicial statement made by codefendant which court instructed jury should be considered only as against such party *held* not to require reversal as to defendant, where no miscarriage of justice resulted (Pen.Code, § 182; St.1935, p. 1126, § 4; Const. art. 6, § 4½).

8. Criminal law 🔑622(2)

Where several accused are jointly charged with crime and it is brought to attention of court in appropriate legal manner that certain evidence or declarations made by one of them will be used at trial, denial of separate trial is not error.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Joe Dal Porto was convicted of conspiracy to possess and operate unlicensed still, and, from the judgment of conviction and from order denying motion in arrest of judgment, he appeals.

Affirmed.

Levinsky & Jones, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant, together with one Eugene Ghilarducci and one Victor Genovali, was convicted on an information filed by the district attorney of the county of Stanislaus, on the 14th day of November, 1935, charging the defendants with conspiracy to possess and operate a still for the distillation and production of alcoholic liquors, without the same being then and there registered with the State Board of Equalization, and upon which no license therefor had been obtained or was applied for from the State Board of Equalization, etc. Count 2 charges the same defendants with conspiracy to possess and operate a still, without the same being registered or licensed. The information further charges that the defendants proceeded to equip and operate the still in the county of Stanislaus, etc. After conviction, the defendant made a motion in arrest of judgment, which was denied, and, judgment being pronounced, the defendant appeals to this court therefrom and from the denial of his motion in arrest of judgment.

The record shows that on the night of September 27, 1935, liquor control officers found a still in a barn on property belonging to one Ghilarducci, near Knight's Ferry in Stanislaus county.

Upon this appeal the defendant urges, first, the insufficiency of the preliminary examination to set forth any evidence showing or indicating the offense for which he was tried; and that the defendant's motion to set aside the information on the grounds that the preliminary examination did not show the commission of any offense charged in the information should have been granted.

It appears that the defendant was committed on the charge of possessing a still. Section 872 of the Penal Code provides that a defendant shall be committed after examination if it appears that a public offense has been committed, and further provides that the committing magistrate shall make an order, signed by him, to the effect that it appears that the offense within the complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the person named in the complaint to be guilty thereof, etc.

Section 809 of the Penal Code authorizes the district attorney to file an information against a defendant charging the defendant with any offense shown by the testimony taken before the officer conducting the preliminary examination, the contention of the appellant in this case being that the order holding the defendant for trial did not describe the offense as a conspiracy to possess a still or to operate a still.

[1, 2] Section 809, supra, is slightly broader in its scope than section 872, supra, for which an abundant reason exists. Ordinarily, the committing magistrate is not a person learned in the law, and it is evident that the purpose of the Legislature was not to confine the district attorney to the definitions and limitations of the offense or offenses shown to have been committed by the defendant, through the preliminary examination, to the definitions of the offense as set forth by the committing magistrate. Whether the testimony taken at the preliminary examination was sufficient to show probable cause for the existence of a conspiracy to commit a crime is a question only to be raised by habeas corpus proceedings, and cannot be raised by motion to set aside an information. Subdivision 7 of section 1487 of the Penal Code, after setting forth grounds for discharging one after preliminary examination, reads: "Where a party has been committed on a criminal charge without reasonable or probable cause."

In the case of People v. Creeks, 170 Cal. 368, 149 P. 821, 822, the Supreme Court of this state, in deciding the question as to whether one had been committed without probable cause, which, of course, included the question of whether the preliminary examination showed the commission of any criminal offense, used the following language: "By reason of an express statutory provision so declaring (Pen.Code, § 1487, subd. 7), such an objection may be raised on habeas corpus, if timely made, and we know of no other way in which it can be raised. It is not included in the grounds specified in the statute for the setting aside of an information."

To the same effect is the case of People v. Campos, 10 Cal.App.(2d) 310, 52 P.

(2d) 251. See, also, the case of People v. Mitsunaga, 91 Cal.App. 298, 266 P. 1020.

Not having raised the objection in the manner authorized by the Penal Code, it is too late now to urge the same upon appeal.

[3] It is next urged that there is no direct testimony establishing the crime of conspiracy. This crime is defined in section 182 of the Penal Code. However, the law is well settled that the crime of conspiracy need not be established by direct evidence, but may be established by the circumstances surrounding the alleged conspiracy.

As stated in the case of People v. Gregory, 12 Cal.App.(2d) 7, 54 P.(2d) 770, 774: "It may be stated, however, that the existence of a conspiracy need not be proved by direct evidence that the parties actually met together and agreed to undertake the performance of an unlawful act"—citing People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Correa, 44 Cal. App. 634, 186 P. 1055, 1058. In People v. Correa, supra, the court said: "As a general rule a conspiracy can only be established by circumstances, and all these bearing in any way upon the fact of a conspiracy, or upon the acts done in pursuance thereof, may be shown to prove the fact of a conspiracy and to show the intent or motive of a defendant for a crime involved in the commission of an overt act in furtherance and execution of a conspiracy"—citing a number of authorities.

Section 4 of the Alcoholic Beverage Control Act, Statutes 1935, pp. 1123, 1126, reads: "On and after July 1, 1935, every still located within the limits of this State must be registered with the board. Every person owning or possessing a still who fails to register the same, as herein required or fails to obtain a license issued pursuant to the provisions of this act authorizing the ownership and possession of such still shall be guilty of a felony," etc.

[4] While there is no direct evidence that the still involved in this action was unregistered, the law is pretty well settled in other states, and we think the same rule should be held to prevail here, that the question of whether a still has been registered, and that the defendant holds a license to operate the same, is a matter of defense, even though the information or indictment must charge the fact of the still being unregistered and no license issued. In addition to this, the circumstances which we are about to relate, as shown by the transcript, establish beyond all reasonable doubt that the still involved in this action was unregistered and none of the defendants were licensed to operate the same.

[5] The testimony also establishes almost beyond controversy, when taken as a whole, that the appellant was justly convicted. The defendant Ghilarducci was shown to have been the owner of the property where the still was located. When the premises were raided, the still was found in a barn concealed by a false front of hay or a screen of hay. The sides of the barn had been papered in such a manner as to exclude the light, and also to exclude the fact of a light in the barn being visible from the outside.

When the appellant was arrested, he told the officers of his accompanying an unidentified man by the name of "John" to make purchases, which were shown by the evidence at the trial to be as follows: The investigating officers found a complete still set up in the barn, concealed behind a false front of hay. At the still were two 4000-gallon vats nearly full of sugar mash, which was then boiling. There were some 70 sacks of sugar and 11 full sacks of sugar; 45 gallon cans; a certain motor and pump was found at the still, being articles purchased from one Thomas who was in the hardware business at Stockton. Thomas testified as follows: "Mr. Dal Porto and I think two other gentlemen came in and gave me a little idea of what they wanted. I got the motor and the pump, and told them how I could mount it up so that it would be satisfactory to them, and we decided on a price, and I gave the shop orders to put it together." A 4,000-gallon redwood tank or vat bearing the name of "Stockton Lumber Company" was found at the still. One Ernest Muzio testified that he was an estimater for the Stockton Lumber Company; that Dal Porto called at the lumber yard with another man and stated that the gentleman wanted to buy a tank; that the sale was made to the latter, who did not wish to give his name, so the tank was charged to Dal Porto, who stated that it was all right to charge the tank to him. At the same time there was purchased a bundle of laths and a roll of paper. As we have said, the inside of the barn where the still was concealed was sealed with building paper held in place by laths. At the still was found a "Wood Wizzard" motor and a number of fire-bricks. In a conversation with witness Sutherland, Dal Porto stated that he was with a person named "John," who purchased a "Wood Wizzard" motor and about 600 fire bricks. At the still, yeast papers and cartons were found bearing the "Peerless Yeast" brands. A witness by the name of Willett testified that Dal Porto purchased from the Muzio Bakery in Stockton, during the month of September, two orders of Peerless yeast, each being for 200 pounds. He paid for the yeast himself. A third order for 200 pounds ordered by a person not identified was canceled by Dal Porto on September 28, 1935, the morning following the seizure of the still. In conversation with a witness by the name of Smith, Dal Porto stated that he was buying the yeast for the person by the name of "John," and that he had bought $96 worth of yeast during the three days from September 23d to September 25th, and that on the date of the seizure he was notified by John that he (John) would not need any yeast that day. In conversation with a witness by the name of McDonald, Dal Porto stated that he felt sure that all of these things were purchased for a still.

The evidence further shows that the appellant's car was used to transport one of the motors purchased; also to transport the yeast which was delivered by the appellant to John, some place near Stockton.

We agree with counsel for the People that the foregoing evidence found in the transcript is sufficient to justify a verdict that the appellant aided and abetted another in the possession of a still. At the same time we agree with counsel for the appellant that redwood tanks may be and are used for the storage of water, and the water so stored intended for and used in the irrigation of orchards, gardens, and alfalfa land. We also agree with counsel for the appellant that pumps are used for the purpose of conveying water to such tanks for storage purposes, but we have yet to be advised that hundreds of pounds of yeast are necessary for the irrigation of either gardens, orchards, or alfalfa lands. Such large quantities of yeast bought and paid for by the defendant and delivered to the man named "John," whose other name the appellant was unable to disclose, is sufficient of itself to establish the guilt of the appellant. Furthermore, the $96, the purchase price of the yeast, was paid for by the appellant. While delivery was made to the unknown man named "John," there is nothing in the record indicating that John advanced any portion of the $96. The fact that the defendant was expending that sum of money for a quantity of yeast which could not be used for any reasonable purpose other than connected with the tank, pump, and machinery purchased by John stands out as a piece of testimony sufficient to show that the appellant was a participant in the conduct of the illegal business. No jury could reasonably come to any other conclusion.

The respondent also calls our attention to the fact that the appellant did not take the stand in his own behalf to explain any of the circumstances herein set forth.

Again, it may be asked why was the pump and the yeast loaded in the appellant's car and taken to a point outside of the city of Stockton and there transferred to a car operated by a man named "John"? If it were a registered and licensed still, it is certain that no such subterfuges would have been practiced. People doing a legitimate business are not usually seeking ways and means of disguising all of their transactions. The old story of somebody else being the guilty party comes up with exceeding frequency, but it is seldom sufficient to mislead any fair-minded jury. In this connection the respondent calls our attention to the case of People v. Borrego, 211 Cal. 759, 297 P. 17, where only a component part consisting of connected pieces of pipe fitted perfectly into the still was held to show that the defendant was aiding and abetting in the operation of an illegal still. In that case we also find the following (quoting from the syllabus): "A defendant's connection with the crime of possession of a still may be shown by positive proof or by circumstantial evidence which excludes every other reasonable hypothesis except that of guilt." As we have said, no other reasonable conclusion could have been reached by the jury in the case now under consideration.

What we have set forth herein, however, establishes clearly that the still involved in this action was unregistered and no license for the operation thereof had been issued. However, the cases where this question has arisen have, so far as we have been able to ascertain, held that the question of registration and the issuance of a license constituted matters of defense, and that the burden rests upon the defendant to show such license or registration.

In State v. Cox, 117 Or. 204, 243 P. 77, 78, the Supreme Court of Oregon, having under consideration a prosecution for the possession of a still, held that, while it was necessary for the People to allege the possession and operation of an unlicensed still, all it was necessary to show was the possession of the still, and that the burden of showing that it was registered or licensed rested upon the defendant. The language there used is as follows: "A case against a defendant for keeping or having in his possession an unregistered still is analogous in many particulars to the old liquor license laws. In prosecutions for violation of such laws it was always necessary to allege the failure of the defendant to procure a license before he sold the liquor, but when it came to the proof the state had only to prove the sale; the burden of proof then being on the defendant to produce his license. So here it was necessary to allege that defendant kept and had in his possession a still and worm, whereupon the burden of proof would shift to him to produce his certificate of registration."

In McKee v. State, 37 Okl.Cr. 73, 256 P. 522, the Criminal Court of Appeals of Oklahoma held that in prosecutions for unlawfully possessing a still the defendant must show he had a legal authority to possess and operate the same.

The statute in Oregon (Code 1930, § 15-506) relative to possession of a still reads as follows: "No person shall keep in his possession any still worm or still in any county in this state without having first registered the same, together with a description of the particular premises where it is kept," etc. To the same effect are the cases of State v. Waller, 122 Or. 404, 259 P. 424; Harris v. Commonwealth, 161 Va. 1028, 170 S.E. 717; Moore v. State, 154 Ark. 13, 240 S.W. 1083; Rosslot v. State, 162 Ark. 340, 258 S.W. 348; Sanford v. State, 198 Ind. 198, 152 N.E. 814; Giacolone v. United States (C.C.A.) 13 F.(2d) 108. A similar case is that of McCurry v. United States (C.C.A.) 281 F. 532, where the defendant was prosecuted for setting up and operating a still without registering the same and giving a bond as required by the United States Statutes. The court held that the burden of proving the registration and the giving of the bond devolved upon the defendant and that an instruction to such effect was proper. This case was commented upon in the case of Rossi v. United States, 289 U.S. 89, 53 S. Ct. 532, 533, 77 L.Ed. 1051, the court using the following language: "The general principle, and we think the correct one, underlying the foregoing decisions, is that it is not incumbent upon the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control."

We do not need to cite any of the long list of authorities holding that in prosecutions for the unlawful sale of liquor the burden of proof is upon the defendant to show that he is duly authorized to make such sales by having in his possession the necessary license.

[6] We think the authorities which we have cited support the following statement, to wit: The operation of a still in the state of California is a special privilege, and not a right, and therefore one exercising such privilege has the burden of establishing that he has the legal right so to do.

[7, 8] It is further contended that the court committed prejudicial error in permitting the prosecution to read to the jury an extrajudicial statement made by the defendant Ghilarducci. The court limited the statement as evidence against the maker thereof, and likewise instructed the jury that it could only be considered for such purposes, and that it could not be considered as testimony against either Dal Porto or against the defendant Genovali. The statement in one or two places identified the two other defendants as being present at the barn where the still was being operated. If we admit that the portion of the statement made by the defendant where reference is made to the appellant in this action should have been excluded, it does not follow that the error of the court necessitates a reversal. Section 4½ of article 6 of the Constitution is explicit in providing that no reversal shall be had unless the error complained of resulted in a miscarriage of justice. That there has been no miscarriage of justice in this case is so apparent that further consideration of the objections urged by the appellant seem unnecessary. However, we may cite the following cases to the effect that, where two persons are jointly charged with a crime, and it is brought to the attention of the court in an appropriate legal manner that certain evidence or declarations made by one of them would be used at the trial, error is not committed in denying a separate trial: People v. Perry, 195 Cal.

623, 234 P. 890; People v. Dowell, 204 Cal. 109, 266 P. 807; People v. Remington, 74 Cal.App. 371, 240 P. 526; People v. Roderick, 118 Cal.App. 457, 5 P.(2d) 463.

While the numerous points made and the vigorous argument of appellant in urging a reversal of the judgment in this cause has entailed a somewhat lengthy investigation, we have been unable to find any tenable grounds upon which such a conclusion could rest.

The order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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17 Cal.App.2d 769

The PEOPLE of the State of California, Plaintiff and Respondent, v. Victor GENOVALI, Defendant and Appellant.

Cr. 1494.

District Court of Appeal, Third District, California.

Dec. 2, 1936.

Rehearing Denied Dec. 17, 1936.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Wallace Shepard and R. C. Fleming, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This is a companion case with that of the defendant Joe Dal Porto (People v. Dal Parto, 62 P.(2d) 1061); was tried at the same time on the same testimony; and is presented to us upon the same transcript, though the appeal itself is separate. The defendant's appeal is from the order denying his motion for new trial and judgment of conviction.

No question is made as to the sufficiency of the testimony. The only points urged for reversal are, first, that the testimony given at the preliminary hearing was wholly insufficient to support the order of the magistrate holding the preliminary examination committing the appellant for trial; and, second, that the evidence is insufficient to show that the still was unregistered.

What we have said, and the law we have quoted in the Dal Porto Case relative to the preliminary examination, is applicable here, and is referred to as a complete answer to the appellant's first contention. Likewise, what we have said in the Dal Porto Case, the opinion of which is filed this day, is a sufficient answer as to the contention that the prosecution failed by direct testimony to show that the still was unregistered.

It follows, therefore, that the order and judgment of the trial court must be, and the same are hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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18 Cal.App.2d 32

O'SHEA v. PACIFIC GAS & ELECTRIC CO.

Civ. 5630.

District Court of Appeal, Third District, California.

Dec. 5, 1936.

Rehearing Denied Jan. 4, 1937.

Hearing Denied by Supreme Court Feb. 1, 1937.

1. Master and servant 🔑302(2)

Removal of city's fire alarm bell from electric power company's substation building *held* within scope of duties of substation foreman, so as to render company liable for injuries to city fire chief because of foreman's negligence in directing chief to cut live wires in order to remove bell.

2. Pleading 🔑129(2)

Allegation of complaint in city fire chief's action against electric power company for injuries resulting from his attempt to cut live wires, as directed by defendant's employee in order to remove city's fire alarm bell from defendant's substation building, that such employee was foreman of defendant's yard and substation, was admitted by defendant's failure to deny it (Code Civ.Proc. § 462).

3. Master and servant 🔑330(3)

Evidence in action against electric power company for injuries to city fire chief as result of his attempt to cut live wires, as directed by defendant's employee, in order to remove city's fire alarm bell from defendant's substation building, *held* to warrant jury's finding that such employee was substation foreman authorized to disconnect and remove bell.

4. Master and servant ⚷332(2)

Whether removal of city's fire alarm bell from electric power company's substation building was within scope of employment of substation foreman *held* for jury in action against company for injuries to city fire chief as result of his attempt to cut live wires at such foreman's request in order to remove bell from building.

5. Master and servant ⚷304

Negligence of foreman of electric power company's substation in directing city fire chief to cut live wires in furtherance of foreman's duty to detach city's fire alarm bell from company's substation building and return it to chief as city's agent rendered company liable for resulting injuries to chief.

6. Master and servant ⚷304

Master need not have specifically authorized servant's particular negligent act to be liable therefor, but such authority may be implied as incident to and in furtherance of servant's work.

7. Negligence ⚷33(2)

City fire chief, injured as result of his attempt to cut live wires, as directed by foreman of electric power company's substation, in order to remove city's fire alarm bell from building, to which he went as city's agent to secure bell, *held* not mere trespasser or volunteer in performance of such aid to foreman, whose duty it was to disconnect bell and deliver it to chief as city's agent.

8. Negligence ⚷32(1)

City fire chief *held* not precluded from recovering damages from electric power company for injuries resulting from negligence of latter's employee in directing chief to cut live wires in order to remove city's fire alarm bell from company's substation building, to which he went as city's agent to procure bell, even if he was mere licensee on company's premises.

9. Corporations ⚷1, 383

Corporation is artificial creature of law, and must act through its agents, servants, and employees.

10. Corporations ⚷423

Negligence of corporation's employee, acting in discharge of his duties and within scope of his authority, express or implied, is negligence of corporation.

11. Trial ⚷296(3)

Instruction to find for plaintiff in action against electric power company for injuries to city fire chief as result of his attempt to cut live wires, as directed by foreman of defendant's substation, in order to remove city's fire alarm bell from building, if damages resulted wholly or partly from negligence of defendant's employee in performance of his duties, *held* not misleading in view of other instructions.

> The jury was repeatedly instructed that, if plaintiff was mere invitee on defendant's premises, he assumed risk of defective or dangerous conditions and must prove that he was injured because of active and overt negligent act of defendant's servant to recover damages, the term "invitee" was clearly and correctly defined, and the distinction between an invitee and mere volunteer was explained.

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Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Frank J. O'Shea against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. J. Straub, Clinton F. Stanley, and W. H. Spaulding, all of San Francisco, for appellant.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $6,000 which was rendered in favor of the plaintiff for injuries received as the result of a fall from a ladder caused by coming in contact with highly charged electric wires which, at the request of defendant's foreman, he attempted to cut after having been assured they were dead wires.

The defendant owns and operates an electric power and lighting system in Willows and other California communities. Among the properties which it owns at Willows is an electric substation building. Several years prior to the commencement of this action an electric fire alarm bell was attached to the front of this building. It was installed in a metal box which was fastened to the outer wall above the door about 12 feet from the ground. The bell belonged to the city of Willows. It had not been used for several years. The plaintiff, Frank J. O'Shea, was chief of the fire department. Frank Loder was defendant's foreman and superintendent in charge of the substation. The plaintiff telephoned to Loder several days prior to the time of the accident requesting him to return the bell for the reason that the city wished to install it at the fire department house. Loder told him he would detach the bell and bring it to him. He failed to do so.

November 6, 1933, the plaintiff called at the substation and found Loder working at a bench. It does not appear there was any other person present. Seeing O'Shea, Mr. Loder remarked: "I suppose you are after that bell?" to which the plaintiff replied, "Yes, if I could get it." Loder procured a screwdriver, a pair of pliers, a wrench, and a ladder. Placing the ladder against the building, he climbed up to the metal box containing the bell, and disconnected two wires. He then discovered it would be necessary to remove the entire box to secure the bell. The box was fastened to the corrugated iron side of the building by means of three bolts which passed through the wall. The nuts which secured the bolts were on the inside of the building. Loder descended from the ladder, handed O'Shea the screwdriver and the pliers, and told him to climb the ladder and loosen the bolts and that he would go inside the building and secure the nuts. The plaintiff followed his instructions and removed the bolts. It was then discovered the box still could not be removed, for the reason that there were two other wires which held it in place. O'Shea called to Loder, saying, "There are a couple of wires up here yet." Loder replied, "Yes, doggone those wires, I never did trace them out to see where they went; they are dead though. There has been no juice in them, they have been dead for eight years or ten years, will you cut them while you are up there?" O'Shea proceeded to do so. When he applied the pliers to the live wires he received a charge of electricity which prevented him from releasing his hold. He shouted for help. Loder ran to his assistance, and, climbing the ladder, he finally succeeded in breaking the plaintiff's hold. The ladder toppled over and both men fell to the cement walk. O'Shea's spine was fractured in the fall, and he sustained serious, permanent injuries as a result thereof. This suit for damages was brought. The cause was tried with a jury. From the judgment which was rendered pursuant to the verdict returned by the jury this appeal was perfected.

The appellant contends that the verdict and judgment are not supported by the evidence, for the reason that it appears the removal of the fire alarm bell was not within the scope of the duties of Loder as an employee of the defendant and that his instructions to O'Shea with relation thereto could therefore not bind his employer. It is also asserted the court erred in giving to the jury certain instructions. The plaintiff was seriously injured. It is conceded the amount of the judgment is not excessive.

[1] We are of the opinion the removal of the alarm bell from the defendant's substation building was within the scope of the duties of its foreman and superintendent of that plant, and that the defendant is therefore liable for injuries sustained by O'Shea as a result of the negligence of Loder in directing the fire chief to cut the wires which he erroneously informed the chief were dead and had not been charged with electricity for years.

There is substantial evidence that the bell belongs to the city of Willows. It was installed by the defendant and operated on its building for several years. After its use was discontinued the fire chief requested the return of the bell so that it could be used on a fire department house. The defendant's foreman agreed to return the bell, but failed to do so. It was the duty of the defendant to disconnect the bell from the power plant building so that the city could obtain possession of its own property. The fire chief called for the bell, and the foreman and superintendent of the plant proceeded to disconnect the apparatus. He requested the chief to assist him in doing so and directed him to sever the wires, stating that they were dead and carried no load of electricity. In obeying the instructions of the foreman the plaintiff received a shock of electricity which was the proximate cause of his fall from the ladder and of the injuries which were received as a result thereof. The chief had no knowledge that the wires were charged with electricity or that they were dangerous. He was misled by the foreman's assurance that they were dead and that they were therefore not dangerous.

[2, 3] There is a serious controversy regarding the question as to whether Frank Loder was acting as foreman and superintendent of the substation where the alarm bell was installed at the time of the accident, and as to whether he was authorized by the defendant to remove the bell. The pleadings admit that he was then the foreman and superintendent of that plant. The complaint alleges that: "At all times herein mentioned Frank Loder was plant foreman and superintendent of defendant's yard and electrical sub-station at Willows, Glenn County, California, and in the performances of the acts herein alleged was acting as such plant foreman and superintendent."

That allegation of the complaint was admitted by failure on the part of the defendant to deny it. Section 462, Code Civ. Proc.; Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626; 2 Cal.Jur. 234, § 67. Moreover, Mr. Loder testified in that regard: "Q. In the pleadings there is an allegation that you were superintendent and plant manager at the sub-station? * * * A. Yes."

Mr. Hogle, attorney for the defendant, admitted at the trial that Frank Loder was acting as superintendent of that substation. He said: "Mr. Loder is a servant and employee of the Pacific Gas and Electric Company, but we deny that he has any capacity other than superintendent possibly of this isolated local unit."

The foregoing record furnishes ample evidence upon which the jury was warranted in finding that Loder was the foreman and superintendent of the substation with authority to disconnect and remove therefrom the fire alarm bell belonging to the city of Willows.

[4-6] Under the circumstances of this case it was the province of the jury to determine whether the removal of the fire alarm bell from the defendant's building was within the scope of the employment of the foreman and superintendent of that substation. 18 R.C.L. 796, § 254. There is sufficient evidence to warrant the jury in finding that Frank Loder had charge and supervision of the defendant's substation; that the alarm bell, belonging to the city of Willows, was attached to that building; that the bell was no longer in use in the place where it was located; that the city authorities desired the return of their bell for use elsewhere; and that it was the duty of the foreman of that building to detach the bell and return it to the fire chief, who was the agent of the city of Willows. It was in furtherance of that duty in behalf of the defendant that Loder directed the plaintiff to assist him in disconnecting the bell. Loder's negligence in directing O'Shea to cut the live electric wires connecting the bell with the substation building over which he had charge, assuring him the wires were dead, and that they were not charged with electricity, renders the defendant liable for the injuries sustained by the plaintiff as a result of obeying such instructions. Callahan v. Harm, 98 Cal.App. 568, 277 P. 529. It is not necessary that the master shall specifically authorize the particular act of the servant which is charged as negligence, to render him liable therefor. That authority may be merely incidental to, and in furtherance of, the work for which he is employed, and therefore the authority may be implied. It is frequently difficult to determine just what acts of a servant are within the scope of his employment. The determination of that relationship often depends upon the circumstances of a particular case. The master may be liable for the tort of a servant even though the act may not have been directly authorized. Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Kish v. California State Automobile Association, 190 Cal. 246, 212 P. 27; 39 C.J. 1283, § 1472; 16 Cal.Jur. 1104, § 63; 18 R.C.L. pp. 793–796, §§ 253, 254. In the authority last cited it is said in that regard:

"The test now universally accepted is whether there was express or implied authority for doing the act relied upon, * * * or, in the customary legal phrase, whether the act was done 'within the scope of the employment.' * * *

"Acts impliedly authorized or such as are within the scope of employment—that is, wrongs for which the employer may be held accountable—are not susceptible of precise or even very helpful definition by any phrase or short form of expression. Each case must be determined with a view to the surrounding facts and circumstances—the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the employment's scope is ordinarily one of fact for the jury's determination."

[7,8] It may not be said the plaintiff was a mere trespasser on defendant's premises or a volunteer in the performance of his aid to the foreman at the time of the accident, and that the company was therefore not liable for injuries received as a result of its foreman's negligence. The fire chief went there as the agent of the city of Willows to procure the alarm bell which belongs to that city. It was the duty of the substation foreman and superintendent to disconnect the bell and deliver it to the agent of the city. These men were engaged in that task when the plaintiff was injured. He was assisting the foreman in the performance of his duty, at his specific request. Assuming that the plaintiff was a mere licensee on the defendant's premises, that fact does not preclude him from recovering damages for the negligence of defendant's employee. The principle which renders the master liable for the conduct of his servant resulting in injury to a third person, under circumstances similar to those of the present case, is concisely stated in a note involving the subject of liability of a master for the torts of his servant performed in the course of his employment, in 43 L.R.A.(N.S.) p. 190, as follows:

"One who, in furtherance of his own interests or those of his master, assists the servants of another in the performance of their work, is neither a fellow servant of such servant nor a mere volunteer, but occupies a third position; namely, that of a licensee with an interest. He is not a trespasser, because he is lawfully in the place; he is not a fellow servant, because he is not directly or indirectly retained or employed by the master; and he is not a bare volunteer, because he does the work to further his own interests or those of his master. When a person thus situated is injured through the negligence of the servant whom he assists, the doctrine of respondeat superior applies, and the master of the negligent servant is responsible for the injury."

"The principle upon which a recovery is based is this: The plaintiff is regarded, not as a volunteer, but as having been engaged at the request or with the permission of the defendant or his servant, in a transaction of interest as well to himself or his master as to the person for whom he acts; and this entitles him to the same protection against the negligence of the defendant's servant as if he were at the time attending to his own private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the defendant. The request or acquiescence of the latter gives him the right to perform the service, and the fact that he acts in his own behalf, however beneficial his labor may be to the defendant, gives the plaintiff the right to be protected against the negligence of the company's servant."

Regarding the same subject it is said in Welch v. Maine Central Ry. Co., 86 Me. 552, 30 A. 116, 117, 25 L.R.A. 658, 660: "It is undoubtedly true that, if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk. * * * But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases, the master will not be responsible; in the latter, he will be. This distinction is sustained by every textbook to which our attention has been called."

[9-11] The court did not err in giving to the jury the following instructions:

"A corporation is an artificial creature, or creature of the law and must act through its agents, servants and employees. The negligence of an employe of a corporation acting in the discharge of his duties and within the scope of his authority, express or implied, is under the law the negligence of the corporation."

"You are instructed that the Pacific Gas and Electric Company in this case is a corporation, and like all other corporations, must act through its officers, agents or employees. Consequently, if you find from the evidence that the damage to plaintiff described in the complaint resulted in whole or in part from negligence of an agent or employee of the defendant Pacific Gas and Electric Company while in the performance of his duties, and when plaintiff was exercising due care, your verdict should be for the plaintiff."

The preceding instructions are correct declarations of law, containing all of the required elements affecting the principles announced. They are not formula instructions. Each of them properly informs the jury that they must find that the negligence of the servant of defendant complained of occurred in the performance of his duty, either express or implied. The jury was elsewhere repeatedly instructed that, if they found the plaintiff was a mere invitee on the premises of the defendant at the time of the accident, he assumed the risk of existing defective or dangerous conditions, and that it was then necessary for the plaintiff to prove he was injured because of active and overt negligent acts of the servant of defendant, to entitle him to recover damages. Morever, the term "invitee" was clearly and correctly defined, and the distinction between an invitee and a mere volunteer in the performance of services was also explained. The jury was fully and fairly instructed upon all necessary elements of law which are involved in this case. They could not possibly have been misled by the preceding instructions.

It follows that the court properly denied defendant's motion for judgment notwithstanding the verdict, and its motion for a new trial.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

CONLIN v. COYNE et al.*

Civ. 10792, 10796.

District Court of Appeal, Second District, Division 1, California.

Nov. 24, 1936.

Rehearing Granted Dec. 21, 1936.

1. Appeal and error 🔑110

Order denying motion for new trial on ground that defendants were unable to obtain transcript of testimony and other proceedings at trial on account of death of court reporter *held* appealable (Code Civ.Proc. § 953e).

2. New trial 🔑93

Granting of new trial for inability to obtain phonographic report of trial because of death or other disability of court reporter rests in discretion of trial court (Code Civ. Proc. § 953e).

3. New trial 🔑93

Refusal to grant new trial for inability to obtain complete transcript of evidence because of death of court reporter *held* not abuse of discretion where bill of exceptions contained summary of testimony of defendants' witnesses, statement of evidence offered and excluded under rulings of court, and instructions given and refused (Code Civ.Proc. § 953e).

4. Negligence 🔑28

In building of structures which are to be exposed to elements, exercise of due care requires that precautions be taken against storms and floods which may be reasonably anticipated.

5. Negligence 🔑63

"Acts of God," within rule that no man is responsible for that which no man can control, are those which operate independently of human agency (Civ.Code, § 3526).

[Ed. Note.—For other definitions of "Act of God," see Words & Phrases.]

6. Adjoining landowners 🔑3

Whether heavy rainfall preceding caving of plaintiff's land into excavation made by defendants on their adjoining land was act of God, which would relieve defendants of liability, *held* for jury.

7. Appeal and error 🔑1001(1)

Jury's determination on question of fact is conclusive on appeal if reasonably supported by evidence.

8. Adjoining landowners 🔑3, 4(1)

Under statute, defendants making excavation, into which adjoining land of plaintiff caved, were required to furnish lateral support only for plaintiff's land and not for wall on plaintiff's land (Civ.Code, § 832).

9. Adjoining landowners 🔑3

Evidence *held* sufficient to warrant verdict for plaintiff whose land caved into excavation on defendants' adjoining land, on ground that manner in which excavation was made was immediate and efficient cause of cave-in.

10. Adjoining landowners 🔑3

In action for damage from caving of plaintiff's land containing cesspool into excavation on defendants' adjoining land, exclusion of ordinance requiring sewers to be

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*For subsequent opinion see 64 P.2d 1123.

connected with city sewer system *held* not error, as against contention that unlawful maintenance of cesspool was negligence, particularly where jury found that seepage from cesspool was not proximate cause of injury.

11. Adjoining landowners ⚷3

In action for damage from caving of plaintiff's land after he acquired ownership thereof into excavation on defendants' land, exclusion of evidence that defendants' land had been partly excavated before plaintiff acquired title to his land *held* not error, since plaintiff and not his predecessor was entitled to recover for injury occurring during plaintiff's ownership.

12. Adjoining landowners ⚷3

Verdict that alleged co-owner of land was jointly liable with owner who ordered excavation for damage resulting from caving of plaintiff's adjoining land into such excavation, *held* proper, as against contention that plaintiff offered no proof of alleged co-owner's ownership, where co-owner did not deny ownership or disclaim knowledge of excavation.

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Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Berthold M. J. Conlin against William R. Coyne and another. From the judgment and from an order denying defendants' motion for new trial, the defendants appeal.

Judgment and order affirmed.

Pacht, Turnbull, Pelton & Warne, Halverson & Halverson, Isaac Pacht, and George Halverson, all of Los Angeles (Lazare F. Bernhard, of Los Angeles, of counsel), for appellants.

Harry K. Sargent and Malcolm Archbald, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff recovered damages against defendants resulting from the caving of plaintiff's land into an excavation made by defendants upon their land, by reason of which excavation plaintiff's land was deprived of lateral support. Before us are two appeals, to be considered together, one an appeal by defendants from the judgment, and the other an appeal from an order denying their motion for new trial, made under section 953e of the Code of Civil Procedure.

[1] The ground of the motion for new trial was that defendants were unable to obtain a transcript of the testimony and other proceedings at the trial on account of the death of the court reporter. We have held that the order denying the motion made on that ground was appealable. Conlin v. Coyne (Cal.App.) 59 P.(2d) 884. The appeals come before us on bills of exceptions from which, and from affidavits used on the motion for new trial, it is shown that the testimony was only partly transcribed by the reporter. The testimony of plaintiff's witnesses is set out in full and there is also a complete transcript of the testimony of defendant William R. Coyne, who was questioned at length by plaintiff's counsel under section 2055 of the Code of Civil Procedure and by his own counsel as well. It was under the sole direction of this defendant that the excavation was made upon the land of defendants.

[2, 3] Section 953e of the Code of Civil Procedure provides that the court may grant a new trial when it shall be unable to obtain a phonographic report of the trial because of the death or other disability of the reporter. A new trial is not given as a matter of right by the terms of the section, but the disposition of a motion made upon that ground rests in the discretion of the court. In the instant case there was no abuse of discretion. The bill of exceptions showing proceedings upon the trial contains a summary of the testimony of defendants' witnesses, a statement of evidence offered and excluded under rulings of the court, as well as the instructions given and refused. It does not appear that the court refused to incorporate in the bill any statement as to evidence introduced, rulings made, or other proceedings had which defendants sought to have included therein. The bill is not deficient in any particular to which our attention has been directed, and we must of necessity hold that defendants were not prejudiced in the presentation of their record on appeal by their inability to furnish a complete transcript of the evidence.

Defendants rely upon the insufficiency of the evidence to support the verdict. They owned two hillside lots facing south, at the northeast corner of intersecting streets. Plaintiff's lot was a key lot extending across the rear of both lots owned by defendants. When defendants excavated their easterly lot down to street level, they built a retaining wall at the rear where it adjoined plaintiff's lot. Later they excavated the westerly lot and, in so doing, as the jury decided, failed to take reasonable precautions to sustain plaintiff's adjoining land, with the result that a shallow wall on plaintiff's property at the division line, together with the earth in proximity therewith, fell into the excavation, which had been carried to a depth of some 25 or 30 feet below the level of plaintiff's lot. The natural slope of the land was toward the south, and defendants' excavation was on the approximate level of the street south of their land. The argument on this point discusses the facts quite fully and advances numerous theories which, if held controlling, would relieve defendants of responsibility. These we shall discuss briefly. The contention that the north wall of defendants' excavation was left with a slope which insured its safety, and that therefore no negligence was shown, conflicts with testimony given by those skilled in such matters in that locality to the effect that the wall was too precipitous for safety, having a slope approximating 45 degrees where a 30-degree angle was required for safety. This testimony is supported by photographic exhibits showing the condition of the bank.

It is contended that the bank caved in as a result of a heavy rainstorm, and it is doubtless true that the rainfall was a contributing cause. The storm was described by defendants' witnesses as an "unprecedented" one. However, while it was of unusual proportions, it was not the first of its kind, and its characterization by the witnesses as "unprecedented" presented their own conclusions and their choice of descriptive phraseology rather than proof of the fact. No evidence was given as to the amount of rainfall which fell during the storm nor as to the time within which it fell. The jury no doubt regarded occasional heavy rainfall as a hazard which should have been anticipated and against which precautions should have been taken to avoid injury such as the one we are considering. If we were to look beyond the testimony in the case to matters of common knowledge, our observations would tend more readily toward an agreement with the views of the jury than toward the contrary.

[4-7] In the building of structures which are to be exposed to the elements, the exercise of due care requires that precautions be taken against storms and floods which may be reasonably anticipated. Asher v. Pacific Electric Ry. Co., 42 Cal.App. 712, 187 P. 976. Acts of God which are within the rule of law that "no man is responsible for that which no man can control" (Civ.Code, § 3526) are those which operate independently of human agency. Polack v. Pioche, 35 Cal. 416, 95 Am.Dec. 115; Newman v. City of Alhambra, 179 Cal. 42, 175 P. 414. The jury was required to determine as a fact whether the injury was caused by an act of God, and its conclusion, if reasonably supported by evidence, is conclusive on appeal. Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 P. 708; Fererira v. Silvey, 38 Cal.App. 346, 176 P. 371.

[8, 9] It is further contended that the concrete wall on plaintiff's land was weakened by the flowing of excessive amounts of water through the drains from the roof of plaintiff's house, due to the obstruction of the drains, which rendered them inadequate to carry the water away and caused its diversion toward the bank. It is argued further that plaintiff's land adjacent to his wall on the north had been filled in with loose earth and that the wall itself had insecure and inadequate footings and had been weakened by an earthquake shock. It is contended also that the bank had been softened by drainage from a cesspool on plaintiff's lot immediately adjacent to the division line. All of these facts are stressed by defendants as showing that plaintiff's own acts and the conditions which he suffered to exist on his property caused or directly contributed to the injury to his land. The argument goes to the weight of the evidence, and, although these facts tend strongly to show that the negligence of defendants was not the sole proximate cause of the injury, nevertheless the evidence and the inferences therefrom were not conclusive. The implied finding of the jury that the facts relied upon by defendants were not a proximate cause of the injury is not unreasonable and therefore is not vulnerable. It is earnestly contended that defendants were under no obligation to furnish lateral support to the wall on plaintiff's land, and under a proper application of the provisions of section 832 of the Civil Code it must be conceded that defendants are correct in this position. However, plaintiff neither claimed nor was awarded any damages for the loss of his wall but only dam-

ages to the land itself occasioned by the cave-in. Defendants were required only to maintain lateral support of the land, and if the cave-in was a result of the weight of the wall, and if, as we believe the evidence establishes, plaintiff had sufficient notice of the excavation work under section 832 of the Civil Code, defendants should not have been held responsible in damages. However, the jury was instructed as to the obligations which defendants assumed in making their excavation, and the duty of furnishing support for the wall was not among them, but was definitely excluded. It must be presumed that the jury believed that insufficient lateral support was left for the land itself and that it would have caved in if there had been no wall resting upon it. The evidence on the point presented a clear question of fact for the determination of the jury, and although with reason it might have been held that the weight of the wall was a proximate cause of the injury, the conclusion of the jury that the fact was otherwise is supported by reasonable inferences of fact. We cannot override the finding of the jury that it was the manner in which the excavation was made by defendants and not one or all of the conditions existing on plaintiff's property which constituted the immediate, efficient cause of the injury. The implied finding that defendants failed to take reasonable precautions to sustain plaintiff's land, based as it is upon reasonable deductions from the evidence, is controlling upon that issue of fact.

[10] Defendants offered in evidence an ordinance of the city of Los Angeles which required all sewers, in the district in which the property involved is located to be connected with the city sewer system. Upon objection the evidence was excluded, and this ruling is assigned as error upon the ground that violation of the terms of the ordinance would in itself constitute negligence. Under the facts of the particular case we do not regard the ruling as erroneous. If the seepage from plaintiff's cesspool had caused a saturation of the soil on the bank of the excavation, and if this condition had been a proximate cause of the caving of the bank, defendants would have been entitled to rely upon the fact as a defense to the action. If the cesspool was negligently maintained because it was maintained unlawfully, proof of the ordinance would have tended to confuse the jury by injecting the element of negligence which was not essential to the defense. It is not, nor could it be, seriously contended that defendants would have been bound to furnish lateral support to plaintiff's land if it had been kept in a state of artificial saturation. In presenting proof in support of their asserted defense, defendants did not have to prove, nor was it necessary that they should have relied upon, negligence of plaintiff in maintaining and using the cesspool. Furthermore, the jury under proper instructions found that the seepage from the cesspool was not a proximate cause of the injury. Proof that the cesspool was used in violation of law would not have altered this finding.

[11] The court also excluded evidence that defendants' land had been excavated in part before plaintiff acquired title to his property. It is urged that this ruling was erroneous for the reason that the principal excavation was made at a time when plaintiff did not own the property and that therefore no right of action was lodged in plaintiff. But plaintiff's predecessor could not have sued until the damage occurred, and there can be no doubt that plaintiff alone was entitled to redress for the injury to the land which occurred during his ownership thereof.

[12] The point is made that no proof was offered that defendant Myrtle Coyne was one of the owners of the property upon which the excavation was made, and from this fact it is argued that the verdict and judgment should not have held her jointly liable with defendant William R. Coyne. It was alleged in the complaint and not denied by answer that at the time the excavation was made said defendants were the owners of the property. While the excavation work was under the direction of defendant William R. Coyne, it would be quite unreasonable, we believe, to assume that it was done without the knowledge and consent of his co-owner, Myrtle Coyne. It does not appear from the record that the latter disclaimed knowledge of the improvement of the land.

We have read the instructions proposed by defendants which were refused, as well as those which were given. We do not find that the instructions given were conflicting, as defendants contend. The jury was correctly instructed as to the matters to which the refused instructions related.

The judgment and the order denying defendants' motion for new trial are affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

17 Cal.App.2d 656

HALLINAN v. PRINDLE et al.

Civ. 9905.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1936.

Rehearing Denied Dec. 26, 1936.
Hearing Denied by Supreme Court Jan. 27, 1937.

1. Physicians and surgeons 🔑16

Hospital nurse in charge of operating room, who inadvertently supplied formalin instead of novocain requested by surgeon, *held* not surgeon's "servant," "employee," or "agent," precluding patient from recovering against surgeon.

[Ed. Note.—For other definitions of "Agent," "Employee" and "Servant," see Words & Phrases.]

2. Physicians and surgeons 🔑16

Surgeon cannot be held responsible for negligence of hospital nurse in performing her duties in operating room unless surgeon exercising ordinary care could or should have been able to prevent injurious effects.

3. Physicians and surgeons 🔑18(7)

In patient's action against surgeon and hospital nurse who inadvertently supplied formalin instead of novocain for operation, evidence of surgeons' custom to accept from graduate trained nurse instruments, medicine, and drugs without personal examination thereof *held* properly admitted.

4. Physicians and surgeons 🔑15

Whether ordinarily prudent person would so act *held* test of surgeon's negligence in using formalin inadvertently supplied by hospital nurse in lieu of novocain requested by surgeon for operation.

5. Negligence 🔑5, 124(3)

Acts clearly shown to be negligent cannot be justified on ground of custom or usage, and evidence of such custom or usage is not generally admissible for such purpose.

6. Negligence 🔑124(3)

Evidence that person charged with negligence followed custom of other persons in same line of business is admissible on question whether he acted as reasonably prudent man, if custom itself is not negligent and unsafe.

7. Trial 🔑253(4)

In action by patient into whom surgeon injected formalin inadvertently supplied by hospital nurse in lieu of novocain, instruction that, as regards surgeon, only issue was whether surgeon negligently administered anæsthetic, *held* not objectionable as eliminating question of surgeon's responsibility for nurse's negligence, in light of record and other instructions.

8. Charities 🔑45(2)

Evidence that hospital was nonprofit organization furnishing care without payment or at charge below actual cost *held* to show that hospital was "charitable institution," and hence not liable to patient for negligence of graduate trained nurse who had been in charge of operating room for about two years, and who inadvertently supplied surgeon with formalin instead of novocain requested for operation.

[Ed. Note.—For other definitions of "Charitable Institution," see Words & Phrases.]

9. Physicians and surgeons 🔑15

Hospital nurse neglecting to read label on bottle *held* liable to patient for negligently supplying surgeon with formalin instead of novocain requested for operation.

10. Appeal and error 🔑1004(1), 1151(2)

Appellate court may reduce or reverse allegedly excessive judgments for personal injuries or pain only where excess appears as matter of law or suggests at first blush passion, prejudice, or corruption of jury.

11. Physicians and surgeons 🔑18(11)

$12,500 to patient for painful injection of formalin inadvertently supplied to surgeon by hospital nurse in lieu of novocain as anæsthetic for operation involving removal of cyst in pelvic region, and for pain accompanying treatment lasting for about three months, and for scar allegedly interfering with marital relations by causing painful sexual intercourse, *held* excessive by $5,000.

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Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by T. J. Hallinan against Kirk H. Prindle, the Church of St. Matthew Mills Memorial Hospital, a corporation, and Ann M. MacKinnon. From a judgment for plaintiff against the defendant hospital and the last-named defendant, such defendants appeal, and from that portion of the judgment in favor of the first-named defendant, plaintiff appeals.

Judgment as to the first-named defendant affirmed and as to the defendant hospital reversed, and judgment as to the last-named defendant affirmed on condition of a remittitur, and cause remanded with directions.

See, also, 220 Cal. 46, 29 P.(2d) 202.

Ross & Ross, of Redwood City, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants Church of St. Matthew Mills Memorial Hospital and Ann M. MacKinnon.

Vincent W. Hallinan, of San Francisco, for appellant Hallinan.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondent Prindle.

PER CURIAM.

The action was brought to recover damages for an injury suffered by plaintiff as the result of the alleged negligence of the defendants in connection with an operation performed by defendant Kirk H. Prindle, a physician and surgeon, at the hospital of the corporation defendant, and for the pain, suffering, etc., occasioned thereby. The cause was tried before a jury. At the conclusion of the plaintiff's case the defendant Church of St. Matthew Mills Memorial Hospital moved the court to grant a nonsuit, which was denied; and at the close of the evidence this defendant moved for a directed verdict in its favor, as did also the plaintiff as against defendants Prindle and MacKinnon. These motions also being denied, the jury returned a verdict against the hospital and Ann M. MacKinnon (the latter being a nurse in the employ of the hospital) for the sum of $12,500, but exonerated Dr. Prindle from any liability.

Thereafter motions by defendant hospital for judgment notwithstanding the verdict and for a new trial were denied, as also were motions by defendant MacKinnon for a new trial and by the plaintiff for judgment against defendant Prindle notwithstanding the verdict and for a new trial as to the same defendant. Judgment was entered in accordance with the verdict.

Appeals have been taken by the defendants hospital and MacKinnon as it affects them, and by the plaintiff from that part thereof in favor of defendant Prindle.

[1, 2] We will consider first the appeal of the plaintiff. It is based upon his contentions: (1) That his motion for a directed verdict should have been granted or the reason that the uncontradicted evidence in the case shows that his injury was caused by the negligence of Ann M. MacKinnon, the nurse, in making preparations for the operation, and that in so doing she was the agent of Dr. Prindle, who accordingly is liable for such negligence; (2) that the trial court committed error in admitting evidence of the custom of physicians and surgeons of good standing in San Mateo county—where the operation was performed—to accept from a graduate trained nurse instruments, medicines, and drugs without making a test thereof themselves; and (3) in the giving of certain instructions to the jury.

With the exception of the extent of the plaintiff's injuries there is no dispute between the parties as to the facts of the case. So far as they are pertinent to the plaintiff's appeal they may be summarized as follows: Dr. Kirk H. Prindle practices his profession in the county of San Mateo, where also is situated the Church of St. Matthew Mills Memorial Hospital—generally known as the Mills Memorial Hospital. Ann M. MacKinnon is a graduate trained nurse in the employ of the hospital. At the time of the occurrence giving rise to this action, she had actively followed her calling for thirteen years, and was then and had been for several years in charge of the operating or emergency room of the hospital. In this room and in the charge of Miss MacKinnon was a cabinet, on the shelves of which were various drugs and other substances, some of which were kept in bottles bearing appropriate labels. Among her duties was that of replenishing these bottles or other receptacles when necessary. For the use of this room for an operation and for the incidental service of the nurse the hospital made a charge directly to the patient, and it was at the disposition of surgeons unconnected with the hospital for the performance of operations on their patients.

In December, 1929, the plaintiff was suffering from a small dermoid cyst in the pelvic region. Dr. Prindle had previously treated him in connection with an operation for appendicitis, and the plaintiff consulted him about the cyst. The doctor advised its removal; but the cyst being at that time infected he recommended that the plaintiff have it treated in the hospital for a few days before operating. The latter, however—whose wife was a trained nurse—preferred to have this preliminary treatment done at home. The inflammation having subsided, he entered the hospital on December 9 for the operation. In the meantime Dr. Prindle had requested Miss MacKinnon to prepare for a minor operation, and informed her that he would use as a local anæsthetic a 1 per cent. solution of novocain. In making these preparations Miss MacKinnon assembled on a tray various articles, including a knife, forceps, sterilized towels, gauze, a syringe, some needles and a medicine-glass containing a small quantity of a 4 per cent. solution of formalin, which she had by mistake poured therein instead of novocain. Both novocain and formalin are colorless liquids, the former being odorless, but the latter having an odor which is quite noticeable if approached to the nostrils but not otherwise observable in the characteristic atmosphere of an operating room. Before commencing the operation the doctor made a general inspection of the tray but did not notice the substitution of the formalin for the novocain. He testified that doctors trust their nurses in preparing such a tray, and that they have no particular test to determine whether the instruments and towels have been properly sterilized, or whether one colorless liquid has been substituted for another. Formalin is a powerful disinfectant and germicide, being equally capable of killing live and preserving dead tissue. Taking up the syringe, Dr. Prindle drew into it a little of the liquid contained in the medicine-glass and injected three or four drops of it into the plaintiff in the immediate vicinity of the cyst. The patient instantly gave evidence of suffering great pain. Realizing that some mistake had been made, the doctor at once smelt of the liquid and recognized it as being formalin. He immediately called for novocain and with it anæsthetized the affected area. He then completed the operation by removing the cyst, first, however, excising the area affected by the formalin—in extent about the size of a penny—and the plaintiff returned to his home. In a few days the wound became infected, and the plaintiff again entered the hospital, where he was treated by Dr. Prindle for three or four days. Thereafter daily for about three weeks he visited the doctor, who treated the wound and continued to do so every several days for a further period of two months, at the end of which time the plaintiff was discharged as cured.

We see nothing in this evidence to support the plaintiff's contention that Miss MacKinnon, in preparing the tray for the operation, was the servant or employee or even the agent of the doctor. While, if the doctor were performing such an operation at the home of the patient, or in his office, without assistance these preparations would necessarily devolve upon him, there is nothing in their nature which renders it improper or even undesirable that they be undertaken by another person, qualified by training and experience, acting in co-operation with the surgeon. This, in fact, under present-day conditions is what usually takes place. The patient enters a hospital, which is specially equipped with its operating room, modern surgical appliances, and trained nurses for the purpose of rendering this precise service, and a charge therefor is made directly to the patient. The nurse in performing her duties in the operating room is acting for her employer, the hospital, and not for the operating surgeon, who cannot be held responsible for her negligent acts unless performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not.

The rule is thus laid down in 48 Corpus Juris, Physicians and Surgeons, § 144, p. 1137: "A physician is not liable for the negligence of hospital or other nurses, attendants or internes who are not his employees if he has no knowledge thereof, or has no connection therewith, or if it is not discoverable by him in the exercise of ordinary care, or unless he is negligent in permitting them to attend the patient." Citing Harris v. Fall (C.C.A.) 177 F. 79, 27 L.R.A.(N.S.) 1174; Reynolds v. Smith, 148 Iowa, 264, 127 N.W. 192; Withington v. Jennings, 253 Mass. 484, 149 N.E. 201; Olson v. Bolstad, 161 Minn. 419, 201 N.W. 918; Hale v. Atkins, 215 Mo.App. 380, 256 S.W. 544; Broz v. Omaha Maternity, etc., Hospital Ass'n, 96 Neb. 648, 148 N.W. 575, 579, L.R.A.1915D, 334; Covington v. Wyatt, 196 N.C. 367, 145 S.E. 673; Stewart v. Manasses, 244 Pa. 221, 90 A. 574; Malkowski v. Graham, 169 Wis. 398, 172 N.W. 785, 4 A.L.R. 1524; Wright v. Conway, 34 Wyo. 1, 241 P. 369, 242 P. 1107; Hunner v. Stev-

enson, 122 Md. 40, 89 A. 418; Perionowsky v. Freeman, 4 Fost. & F. 977. "But it has been held that where a hospital nurse, although not in the regular employ of an operating surgeon, is under his special supervision and control during the operation the relation of master and servant exists, and that the surgeon is liable under the doctrine of respondeat superior for the nurse's negligence." Citing Aderhold v. Bishop, 94 Okl. 203, 221 P. 752, 60 A.L.R. 137. We think it plain from the evidence that the acts of preparation performed by Miss MacKinnon were not done under the special supervision and control of Dr. Prindle; on the contrary, as we have seen, they were performed by her in his absence. That they were done at his request or direction has no significance, since she was merely attending to duties devolving upon her as an employee of the hospital; and whether performed by her at the direction of an officer of the hospital made in pursuance of a previous notification by the doctor (as they well could have been), or upon the request of the doctor made directly to her, cannot affect the legal situation.

[3-6] (2) It was not error on the part of the trial court to admit evidence of the custom of physicians and surgeons of good standing to accept from a graduate trained nurse instruments, medicines, and drugs without making an examination thereof themselves. The jury was called upon to decide whether the defendant, Dr. Prindle, was chargeable with negligence in injecting into the body of plaintiff the liquid placed by the nurse in the medicine-glass. The test of such negligence is whether or not an ordinarily prudent person would so act. Although jurors are presumed to know what an ordinarily prudent person would do under any and all circumstances, it must be of assistance to them to be informed what the practice is of persons habitually called upon to perform a given act, for it is obvious that such practice is most likely to be that which is suggested by ordinary prudence. While a negligent act, clearly shown to be such, cannot be justified on the ground of custom or usage, and evidence of such custom or usage is not generally admissible for that purpose, evidence that a person charged with negligence followed the custom of other persons in the same line of business will be received on the question whether he acted as a reasonably prudent man would have acted under the circumstances of the particular case if the custom of itself is not negligent and unsafe. Thompson on Negligence, § 7882.

[7] (3) The court gave to the jury the following instruction: "The plaintiff charges that prior to commencing said operation said defendant, Kirk H. Prindle, injected into the plaintiff's body a substance that was not an anæsthetic and that said substance was caused to be injected into plaintiff through the carelessness and negligence of the defendant Prindle. This is the only negligent act charged against said defendant. The only issue in the case, so far as Kirk H. Prindle is concerned is, did said Kirk H. Prindle act carelessly and negligently in administering said anæsthetic and, if so, was said carelessness and negligence a proximate cause of the injury complained of." It is urged by the plaintiff that this instruction is erroneous in that it limits the issue of negligence to the personal conduct of defendant Prindle, and states that as to him it was the only issue in the case.

Read in the light of the record, it is plain to us that this instruction merely reminded the jury that no charge of negligence in the actual performance of the operation was made against the doctor but only in the administering of the anæsthetic, and other parts of the court's charge covered the question of his responsibility for the acts of third persons.

The court further charged: "If you find from the evidence that it was part of the service rendered by the Hospital to physicians operating in said Hospital to prepare and furnish local anæsthetics to be used by physicians operating in said Hospital, and if you further find that the defendant acted without any negligence, then I instruct you that your verdict should be against the plaintiff and in favor of the defendant Prindle." This instruction is attacked on the ground that it eliminated the question of the doctor's responsibility for the mistake of the nurse. But it only eliminated this question if the jury should find that it was part of the service rendered by the hospital (at the charge of the patient) to furnish local anæsthetics—which, as we have seen, the uncontradicted evidence in the case showed to be the fact—and that this defendant was otherwise free from negligence.

The jury were further instructed:

"I instruct you that if you find from the evidence that a physician and surgeon following the same line of practice as the defendant, Prindle, in San Mateo, or similar localities, and exercising the degree of skill and learning ordinarily possessed by such physicians in such localities, would rely upon a nurse furnished by a hospital for the preparation of an anæsthetic to be used in an operation, and if you further find that such custom among surgeons—if there be one—is a reasonable custom, and that the defendant Prindle acted without any negligence, your verdict must be in favor of the defendant Prindle."

"I instruct you that if you find from the evidence that the defendant, Ann M. MacKinnon, was a graduate nurse in the employ of the defendant Hospital, a corporation, and if you further find from the evidence that it was part of the service offered by the Hospital to physicians operating in it to have the anæsthetic to be used for operating purposes prepared and supplied by an employee of the Hospital, and if you further find that physicians practicing in San Mateo county and similar localities and following the same line of practice as the defendant Prindle, in the exercise of ordinary care, would rely upon the selection and preparation of the anæsthetic by said hospital nurse, and you further find that such was the custom among surgeons—if you find that there was such a custom and that it is a reasonable one—I instruct you that your verdict will be in favor of the doctor."

These instructions were followed by two or three variations of it. They are all attacked on the ground last mentioned, namely, that they eliminated the question of the doctor's responsibility for a mistake of the nurse.

We are of the opinion that since the evidence is without contradiction that the service referred to in these instructions was in fact rendered by the hospital through its qualified nurse, and that the preparation of the anæsthetic was done in the absence of defendant Prindle, there was nothing in the case upon which to predicate responsibility in this defendant on the doctrine of respondeat superior.

It follows from what we have said that the action of the trial court was correct in denying plaintiff's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial.

[8] On the appeal of the defendants hospital and Ann M. MacKinnon the points are made by one or both that (1) the charity doctrine exempts the defendant hospital from liability; (2) the doctrine of respondeat superior exempts the defendant hospital from liability; (3) the doctrine of proximate cause exonerates the defendant hospital from liability; (4) the jury was misdirected to the prejudice of the defendant hospital; and (5) the damage awarded of $12,500 was excessive as a matter of law.

As we are of the opinion that the first of these points is fully sustained by the record, it will not be necessary to consider the others in connection with the appeal of the hospital.

There is no conflict in the evidence concerning the purpose for which the hospital was founded, that it is a nonprofit organization devoted to the care of the sick either without payment or at a charge which is less than the cost of such care, nor in the manner in which its activities are carried on. We think the foregoing is demonstrated by a brief resume of the evidence on those points.

In the year 1907 Mrs. Whitelaw Reid, daughter of D. O. Mills, a pioneer banker of this state, donated the necessary funds for the building of a small cottage on property belonging to the St. Matthew's Episcopal Church in San Mateo, the purpose of which was to provide a home for a district nurse charged with the duty of taking care of sick indigents of the community. One of the rooms of the cottage was equipped as an operating room in which emergency cases might be treated. Mrs. Reid later donated the further sum of $30,000 for additional construction and equipment at the cottage, and the institution became known as the Church of St. Matthew Red Cross Hospital. In 1911 and under the direction of Mrs. Reid, a nonprofit corporation under such name was formed to conduct and maintain the hospital, to establish a training school for nurses (this purpose was never carried out), and receive donations for such purposes. In 1921 the corporate name was changed to Church of St. Matthew Mills Memorial Hospital, the name which it now bears. Thereafter over $1,000,000 was donated to the corporation by Mrs. Reid and expended in land, buildings, and equipment, so that from the modest five-room cottage in which the institution had its origin it has now developed into a modern hospital with accommodations for 125 patients housed in a class A building, with accommodation for 25 or 30 additional patients under emergency circumstances. Besides donating the sum mentioned for land, buildings, and equipment, Mrs. Reid settled a trust, devoting the income from two thousand shares of Spring Valley Water Company stock or the proceeds thereof to free beds, free clinics, and free medical service for the poor and needy, and each year up to the time of her death in 1931 donated sufficient money to meet the deficits which occurred each year in the operation of the hospital. Not only was the institution incorporated as a nonprofit organization, but the first article of its by-laws provides: "This institution has been incorporated as and shall be maintained as a nonprofit corporation." It has no stock nor stockholders; its directors, managers, and officers charged with the conduct of its affairs serve without pay; poor, needy injured persons, without distinction of class or creed, are admitted to the hospital and treated either without charge or to the extent of part only of the cost of the service rendered. To persons able to pay a moderate charge for their care a rate of $4 a day for a bed in a ward, and a charge of $6 a day for a room, were established by Mrs. Reid; and in spite of regularly recurring annual deficits in the operation of the hospital Mrs. Reid refused to consider increasing these rates, and the directors have continued to respect the founder's wishes in this respect. The hospital also takes care of emergency cases, frequently involving indigents, for which no charge is made. The cost to the hospital of maintaining a patient has varied from $8.82 per day in 1922 to $9.66 in 1931. The hospital has been made the beneficiary of various trusts, the income from which is directed to be devoted to the care of needy sick persons, and is so used. Notwithstanding this the financial statements of the institution's operations have shown annually an excess of expenditures over receipts with the exception of two years—in one of which the so-called profit was used to purchase new equipment. In these financial statements no account is taken of interest on the million dollar cost, nor of depreciation of buildings and equipment.

It is argued on behalf of the plaintiff that the hospital should not be regarded as a charitable institution inasmuch as a charge is made on the books against each patient, which in the case of an indigent person is met by crediting against it a corresponding amount taken from one of the trust funds mentioned, the plaintiff's idea apparently being that the charity received by this patient did not come from the hospital but from the trustor of that particular fund. This suggestion ignores the obvious fact that a charitable institution purports only to administer a fund—not to create, donate, or earn it. The course adopted by the institution in respect of a needy sick person is as follows: A patient is admitted to the hospital. It is not known whether he is indigent or able to pay. The officers of the institution are humanitarian enough not to immediately pester him with questions as to his financial condition. He is merely regarded as a suffering human being needing the hospital's care. A bed is assigned to him and he is cared for. Automatically and as matter of bookkeeping his name is entered on the account books and a charge made against him. Can the entering of this charge be regarded as negativing the intention of the directors of the institution to care for the patient without charge if it should turn out that he is indigent or unable to pay? Obviously not. The evidence in the case shows that when the patient becomes in a proper physical condition inquiry into his financial ability is made, and if he is unable to pay, or only able to pay in part, the debit against him is either canceled or reduced—or what amounts to the same thing: it is balanced by crediting against it a corresponding amount from one or other of the trust funds above mentioned.

The particular course of procedure is of little consequence. It is the ultimate result which is to be regarded. Whether these different trust funds be considered as several or in their aggregate amount of $15,000 of annual income, the whole sum is devoted to the purposes of the hospital, and the record shows that the annually recurring deficits arise principally from the expense of caring for sick indigent persons.

Also, as negativing the charitable character of the institution, the plaintiff calls attention to its practice of rendering bills to the county of San Mateo for the care of sick indigents, for certain emergency cases, and for the service of its ambulance in conveying injured persons to or from the hospital.

As to these the record shows that the hospital is located in a territory fruitful of automobile collisions, giving rise to frequent calls upon it for emergency service, which it renders without any inquiry as to how or whether it will be paid for the service. By arrangement with the county authorities—who themselves maintain a community hospital for the care of the sick indigent of the county—if a person who has been admitted to the defendant hospital should prove to belong to the class of persons entitled to be received into the community hospital the defendant hospital transfers him there, and renders to the county a bill for the care and service which it has given to such person. Similarly the county pays to the defendant hospital a charge for ambulance service in such and analogous cases. It seems obvious to us that the result of such an arrangement is to enable the hospital to render its service to a wider class of sick persons, since by transferring to the county hospital persons entitled to be received there, and collecting from the county a charge for the service already rendered, room is provided in the defendant hospital for others who could not be admitted to that of the county, and its available funds for its own particular service are augmented.

Nor do we think that the charitable nature of the institution is to be judged solely by the gratuitous service it renders to indigent patients. We see no reason to doubt that the furnishing to persons of small financial ability of the best type of hospital care at a rate of payment below actual cost is a charitable undertaking. A large part of our population finds it difficult and sometimes impossible to pay the regular charges of a modernly equipped hospital conducted for profit. A prolonged sickness necessitating treatment in such an institution is to many families a financial calamity. Service to such persons for a payment within their means but which is less than cost constitutes a distinct service to the community and, we think, comes fairly within the definition of charity adopted by our Supreme Court in Re Estate of Merchant, 143 Cal. 537, 77 P. 475, 477, namely, "A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." A liberal construction of the rule exempting charitable institutions from liability for the negligent acts of their employees, when due care is exercised in their selection and retention, works no injustice, since the principal ground upon which such liability is founded, namely, that the employer is using the services of the employee for his own profit, convenience, or pleasure, is, in the case of a charitable institution, entirely lacking. And it must be remembered that the injured person is still left his remedy against the person whose negligence caused the injury.

That a hospital admitting and caring for indigent persons does not lose its character as a charitable institution because it also receives and cares for paying patients is well established by the following cases: Thomas v. German General, etc., Society, 168 Cal. 183, 141 P. 1186; Burdell v. St. Luke's Hospital, 37 Cal.App. 310, 173 P. 1008; Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 2 P.(2d) 520; Ritchie v. Long Beach Community Hospital Ass'n, 139 Cal. App. 688, 34 P.(2d) 771; Shane v. Hospital of the Good Samaritan, 2 Cal.App.(2d) 334, 37 P.(2d) 1066; Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327.

We conclude on this point that no reasonable inference can be drawn from the evidence in the case that the Church of St. Matthew Mills Memorial Hospital is not properly classed as a charitable institution. It is not disputed that if properly classed as such it cannot be held liable for the negligent acts of its employees if it has used due care in their selection; and no contention is made—nor from the record could there be—that any lack of care in this respect, particularly with regard to Miss MacKinnon, has been shown. It follows that the trial court erred in denying this defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

[9] This leaves for consideration the appeal of Ann M. MacKinnon. It could hardly be contended that Miss MacKinnon was not guilty of negligence in furnishing to Dr. Prindle a solution of formalin in place of the novocain requested. On a former appeal in this case (Hallinan v. Prindle, 220 Cal. 46, 29 P.(2d) 202) the Supreme Court held that the evidence conclusively established such negligence; and the evidence presented on the present trial on that point was no different. It shows that Miss MacKinnon was quite familiar with the characteristics of novocain and formalin, that she was in charge of the cabinet in the operating room in which they were kept and had been for nearly two years; that it was among her duties to replenish from time to time as necessary the drugs and other substances kept in said cabinet, among them novocain and formalin,

which were contained in bottles each labeled with the name of its contents. She accounted for her mistake by frankly admitting that she took no pains to read the label on the formalin bottle before pouring part of its contents into the medicine-glass.

It is urged on behalf of this defendant that the verdict of $12,500 is excessive to a degree that furnishes ground for holding that it was rendered under the influence of passion or prejudice.

The plaintiff gave testimony as to his injuries and the pain, inconvenience, and disability resulting therefrom. We quote from his testimony: "I went into the emergency room in Mills Hospital and was prepared for the operation and put on the table, and then Dr. Prindle injected a fluid into me. There was a terrible burning sensation and I screamed with pain and was in a terrible state of agony. After several further injections the pain stopped. Dr. Prindle then cut out the cyst and I was in the hospital about one and a half hours. I walked out and drove my car home, and was in a shaky condition and had a terrible pain from the operation. I remained in bed until the following day. The following Saturday he bandaged the wound, and the flesh around it was very much discolored and the wound had also swollen. The only pain was in the area of the wound and in my back, and it was painful to stand up. I was in the hospital five or six days, and for three or four months afterwards Dr. Prindle treated me. The swelling had burst and the wound had broken down, and there was a deep hole a little larger than a dollar right in the center of the groin, and it was an open wound and the flesh was exposed, and every day he would cut out around the wound and bandage it. The treatment was painful at all times, but I would say the interior of the wound was dead and had no feeling. In healing the wound left a lip which is probably as long as my finger, and it crosses the center of my body, and there is a hole in the right side in which a lead pencil could be inserted, and a little less than half an inch deep. There is very little scar tissue there. If pressure is applied to it it causes pain, and it is sometimes irritating if I sit in the same position for any length of time. The scar is about one-eighth of an inch above the base of the penis. It has interfered with my matrimonial relations, and in the the act of intercourse causes a terrific and lasting pain. It takes away any pleasure connected with the matrimonial relation."

A medical witness of plaintiff gave corroborative testimony that pressure applied to the scar would produce pain. Contrary testimony on this point was given by the defendants' medical expert, who also stated his opinion that the scar could not possibly interfere with intercourse. This conflict in the evidence was resolved by the jury in plaintiff's favor.

"A finding of value or the amount of damages is ordinarily so much a matter within the exclusive province of the jury that it will not be disturbed by the reviewing court, and this is especially true where the verdict has been approved by the trial court." 4 Cor.Jur., Appeal and Error, § 2846, p. 869. This general rule has long been followed in this state. Bartlett v. Hogden, 3 Cal. 55; Douglas v. Berlin Dye Works & Laundry Co., 169 Cal. 28, 145 P. 535.

[10] The power of the appellate court to reduce or reverse judgments on the ground that they are excessive exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.(N.S.) 687, Ann.Cas. 1912C, 50; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 716, 106 P. 83; Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas.1913D, 908; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Swain v. Fourteenth Street R. Co., 93 Cal. 179, 28 P. 829; Lynch v. Southern Pacific Co., 24 Cal. App. 108, 140 P. 298. Subject to this limitation the damage resulting from pain, suffering, or injuries of the nature of that here complained of, being incapable of exact measurement, its compensation in terms of money is necessarily only approximate, and must be left to the jury to determine.

It has been said that the best obtainable criterion of the reasonableness of a verdict is its conformity to the average amount awarded by juries in cases in which injuries of like nature and like extent have been sustained. Lockwood v. Twenty-Third Street R. Co., 15 Daly, 374, 7 N.Y.S. 663. While it would be a hopeless task to search for cases exactly like the one at bar, some light also may, we think, be thrown on the question by comparing this verdict with others in amount similar or somewhat more or less, and noticing the character and degree of gravity of the injuries and disabilities for which they were awarded.

In the case of Boa v. San Francisco-Oakland Terminal Railways, 182 Cal. 93, 187 P. 2, there was a verdict of $8,000, the injury sustained being a fracture of the neck of the femur rendering the injured person a permanent invalid; in Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800, one of $10,000 for crushing and permanent shortening of the leg; in Grant v. Los Angeles Transfer Co., 45 Cal.App. 731, 188 P. 294, a verdict of $10,000 for compound fracture of and crushing of the leg below the knee; in Klein v. Atchison, etc., R. Co., 12 Cal.App. 285, 107 P. 147, a verdict of $8,500 for injuries resulting in rupture, chronic peritonitis and other ailments; in James v. Oakland Traction Co., 10 Cal.App. 785, 103 P. 1082, $15,000 for lacerations, denuding of flesh and permanent disfigurement of the face, rendering it unrecognizable as a human face; in Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601, a verdict for the same amount for serious injuries to different parts of the body, including the arm and shoulder, involving rupture of the ligaments, impairment of memory, and probably permanent disability; in Meek v. Pacific Elec. R. Co., 175 Cal. 53, 164 P. 1117, the same sum, $15,000 for injuries of a serious and permanent nature, including loss of arm and impairment of health; and $15,750 in the case of Lynch v. Southern Pacific Co., 24 Cal. App. 108, 140 P. 298, for fracture of the bones of the leg, with fracture of some of the ribs, including sensory paralysis of the arm.

[11] In the case at bar, as we have seen, there was no loss of earning capacity, and the verdict is based on acute, but brief, pain at the time of the injection of the formalin solution, some pain accompanying the treatment, and the effect of the operation upon the plaintiff's matrimonial relations as testified to by him. The first two of these elements would of course be compensated by the recovery of a comparatively trifling sum, and the main ground of the verdict must be the third. It is not at all clear from the record whether any of the matters of which the plaintiff complains, except the pain resulting from the injection, are the consequences of such injection and would not have occurred without it as the result of the excising of the cyst. Comparing the verdict of $12,500 in this case with those above set out our first impression that it is excessive is amply confirmed, and we think it is excessive to a degree to require its reduction under the rule of decision established by the authorities above cited.

For the several reasons above set forth the judgment in favor of defendant Kirk H. Prindle is affirmed; as to the defendant hospital the judgment is reversed; as to defendant Ann M. MacKinnon, if the plaintiff shall within five days from the going down of the remittitur file in the superior court a stipulation abating from the amount of the judgment the sum of $5,000, the judgment shall be affirmed subject to such abatement; and it is ordered that the cause be remanded to the superior court, with directions to enter judgment in favor of said hospital and for a new trial as to the defendant MacKinnon in the event said abatement shall not be made.

17 Cal.App.2d 696

McMULLEN v. GLENN-COLUSA IRR. DIST. et al.

Civ. 5740.

District Court of Appeal, Third District, California.

Nov. 28, 1936.

1. Mandamus ⇨10

Writ of mandamus will not issue to compel officers to perform acts which they are not presently required to execute, but which they may merely have to do at some future time.

2. Mandamus ⇨10

Office of mandamus is to compel performance of a plain and positive duty, and is never granted in anticipation of an omission of duty, but only after actual default.

3. Injunction ⇨11

Injunction is proper remedy for threatened violation of a duty entailing an injury for which the law gives no adequate compensation.

4. Mandamus ⇨154(7)

Bondholders' allegations, on application for mandamus, that irrigation district's matured bonds were presented to treasurer for payment and that bond fund was insufficient to pay bonds or interest, which did not charge refusal of payment when money should have become accessible, *held* not to authorize inference that treasurer would refuse to pay bonds when necessary funds did become available.

5. Mandamus ⚷14(3)

On application for mandamus against municipality to pay bonds and interest out of fund to become available, it must appear that payment was demanded and refused at a time when officers were able to comply therewith, or at least that officers, from their conduct or declarations, do not intend to comply therewith when money is available.

6. Mandamus ⚷154(2)

Mandamus *held* not to lie to compel irrigation district to pay matured bonds and interest out of anticipated fund upon application of bondholder who alleged, upon information and belief, that treasurer would use fund for another purpose, in absence of allegations that district did not intend to pay bonds from fund, since if fund should be received it must be presumed that officers would expend money for required purposes.

7. Mandamus ⚷154(2)

Mere allegation that remedy was not available in certain court because judge was disqualified, without alleging facts upon which asserted disqualification existed, *held* mere statement of pleader's conclusion, and insufficient upon which to base showing of disqualification.

8. Abatement and revival ⚷5

Bondholder's petition for mandamus on behalf of himself and all other bondholders to compel payment of matured irrigation district bonds and interest *held* barred by pending of another bondholder's previously filed petition for mandamus, notwithstanding bondholder was not specifically made a party to those proceedings, since parties and issues were the same.

◆

Original application by R. J. McMullen for a writ of mandamus against Glenn-Colusa Irrigation District and others. An alternative writ was issued, to which respondents filed a demurrer and a plea in abatement.

Demurrer sustained without leave to amend, and peremptory writ of mandamus denied.

W. Coburn Cook, of Turlock, for petitioner.

Hankins & Hankins, of San Francisco, and A. L. Cowell, of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an original application to this court for a writ of mandamus to compel the respondent irrigation district to pay to the petitioner and other bondholders of the first issue of bonds of that district the amounts of principal and interest due to them upon their respective securities from the proceeds which may hereafter be derived by the district as compensation for the Spalding ranch, consisting of 10,775 acres of land belonging to it, as the result of a condemnation suit which is now pending in the United States District Court of the Northern District of California between the government and the irrigation district. An alternative writ was issued in this proceeding to which the respondents have filed a demurrer and a plea in abatement.

The demurrer asserts that the petition fails to state facts sufficient to warrant the issuing of a writ; that the allegations of the petition are uncertain with respect to various specified details; and that there is a nonjoinder of a necessary party defendant, to wit, the Federal Reconstruction Finance Corporation, which is a creditor of the district and holds its bonds in a large sum as security for the payment of a loan of $802,500.

The plea in abatement alleges that at the time of commencement of this proceeding there were pending in the superior court of Glenn county two other actions between substantially the same parties and involving the same issues which are presented in this proceeding.

This application for a writ of mandamus is brought by the petitioner for his own benefit and on behalf of "all the other owners of said outstanding bonds of said first issue," including W. S. Kimball, who is specifically alleged to be the owner of matured bonds of the district in the sum of $5,000. The petition alleges the consolidation of the Glenn-Colusa Irrigation District and the Williams Irrigation District, with outstanding bonds of the first issue of the Glenn-Colusa Irrigation District in the sum of $1,598,000, and that the consolidated districts voted refunding bonds in the aggregate sum of $300,000; that in November, 1935, the consolidated districts borrowed from the Federal Reconstruction Finance Corporation the sum of $802,500, which is secured by certain district bonds; that the outstanding obligations of the district which are now due to bondholders who are made parties to this proceeding, including the petitioner and W. S. Kimball, other than the bonds which are held by the Reconstruction Finance Corporation, aggregate the sum of $49,100; that the district is without sufficient funds to pay these matured obligations; that a suit in condemnation of the Spalding ranch, consisting of 10,775 acres of land belonging to the irrigation district was commenced and is now pending in the United States District Court of the Northern District of California between the United States and this irrigation district, in which suit "the consideration of $55,000 * * * is provided to be paid * * * to the said Glenn-Colusa Irrigation District for the title," to said land; and that *"petitioner is informed and believes* and therefore alleges the fact to be that it is the intention of the Board of Directors of Glenn-Colusa Irrigation District and of said Lucile Smith, Treasurer thereof, to use the said sum of $55,000 paid or about to be paid by the United States of America, or the major portion thereof, for the purpose of completing the said purchase of bonds"; that "the said sum of $55,000 * * * is a trust fund belonging to the bondholders, * * * and said sum belongs in the bond fund of said district"; that there is no speedy or adequate remedy at law by means of injunction or otherwise for the reason that the judge of the superior court of Glenn county, which would have jurisdiction of such suit, "is disqualified to act." The petition then prays for a writ of mandamus to require the payment of said prospective sum of $55,000 to the liquidation of the claim of petitioner and other bondholders, and that the irrigation district and its officers be restrained from diverting that fund for any other purpose.

We are of the opinion the demurrer should be sustained. The petition does not allege facts from which it appears there would be a present ability on the part of the board of directors of the irrigation district to comply with the writ. In truth, the facts which are affirmatively alleged indicate clearly that it is presently impossible for them to comply with such a writ. There is no money on hand with which to pay the matured bonds in question, and the $55,000 which may be received by the district as compensation for the condemned land is speculative. It may or may not be received. Moreover, if it should be received by the district some time in the future, we must presume the officers of that district will discharge their lawful duties and expend the money for the purposes required by law.

[1-3] It is uniformly held that a writ of mandamus will not issue to compel the performance of acts on the part of officers which they are not presently required to execute, but, on the contrary, which they may merely have to do at some time in the future. McGinnis v. Mayor and Common Council of City of San Jose, 153 Cal. 711, 96 P. 367; 16 Cal.Jur. 782, § 15; 5 Bancroft's Code Practice and Remedies, § 3741. The text of an opinion which was rendered by the United States Circuit Court of Appeals in North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, 840, 33 A.L.R. 626, is applicable to the present proceeding, as follows: "The office of mandamus is to compel the performance of a plain and positive duty. It is never granted in anticipation of an omission of duty, but only after actual default. Injunction is the proper remedy for threatened violation of a duty, entailing an injury for which the law gives no adequate compensation."

[4, 5] While there is an allegation that the matured bonds in question were presented for payment to the treasurer of the district after they were due, there is not charge that payment thereof, when the money shall have become accessible, was refused. It is affirmatively alleged that "there are not sufficient funds in the bond fund * * * of said district to pay petitioner's bonds or interest." From those allegations we may not infer that the treasurer will refuse to pay the bonds when the necessary funds are available. Ordinarily, under the circumstances of this case it must appear that payment of the bonds was demanded and refused at a time when the officers were able to comply therewith. At least it must appear from the conduct or declarations of the officers that they do not intend to comply therewith when the money is available. Shirley v. Board of Trustees of Cottonwood School District, 3 Cal.Unrep. 605, 31 P. 365, 366; 16 Cal. Jur. 771, § 10; 19 Standard Encyc. of Proc. 170, § 2F. In the Shirley Case, su-

pra, quoting with approval from People v. Romero, 18 Cal. 89, 90, it is said in that regard: "To authorize a mandamus it must appear not only that the performance of the act, to enforce which the writ is asked, is a duty resulting from the office, trust, or station of the party to whom the writ is to be directed, but that the performance has been requested and refused."

[6] The nearest that the petitioner comes to alleging that the respondents do not intend to pay the matured bonds from the anticipated condemnation fund of $55,000, when it becomes accessible, is the following: "Petitioner is informed and believes and therefore alleges the fact to be that it is the intention of the Board of Directors of Glenn-Colusa Irrigation District and of said Lucile Smith, Treasurer thereof, to use the said sum of $55,000 paid or about to be paid by the United States of America, or the major portion thereof, for the purpose of completing the said purchase of bonds of said reclamation district." This merely amounts to a statement based on information and belief. Aside from the foregoing quotation from the petition, there is nothing definite or positive regarding the necessary allegations from which this court may reasonably infer that the respondents will not comply with the law and pay the matured bonds from the proper fund when the money is accessible. There may be some mere conclusions in the petition which do not aid the pleader. In 5 Bancroft's Code Practice and Remedies, p. 5197, § 3927, it is said in that regard: "The allegations should be definite and certain, and should not consist of mere conclusions of law or statements made upon information and belief. At the very least, if averments are made on information and belief, there must be a showing as to why the facts are not stated, upon actual knowledge."

For the reasons heretofore stated, the demurrer should be sustained.

In the event the directors of the irrigation district should attempt to wrongfully divert the funds belonging to their district when money for the payment of bonds is accessible, there is a plain, speedy, and adequate remedy by an appropriate suit in the superior court of Glenn county.

[7] The petitioner has attempted to allege that such action is unavailable to him for the reason that, "The Judge of the County of Glenn, in which county the Glenn-Colusa Irrigation District has its office, is disqualified." There is no attempt to allege facts upon which such asserted disqualification exists. This allegation is a mere statement of the conclusion of the pleader, and is insufficient upon which to base a showing of disqualification. The facts constituting the alleged disqualification must be set forth. Moreover, even though the judge of Glenn county is disqualified from presiding in such an action, the law provides ample means of procuring the presence of another judge who is not disqualified.

[8] To this petition for a writ of mandamus the respondents have also filed a plea in abatement, from which it appears there are now pending in Glenn county two separate suits involving practically the same issues which are included herein. One of those suits is also a petition for a writ of mandamus, No. 5696, and is entitled W. S. Kimball v. Glenn-Colusa Irrigation District et al. That proceeding involves substantially the same issues which are included in this action. Since this petition is brought by R. J. McMullen, for his own benefit, and "on behalf of all the other owners of said outstanding bonds of said first issue, and of the coupons attached thereto, and for their benefit as well as his own," and it is further specifically alleged that W. S. Kimball is one of those other owners of matured bonds in the sum of $5,000, in whose behalf the proceeding is brought, it follows that this proceeding is abated and barred by the pending of the previously filed petition for a writ of mandamus above mentioned since the parties and the issues are the same. It is immaterial that this petitioner is not specifically made a party to the Glenn county proceedings. Millott v. Association of Mare Island Employees, 44 Cal.App. 271, 186 P. 378, 379; 16 Cal.Jur. 849, § 51; 1 C.J.S. 57, § 26; 1 Am.Jur. 27, § 14. In the Millott Case, supra, it is said in that regard: "It is of no consequence that herein one party is made petitioner who does not expressly appear in the court below, since the application is made for the same purpose and involves exactly the same remedy; the subject-matter in all these actions being essentially the same."

The demurrer to the petition is sustained without leave to amend, and the peremptory writ of mandamus is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

18 Cal.App.2d 53

KENNEDY v. BERG.

Civ. 5571.

District Court of Appeal, Third District, California.

Dec. 8, 1936.

1. **Automobiles 🔑244(11, 43)**

In action for injuries sustained in intersectional automobile collision, evidence *held* to sustain judgment for motorist whose automobile was struck by on-coming automobile while motorist was attempting to make left turn, on ground of negligence of driver of on-coming automobile and motorist's freedom from contributory negligence (St.1925, p. 413, § 130(a); St.1931, p. 2126, § 131).

2. **Automobiles 🔑171(4)**

Driver of on-coming automobile was bound to yield right of way to motorist whose automobile first entered intersection (St.1931, p. 2126, § 131).

3. **Automobiles 🔑242(8)**

In motorist's action for injuries sustained in intersectional automobile collision, driver of on-coming automobile colliding with motorist's automobile had burden of proving contributory negligence of motorist who was attempting to make left turn at time of collision.

4. **Automobiles 🔑244(43)**

In motorist's action for injuries sustained in intersectional automobile collision, motorist's testimony indicating that he had ample time to make left turn at intersection ahead of on-coming automobile *held* to support implied finding of jury that motorist was not guilty of contributory negligence in attempting to make the left turn.

5. **Automobiles 🔑245(80)**

Motorist whose automobile entered intersection ahead of on-coming automobile which collided with motorist's automobile and who properly signaled that he intended to make left turn *held* not contributorily negligent as matter of law in attempting to make left turn.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Everett Kennedy against M. J. Berg. From an adverse judgment, the defendant appeals.

Affirmed.

See, also, 55 P.(2d) 1220, 12 Cal.App.(2d) 651.

Everts, Ewing, Wild & Everts and R. H. Reeve, all of Fresno, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $1,854 which was rendered against him for personal injuries received by the plaintiff as a result of negligence in an automobile collision which occurred at the intersection of streets in the town of Atwater.

It is contended the verdict and judgment are not supported by the evidence, chiefly because it is asserted the plaintiff was guilty of contributory negligence in attempting to cross the pathway of an approaching machine, at the intersection of streets, without first assuring himself that the turn could be safely made, as provided by section 130, subdivision (a), of the California Vehicle Act (St.1923, p. 558, as amended by St. 1925, p. 413), and that the defendant's motions for a nonsuit and for a new trial were erroneously refused on the same ground.

There is no merit in the appeal. The state highway runs north and south through the town of Atwater. In the center of the town the highway is intersected at a right angle by Third street. Both streets are 60 feet in width, and paved along the centers thereof for a width of 20 feet. They were straight and level for a considerable distance in both directions from the intersection. White painted lines and a conspicuous button marked the intersection.

The plaintiff operated a light Pontiac automobile, and the defendant drove a heavier Oldsmobile sedan. Both parties were familiar with the streets of Atwater. The plaintiff had lived there for six months.

The defendant was the local managing agent of the Northern Life Insurance Company and had driven through Atwater on an average of every ten days for some time past. Accompanying the defendant on the day of the accident was another agent of the same company, by the name of Rudd. December 13, 1934, at 9 o'clock in the morning, the plaintiff was driving south along the highway with the intention of turning to his left on Third street to go to the post office. It had been raining that morning, and the pavement was wet. But it was not raining at the time of the accident. At that time the defendant was approaching Atwater from the south. He was on his way from Fresno to Turlock. When the plaintiff reached a point about 100 or 150 feet northerly of the intersection, he observed the defendant approaching along the same highway from the south at a distance of approximately a hundred yards from the intersection. The plaintiff slackened the speed of his car to about 12 or 15 miles an hour, and extended his arm as a signal for a left turn on Third street. The defendant was then running at the rate of 40 or 50 miles an hour. The plaintiff testified that when he started to make the turn the defendant's machine was "a hundred or a hundred and fifty feet back * * *" from the intersection, and that "it was so far off when I crossed, I didn't figure it would ever hit me." The plaintiff succeeded in making the left turn on his proper side of the street, and passed the button at the intersection when his machine was struck by the defendant's car just back of his right front wheel. The plaintiff said the force of the collision "tore it (his machine) all to pieces." He was hurled from his car and sustained a broken wrist and a fractured shoulder, together with numerous bruises and cuts. Mr. Walters, the chief of police of Atwater, corroborated the plaintiff in his statement that he retarded the speed of his car to about 10 or 15 miles an hour as he approached the intersection; that he properly extended his arm as a signal for the left turn and negotiated the turn on his proper side of the street, being struck after he had passed the center button by the defendant's machine, which was traveling at the rate of 40 or 50 miles an hour. The chief of police said that when the plaintiff's car was struck, "he flew out like he was catapulted out like from a gun and went up in the air and landed on the back of his head and shoulders." Suit for damages was brought by the plaintiff. The cause was tried with a jury, which returned a verdict against the defendant. Judgment was rendered accordingly. From that judgment, this appeal was perfected. The amount of the judgment is not challenged as excessive.

[1-5] The verdict and judgment are adequately supported by the evidence. The defendant was driving his machine at an excessive rate of speed at the time of the accident. The plaintiff's car was in plain view for a distance of over 200 yards. The defendant had ample opportunity to observe that the plaintiff was attempting to make a left turn across his pathway. No other vehicles were in sight or obstructed the view. The plaintiff's car having first entered the intersection, the defendant was bound to yield the right of way pursuant to section 131 of the California Vehicle Act (St.1923, p. 560, as amended by St.1931, p. 2126). Leblanc v. Coverdale, 213 Cal. 654, 3 P.(2d) 312. The burden of proving that the plaintiff was guilty of contributory negligence for failure to wait until he could safely make a left turn at the intersection of the streets, pursuant to section 130, subdivision (a), of the California Vehicle Act, was upon the defendant. Huber v. Scott, 122 Cal.App. 334, 10 P.(2d) 150. The plaintiff testified to facts indicating that he had ample time to make the left turn ahead of the defendant's machine. He said, "It (defendant's car) was so far off when I crossed, I didn't figure it would ever hit me." This furnishes ample evidence to support the implied finding of the jury that the plaintiff was not guilty of contributory negligence in making the left turn. Certainly, under the evidence of this case, we may not hold him to have been guilty of contributory negligence as a matter of law.

Even though it appears that reasonable minds might differ as to whether the plaintiff could safely make the left turn at the intersection ahead of the defendant's machine, the verdict should be approved. The plaintiff had a right to assume the defendant would observe his effort to make the turn and that he would slacken the speed of his machine so as to permit him to do so. Under such circumstances, this court is required to affirm the judgment.

It follows that the motion for a nonsuit and the motion for a new trial were properly denied.

The judgment is affirmed.

We concur: PULLEN, P. J; PLUMMER, J.

18 Cal.App.2d 61

KINGSTON v. HARDT.

Civ. 10078.

District Court of Appeal, First District, Division 2, California.

Dec. 10, 1936.

Rehearing Denied Jan. 9, 1937.

Hearing Denied by Supreme Court Feb. 8, 1937.

1. Automobiles 🔑245(76)

Contributory negligence of passenger who, having descended to safety island from second of two standing southbound street cars, peered out from behind first car to observe traffic and was immediately struck in face by northbound automobile, *held* for jury in action against motorist.

2. Appeal and error 🔑909(6)

In pedestrian's action against motorist, appellate court must assume that safety island and safety zone were legally constructed under legal authority conferred on board of works and its agents, in absence of anything to contrary.

3. Evidence 🔑5(2), 10(3)

Court could take judicial notice of location of intersection of Geary street and Van Ness avenue in San Francisco and operation of municipal street cars at such intersection.

4. Automobiles 🔑245(76)

Passenger descending to safety island from southbound street car and struck by northbound automobile could not be deemed contributorily negligent as matter of law if seeking to follow established custom of walking to safety zone and then to cross street in order to board westbound street car.

5. Automobiles 🔑245(76)

Contributory negligence of passenger descending from southbound street car and struck by northbound automobile *held* for jury in action against motorist if course followed by passenger in seeking to walk to safety zone on east side of street in order to reach cross street to board westbound street car was course which reasonable person would have followed under circumstances.

6. Automobiles 🔑220(7)

Injured passenger descending from street car to safety island from which there were no pedestrian lanes *held* entitled to proceed in any direction, as regards question of his contributory negligence in action against motorist, notwithstanding ordinance forbidding crossing of street except at crosswalk; ordinance further providing that pedestrian might make necessary use of roadway.

7. Automobiles 🔑244(9)

Evidence that motorist crossed intersection against red light or only moment before lights changed and drove at dangerous speed on northbound street car tracks to left of middle of street and struck face of passenger who, having descended from street car to safety island, was peering out from behind car before crossing to safety zone, *held* to support jury's finding of negligence (Gen. Laws 1931, Act 5128, § 122).

8. Automobiles 🔑153

Rules of road reserve middle of highway for passing other vehicles unless definite traffic lanes are marked, and all vehicles must travel on right side of highway if free from obstruction (Gen.Laws 1931, Act 5128, § 122).

SPENCE, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by William Kingston against Helmut Hardt. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rehearing denied; SPENCE, J., dissents.

Myrick & Deering and Scott, James J. Harrington, and J. LeRoy Wehr, all of San Francisco, for appellant.

Olds & Olds, Walter K. Olds, and James W. Harvey, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover damages for personal injuries. Upon trial by jury plaintiff had judgment from which defendant appeals.

The accident occurred on Van Ness avenue in San Francisco on the evening of October 23, 1933. Plaintiff had been a passenger on a "D" car which was southbound on Van Ness avenue. This car had stopped at a safety "island" about 6 feet to the rear of a southbound "H" car. Plaintiff had alighted from the front platform of the car, had stepped upon the safety "island," and had then started to walk between the two cars toward a safety zone located east of the easterly tracks on Van Ness avenue. He stopped behind the "H" car with one foot on the easterly rail of that track, stuck his head out from behind the "H" car to observe traffic, and was immediately struck in the face by the windshield or other left side portion of defendant's car which he was driving in a northerly direction between the two safety zones on or near the northbound tracks and within approximately 6 inches of the easterly side of the standing "H" car. When he alighted from the "D" car, plaintiff looked to the south and noticed that the red or stop sign appeared on the traffic signal at the northwest corner of the intersection, and this stop signal remained so until after he was struck.

[1] We are concerned here with but two questions—the alleged contributory negligence of the respondent; and the alleged negligence of the appellant. Upon the first question the respondent starts with the hypothesis that he had some reason to anticipate that a street car might be running north on the northbound rails, though the traffic signal would indicate that this was not probable. He asserts, however, that he had no reason to assume, and should not be required to have assumed, that an automobile would be traveling in that space contrary to the express provisions of law and particularly within such close proximity to the standing street cars. This contention has good reasoning back of it because, if a street car had been coming upon the northbound rails, there would have been a space of at least 2 feet between it and the side of the standing "H" car, and his position in the street would then have been free from danger. For this reason it is not within the province of the court to say that he had a total disregard for his own safety when he was merely doing what any reasonable person might have done under the same circumstances, and was seeking to avoid the only danger which he could reasonably anticipate at the particular time and place.

[2] Since the general surroundings and the conduct of traffic at the intersection where the accident occurred are all unusual and related so closely to the two questions of negligence and contributory negligence, we add a more complete statement of those conditions. Geary street and Van Ness avenue cross each other at right angles. Geary runs east and west; Van Ness runs north and south. In the middle of Geary street there is a double set of street railroad tracks. In the middle of Van Ness there is a double set of street railroad tracks. Pedestrians lanes are marked on both highways. Each lane indicates the space between the property line extended and the curb line extended. There are no others. A safety island of concrete about 6 inches high, 50 feet long, and 6 feet wide is located in Van Ness about 3 feet west of the westerly rail. The south end of the island is 34 feet 6 inches from the northerly line of the pedestrian lane crossing Van Ness. About 3 feet east from the easterly rail on Van Ness and directly opposite the safety island a safety zone is indicated by buttons. That zone is about the same size as the safety island. No pedestrian lane is indicated to either zone, either from the sidewalk or from the pedestrian lanes above mentioned. Nothing to the contrary appearing, it must be assumed that the safety island and the safety zone were legally constructed under a legal authority conferred upon the board of works and its agents.

[3-5] The location of the intersection and the operation of street cars at that point is so well known that we can take judicial notice of it. These street cars are all operated by the municipality. Three lines marked "A," "B," and "C" all run directly across the intersection east and west on Geary street. One line marked "H" runs directly across north and south on Van Ness. Another marked "D" runs west on Geary and turns to the easterly track on Van Ness and then proceeds northerly on Van Ness. The same line returns southerly on Van Ness and there turns in a wide curve to the southerly line on Geary and then proceeds easterly on that street. Curves are also maintained from both of the tracks on Van Ness north of Geary to route southbound Van Ness cars westerly on Geary, and from both tracks on Van Ness south of Geary to route northbound Van Ness cars easterly on Geary and in the opposite direction in each instance. The municipality maintains a complete transfer service at the intersection, and has installed the safety stations heretofore mentioned

for the protection of its patrons. Thus a passenger coming south on a Van Ness avenue "H" or "D" car and desiring to go westerly on Geary would be required to cross the easterly side of Van Ness, then the northerly side of Geary, and there board an "A," "B," or "C" car. This is the course that the plaintiff tried to follow, and the primary question presented here is whether he was guilty of negligence as a matter of law. If custom and usage has established the practice of walking from the safety island over the Van Ness tracks to the safety zone on the easterly side of that avenue, then to the curb, and then to the boarding zone on Geary, it cannot be said as a matter of law that one is guilty of contributory negligence in following that established custom. On the other hand, if no such custom or practice is established, and the course followed by the plaintiff was the course which a reasonable person would have followed under the circumstances, the question of contributory negligence is equally one to be determined by the jury.

[6] The appellant relies upon section 10 of an ordinance of the city and county of San Francisco which reads in part:

"When within the Central Traffic District or a Business District, no pedestrian shall cross a roadway other than by a crosswalk.

"Outside of the Central Traffic District or a Business District no pedestrian shall cross a roadway other than by a route at right angles to the curb, and when crossing at any place other than a crosswalk shall yield the right of way to all vehicles upon the roadway.

"It shall be unlawful for any person to be in any roadway other than in a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian."

The parties concede that the intersection is in a business district, but the respondent contends that the peculiar and unusual circumstances of the crossing and recrossing of traffic at the intersection and the location of the additional safety zones make the application of the ordinance impossible, at least to such an extent that the question must be left to the jury to decide whether, in view of all these circumstances and conditions, the respondent pursued the course of a reasonable man. The proviso in the last portion of the ordinance quoted supports this contention. When the respondent had alighted from the "D" car and stepped on the safety island, he was entitled to leave that island and go on his way. He was bound to determine whether to go north, east, south, or west. He could not go in any direction in a pedestrian lane. Whatever direction he walked was in violation of the ordinance, if that ordinance is given the broad interpretation for which the appellant contends. The latter contention does violence to the ordinance and gives no force or effect to the language "* * * provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian." Giving that proviso the effect to which it is entitled, it seems clear that the respondent was entitled to go in any direction and that it was a question for the jury as to whether he exercised due care.

[7, 8] The evidence is sufficient to support the charge of appellant's negligence. He was driving at a dangerous rate of speed upon the street car tracks to the left of the center of the avenue. He cut between a safety zone and two standing street cars, running so close to the latter that his windshield clipped respondent's face as it protruded from behind the first street car, He crossed the intersection either after the red stop light had flashed or so close to that time as to make his progress over the intersection inherently dangerous. In "riding the rails" he says that practice is prohibited only on Market street from Van Ness to Embarcadero. This is true as far as the city ordinance is concerned. But section 122 of the California Vehicle Act (Deering's Gen.Laws 1931, Act 5128), as it read at the time of the accident, provided that: "Upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway, * * * (b) In driving upon the right half of a highway the driver shall drive as closely as practicable to the right-hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in position to make a left turn." All the rules of the road reserve the middle of the highway for the purpose of passing other vehicles, unless definite lanes are marked for the traffic, and all vehicles are required to travel upon the right-hand side if that portion of the highway is clear of traffic or obstruction.

Here the defendant was the only one crossing against the traffic signal, and the jury had ample evidence from which it could draw the inference that he was negligent.

We have examined the instructions of which appellant complains and are satisfied that appellant suffered no prejudice from any of them.

No other questions require discussion. It is simply a "fact" case, with no error appearing in the record.

The judgment is affirmed.

I concur: STURTEVANT, J.

SPENCE, Justice (dissenting).

I dissent. Appellant's main contentions are, first, that the evidence was insufficient to show negligence on the part of appellant, and, second, that the uncontradicted evidence showed that respondent was guilty of contributory negligence as a matter of law.

It may be assumed for the purpose of this discussion that there was sufficient evidence to sustain an implied finding of negligence upon the part of appellant. It should be stated, however, that the evidence introduced by respondent showed that appellant was traveling no faster than approximately 25 to 30 miles per hour. It should be further stated that the uncontradicted evidence showed that appellant did not enter the intersection against the traffic signal and that appellant was not driving his car to the left of the center line of Van Ness avenue.

Turning to appellant's second main contention, I am of the opinion that it should be sustained. This conclusion is reached without regard to the alleged violation by respondent of section 131½ of the Vehicle Act (Deering's Gen.Laws 1931, Act 5128), now section 562 of the Vehicle Code (St. 1935, p. 188) [see Gaston v. Hisashi Tsuruda, 5 Cal.App.(2d) 639, 43 P.(2d) 355], and without regard to the alleged violation by respondent of section 10 of ordinance 7691 of the city and county of San Francisco. See Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.(2d) 553. There are numerous authorities in this state holding either expressly or impliedly that, where the only rational conclusion to be drawn from the uncontradicted evidence is that the injured pedestrian was guilty of negligence which was the proximate cause or one of the proximate causes of his injury, said pedestrian is chargeable with contributory negligence as a matter of law and may not recover. Heiter v. Hirschfeld, 205 Cal. 625, 271 P. 1051; Horton v. Stoll, 3 Cal. App.(2d) 687, 40 P.(2d) 603; Anderson v. Market Street Ry. Co., 116 Cal.App. 282, 2 P.(2d) 529; Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86; Atkins v. Bouchet, 65 Cal.App. 94, 223 P. 87; Ogden v. Lee, 61 Cal.App. 493, 215 P. 122; Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031; Spring v. Tawa, 49 Cal.App. 100, 192 P. 1051; Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631; Mayer v. Anderson, 36 Cal.App. 740, 173 P. 174. In my opinion, the uncontradicted evidence in this case brings it within the rule of the foregoing authorities in many of which no question of the violation of a statute or ordinance by the pedestrian was involved.

The uncontradicted evidence in this case shows that the accident happened at about 9 p. m. on the evening of October 23. Respondent alighted upon a safety zone and then attempted to cross Van Ness avenue, starting his crossing between the two standing street cars. It is a matter of common knowledge that Van Ness avenue was at all times a heavily traveled street and it was entirely lawful for automobiles as well as street cars to travel between the safety zones on said street. Respondent was therefore bound to anticipate traffic approaching from the south and going in a northerly direction between said zones. He was under a duty to "look carefully" in the direction from which traffic was to be anticipated before placing himself in a position of danger. Horton v. Stoll, supra, at page 690 of 3 Cal.App.(2d), 40 P.(2d) 603; Bence v. Teddy's Taxi, supra, at page 752 of 101 Cal. App., 282 P. 392, 283 P. 86. As was said in Moss v. H. R. Boynton Co., supra, at page 477 of 44 Cal.App., 186 P. 631, 632, "In attempting to cross at that point a duty rested upon him to exercise a greater degree of care than if he were at the established crossing. Sheldon v. James, supra [175 Cal. 474, 166 P. 8, 2 A.L.R. 1493]. This was particularly true if his view was to any extent obstructed by the jitney bus." Here respondent was not crossing at an established crosswalk, and his view was largely, if not entirely, obstructed by the street car which was standing in front of the one from which he had alighted. With the conditions as above indicated, respondent left his place of safety, attempted to cross the heavily traveled street, and emerged from between the two street cars and directly into the path of appellant's automobile or, as the evidence seems to show, into the side of appellant's automobile, without first taking the precaution of ascertaining whether any traffic was approaching from the south. While respondent attempted to claim that he "looked," it is certain that he did not discharge his duty to "look carefully" under the circumstances. His own testimony is as follows:

"Q. Did you see the automobile that you collided with? A. I never seen it yet.

"Q. You never did see it? A. I ain't never seen it.

"Q. You didn't see it before you—. A. I ain't never seen it.

"Q. (continuing) —ran into it? A. Not up till this day, I ain't never seen it.

"Q. You don't know what kind of a car it was? A. I never seen it."

The foregoing testimony and other testimony of respondent makes it impossible to reach a rational conclusion that respondent exercised the care required of him under the circumstances. It is difficult to conceive of a case in which the testimony would more irresistibly lead to the conclusion that the injured pedestrian was guilty of negligence which was a proximate cause, if not the sole proximate cause, of his injuries.

In my opinion appellant's motion for a directed verdict should have been granted and the judgment should be reversed.

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18 Cal.App.2d 90

FINCH et ux. v. McKEE et ux.

Civ. 5637.

District Court of Appeal, Third District, California.

Dec. 10, 1936.

1. Fraud 🔑45

Complaint of plaintiffs, seeking damages for defendants' fraud in inducing plaintiffs to exchange their farm for defendants' town property, containing allegation that defendants falsely represented that building was constructed in accordance with specifications and with city ordinance, and actually cost them $22,000, but that materials and methods of construction were inferior to those required specifications and ordinance, and that building did not cost to exceed $12,000, *held* to state cause of action.

2. Action 🔑48(2)

Complaint seeking damages for fraud in inducing plaintiffs to exchange farm for defendants' city property, and requesting that amount of damages be credited on note executed in part payment, and that if damages exceeded note, that it be then canceled, *held* not to improperly unite conflicting actions (Code Civ.Proc. § 427).

3. Fraud 🔑31

Parties defrauded in exchange of property were not required to rescind, but had option to retain property and sue for damages on account of alleged fraud.

4. Fraud 🔑11(1, 2)

Fraud may not ordinarily be predicated on mere statements of opinion regarding value, general character, or stability of building, even though such assertions are greatly exaggerated.

5. Fraud 🔑11(1)

Mere statement that building was constructed earthquake proof *held* not to furnish ground for suit for fraud and deceit.

6. Fraud 🔑13(1)

False statement that building was constructed in accordance with certain specifications and with ordinance and false representations as to cost thereof constituted sufficient ground for suit by purchasers for fraud and deceit.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by George Finch and wife against Samuel J. McKee, also known as Sam J. McKee, and wife. From a judgment dismissing the action, plaintiff appeals.

Judgment reversed, with directions.

Frank E. Downey, of Long Beach, for appellants.

Carl E. Cameron, of Long Beach, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed in this action for damages for fraud alleged to have been exercised in procuring an exchange of real properties from a judgment of dismissal which was rendered after a demurrer to the complaint had been sustained without leave to amend the pleading. The judgment was entered two days after the service of notice of the order sustaining the demurrer.

The complaint contains four counts. The first cause of action alleges that the plaintiffs owned 160 acres of land in Tulare county, of the value of $30,000, subject to a mortgage of $5,000, and that the defendants Samuel J. and Nellie McKee, husband and wife, were the owners of certain lots in Long Beach, upon which there was constructed a brick drive-in market and garage, worth not to exceed $25,000; that by means of fraudulent representations the plaintiffs were persuaded to and did exchange their farm for the Long Beach property December 19, 1929, paying the defendants the additional sum of $25,000, which was represented by a promissory note for that amount, secured by a deed of trust on those lots; that they invested the additional sum of $15,200 in making necessary improvements on the property, and executed several ten-year leases of portions thereof for the aggregate rental of $535 per month; that the building was seriously damaged by the earthquake which occurred in that vicinity March 10, 1933, and it was therefore condemned by the city authorities as dangerous; that the plaintiffs were unable to procure means with which to rebuild or repair the building, and thereby lost their tenants and the entire income from the property; that for the first time after the walls of the building were cracked and shattered by the earthquake they discovered the inferior and defective nature of the structure and the fraudulent representations with respect to the cost and character of the construction of the building, and they thereupon promptly demanded of the defendants the cancellation of their note and trust deed, together with other damages sustained; that these demands were refused, and the defendants then foreclosed the trust deed and plaintiffs lost their property.

Among the numerous specifications of fraud and misrepresentations which are alleged to have induced the exchange of properties are the following positive and definite statements: That the building actually cost defendants $22,000; that it was constructed according to the plans and specifications therefor on file in the city engineer's office, strict compliance with the ordinance of the city of Long Beach; that it was constructed with high-grade materials in first-class manner; that there was no better building of that type in Long Beach; that it would withstand earthquakes, and that the property was worth $50,000.

The complaint alleges that these statements were false; that they were known to the defendants to have been false, and were made to deceive and defraud the plaintiffs; that relying upon those statements as true, the plaintiffs exchanged their Tulare farm for the Long Beach property and executed and delivered their note and trust deed for $25,000, as part payment therefor; that they failed to discover that the statements were false until the walls of the building were cracked and shattered by the earthquake, disclosing, for the first time, that the building was not a first-class structure conforming to the specifications and ordinance, as represented, but, on the contrary, that it was poorly and defectively built of inferior materials and that it was not in compliance with the specifications for the reasons that Portland cement was not used in the mortar, unscreened beach sand was employed instead of clean, rough sand of a specified grade, the mortar which was used was inferior, deteriorated, loose and crumbling, the brick walls were laid without the prescribed header courses, no mortar was used between courses of brick, no anchors were attached to the frame of the structure, and the building did not cost more than $12,000.

The suit for damages was brought. A general and special demurrer to the complaint was sustained without leave to amend the pleading. Two days after the notice of sustaining the demurrer had been served the judgment dismissing the action was rendered. From that judgment the plaintiffs have appealed.

[1] The complaint is not skilfully drawn. Its allegations are prolix and uncertain regarding some of its features. If it were the intention to plead a cause of action for the rescission of the note and trust deed, it would be necessary to allege an offer to restore to the respondents title to the Long Beach property. But the bringing of a suit for rescission was evidently not the purpose of the pleader. In our opinion the complaint states a good cause of action for fraud and deceit. The demurrer was not presented on the ground of uncertainty. It merely asserts that the complaint fails to state a good cause of action, and that a suit for damages for fraud is improperly united with an action to cancel the trust deed.

[2, 3] There is no merit in the charge that the complaint improperly unites two conflicting causes of action. The respondents make no such contention in their briefs on appeal. It is evident the plaintiffs did not attempt to plead an action to rescind the note and trust deed. They do not ask to have the title to their 160-acre ranch restored to them. In effect, they request that the amount of damages which may be ascertained be credited on the note and that if the damages exceed the amount of the note, that it be then canceled. The complaint does not improperly unite conflicting actions. The execution of the note and trust deed was a part of the transaction resulting in the exchange of properties concerning which the alleged fraud was practiced. Various causes of action "arising out of the same transaction" may be properly joined. Section 427, Code Civ.Proc.; Divani v. Donovan, 214 Cal. 447, 6 P.(2d) 247. It was not necessary for the plaintiffs to rescind the exchange of properties. They have the option to retain the Long Beach lot and sue for damages sustained on account of the alleged fraud and deceit. Paolini v. Sulprizio, 201 Cal. 683, 685, 258 P. 380. Apparently that is exactly what they tried to do by means of this action.

[4] It may be conceded the respondents' statements that the store in question was a first-class structure equal to the best building of that type in Long Beach, that it would withstand shocks of earthquake, and that it was worth $25,000, were mere expressions of opinion which do not furnish grounds for damages in a suit for fraud and deceit. Fraud may not ordinarily be predicated on mere statements of opinion regarding the value, general character or stability of a building, even though such assertions are greatly exaggerated. Since it is difficult to distinguish between expressions of honest convictions respecting the stability, value, or adaptability of property, and false representations of an owner regarding those matters, they are charitably considered mere expressions of opinion which will not afford grounds for suit. Usually a purchaser is charged with knowledge of such excess enthusiasm and human frailty on the part of a vendor, for which he must make due allowance, and he is deemed to accept as true such representations, amounting to mere judgment or opinion, at his own peril. 12 R.C.L. 244, § 14, and p. 279, § 44; 26 C.J. 1087, § 25.

[5, 6] The mere statement that the building in question was constructed earthquake proof is a matter of pure speculation or prophecy. Every person of common understanding knows it is impossible to estimate the destructive forces of nature accompanying earthquakes, tornadoes, cyclones, storms, or floods. No human being could have prophesied the serious damages which resulted to first-class buildings in San Francisco, Santa Rosa, and San Jose from the earthquake of 1906. Nor could one foretell the damages which resulted to the structures in Long Beach and that vicinity from the earthquake of 1933. Such statements were pure speculations upon which no purchaser had a right to rely. It may be true that the Long Beach building would have been destroyed by the earthquake of 1933 regardless of the quality of the material or the character of the work which was employed in its construction. But it is specifically alleged that inferior materials and workmanship were employed in the construction of the building, contrary to the specifications therefor and to the requirements of the ordinance of the city, and that neither the character of the structure nor the cost thereof were in accordance with the representations falsely made by the respondents. The question as to whether the building would have withstood the earthquake if it had been constructed of first-class materials in the manner required by the specifications and the city ordinance, that is to say, the question as to whether it was destroyed by an act of God, or because of the contributing negligence and inferior workmanship of man, is a problem for the determination of the jury. 1 Cal.Jur. 386, § 3. In the authority last cited it is said in that regard:

> "If the act of God would not have caused the damage but for the intervention of human agency, there is no exemption from liability by reason thereof. * * *
>
> "The question of whether an accident was the result of an act of God, a cause wholly beyond human control, or the direct result of other causes, is one particularly within the province of the jury to decide."

In the present case the respondents assume that the cause of action which is stated in the complaint is predicated wholly on the alleged statements that the Long Beach building was a first-class structure equal to the best building of that type in the city;

that it would withstand shocks of earthquakes and that it was worth $50,000. If these were the only statements of alleged fraud contained in the pleading, we should feel impelled to affirm the judgment on the ground that they constitute mere expressions of opinion. But they are not the only material statements of alleged fraud which are contained in the pleading. The complaint specifically alleges that the respondents falsely represented that the building was constructed in accordance with the specifications therefor on file in the city engineer's office, and with the city ordinance, and that it actually cost them $22,000. It is then specifically stated wherein the materials and the method of construction of the building were inferior to those required by the specifications and ordinance, and that the building did not cost to exceed the sum of $12,000. These averments, if true, may constitute fraud and misrepresentations furnishing adequate basis for damages in a proper suit.

We are therefore of the opinion the court erred in sustaining the demurrer to the complaint. At least the court abused its discretion in sustaining the demurrer without leave to amend the pleading.

The judgment is reversed, and the court is directed to vacate the order sustaining the demurrer and enter an order overruling the demurrer, or, if the plaintiffs desire to amend their complaint to eliminate suggested uncertainties therein contained then the court is directed to make an appropriate order permitting them to do so.

We concur: PULLEN, P. J.; PLUMMER, J.

18 Cal.App.2d 59

TOTTON v. SUPERIOR COURT IN AND FOR SOLANO COUNTY et al.

Civ. 5796.

District Court of Appeal, Third District, California.

Dec. 9, 1936.

Trial ⚷159

Superior court *held* to have jurisdiction to hear a second motion for nonsuit after previously denying such a motion.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Proceedings by Diane Totton against the Superior Court of the State of California in and for the County of Solano, and the Honorable W. T. O'Donnell, as Judge thereof, to restrain the respondents from proceeding with hearing of a motion for nonsuit.

Temporary restraining order vacated, and proceedings dismissed.

George A. Work, of San Francisco, for petitioner.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Russell F. O'Hara, of Vallejo, for respondents.

The court delivered the following opinion from the bench:

This cause is before us upon the petition of Diane Totton seeking to restrain the superior court from further proceeding with the hearing of a second motion for nonsuit now pending in the case in said court where Diane Totton is plaintiff and Frank Totton, her husband, is also plaintiff, against Martin Belfrie and Chevrolet Motor Company, defendants. It appears that the Chevrolet Motor Company made a motion for a nonsuit which was denied. Later on the motor company asked permission to renew its motion for nonsuit. Permission was granted. A motion was made for nonsuit by the Chevrolet Motor Company and the time set for argument. In the meantime an alternative writ was sued out from this court seeking to restrain the Superior Court of Solano County and W. T. O'Donnell, as the judge thereof, from proceeding with the hearing of said motion.

The question before us is simply: Have the Superior Court of Solano County and W. T. O'Donnell, as judge thereof, jurisdiction to proceed with the hearing of said motion? This question must be answered in the affirmative. The question has been before the Appellate Court of this state twice and once before the Supreme Court. In the case of Bohn v. Pacific Electric Ry. Co., 5 Cal.App. 622, 91 P. 115, 116, we find the following: "At the close of plaintiff's evidence, defendant moved for a nonsuit, which was denied. Defendant then introduced its evidence and renewed its motion for a nonsuit, which motion the court granted, and judgment was entered for defendant."

The action of the superior court was upheld. In the case of King v. Hercules Powder Co., 39 Cal.App. 223, 178 P. 531, a motion was made for nonsuit, which was denied. Later on the motion was renewed and granted. The action of the superior court was upheld. In the case of Fox v. Southern Pacific Co., 95 Cal. 234, 30 P. 384, two motions for nonsuit were denied. Finally, the trial court granted a new trial on the ground that it should have granted the second motion for a nonsuit. The action of the trial court was upheld.

It follows, based upon these three cases, that the holding must be that the trial court of Solano county and W. T. O'Donnell, as the judge thereof, have jurisdiction to proceed with the hearing of the motion now pending in the case mentioned. It follows also that the petition for the writ must be and the same is hereby denied. The temporary restraining order is vacated and the proceedings dismissed.

ROSHER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 11206.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1936.

Rehearing Denied Dec. 30, 1936.

Hearing Granted by Supreme Court Feb. 4, 1937.

1. Divorce 🔑306

Under statute giving court power to order allowance for maintenance of "children of the marriage" and for support of wife "during her life," power to order maintenance was not limited to minor children nor to period of their minority (Civ.Code, §§ 138, 139).

2. Divorce 🔑309

Where, upon granting divorce for fault of husband, he was ordered to make certain payments for maintenance of daughter until she attained majority, and where order was modified by provision for payment until further order, modifying order was not invalid in so far as it went beyond initial order, as attempt of court to confer jurisdiction on itself, but was valid exercise of jurisdiction retained from divorce proceeding, under statute giving court power to order maintenance of "children of the marriage" and allowance for wife "during her life" (Civ.Code, §§ 138, 139).

3. Divorce 🔑312

Upon review of order modifying original order in divorce suit for maintenance of daughter by husband found to be at fault, where record did not show facts upon which original order was made, it would be presumed original order was supported by facts of case.

4. Divorce 🔑309

Where court ordered maintenance of daughter "until said minor child shall arrive at the age of majority," law changing age of majority from 18 to 21 years was merely circumstance which court might consider in modifying order for maintenance beyond daughter's eighteenth birthday, and such modifying order was not void for any retroactive effect of statute, where jurisdiction to modify initial order was given by another statute (Civ.Code, § 139).

5. Divorce 🔑309

Statute which by implication gave court power to order allowance for children beyond their minority would be read into initial order for support of daughter until she attained majority by husband found to be at fault in divorce suit, and order would not be held a final judgment, but a continuing order, subject to modification by exercise of jurisdiction retained under statute, upon consideration of changing circumstances (Civ.Code, § 139).

6. Divorce 🔑309

Where order for maintenance of daughter by husband until she attained majority was modified to order maintenance by payments in an increased amount monthly until further order, that husband paid increased payments after daughter reached 18, and twice applied to court to modify existing order, indicated initial order was continuing order subject to modification and was not final judgment.

7. Divorce 🔑312

Where no transcript of evidence was before District Court of Appeal, that daughter earned certain wages in moving picture business could not be considered on appeal from order finding husband guilty of contempt for failure to make payments for maintenance of daughter in accordance with previous orders.

WOOD, J., dissenting.

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*For subsequent opinion see 71 P.2d 918.

Contempt proceeding against Charles G. Rosher for failure to pay sums ordered for maintenance and support of his daughter. Following an order finding him guilty of contempt, Rosher filed a petition for writ of review.

Affirmed.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Flint & MacKay, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is a review of a proceeding in which the superior court made an order finding petitioner guilty of contempt for failing to pay certain sums which he had been ordered to pay for the maintenance and support of his daughter.

A decree of divorce "for an offense of the husband" was entered against the petitioner on the 29th of December, 1923, awarding the custody of the daughter to petitioner's wife, who was the plaintiff in that action, and by said decree the said petitioner was ordered to pay $100 per month for the support and maintenance of the minor daughter of the parties, "said payments to continue until said minor child shall arrive at the age of majority." On the 8th day of April, 1927, the court modified the order by raising the monthly payments from $100 to $150 per month and by changing the phrase "said payments to continue until said minor child shall arrive at the age of majority" to the words "commencing on May 1st, 1927, and *continuing thereafter until the further order of this court,* and it is further ordered that the Interlocutory Decree of Divorce is hereby modified in this regard." The law at the time the order was made and at the time the modification was made fixed the age at which a female child reached her majority at her eighteenth birthday. By statute effective July 29, 1927, the age was raised to twenty-one years. Petitioner paid all sums required under the modified order until the daughter reached the age of eighteen years, which was on July 10, 1932, and up until the month of December, 1932, but willfully refused to pay further sums although able to do so for a period of thirty-one months, when the daughter reached the age of twenty-one years.

It is the contention of the petitioner that the respondent was without jurisdiction in the premises and acted in excess of its jurisdiction in adjudging petitioner to be guilty of contempt, and he contends that the words, "until the further order of this court," did not extend the liability of petitioner to make the payments beyond the time when she attained the age of eighteen years—that to hold otherwise would be to give the law, extending minority, a retroactive effect as applied to the judgment and that as a matter of law his liability under the order of April 8, 1927, terminated when she reached that age.

[1] Petitioner claims that the jurisdiction of the court to make the order is found solely in section 138 of the Civil Code, which at the time the order was made read as follows: "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." And he relies largely upon the following cases: Kendall v. Kendall, 122 Cal.App. 397, 10 P.(2d) 131; Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868; Hale v. Hale, 6 Cal. App.(2d) 661, 45 P.(2d) 246. He does not discuss section 139 of the Civil Code, which reads as follows: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of *the children of the marriage,* and to make such suitable allowance to the wife for her support, *during her life,* or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects." It will be observed that the authority of the court under this section to order maintenance is in no wise limited to minor children nor to the period of their minority.

The contention of the petitioner that the court had no jurisdiction to make an order for support of the child which extended beyond the period of the child's minority was decided adversely to the petitioner in the case of Anderson v. Anderson, 124 Cal. 48, 54, 56 P. 630, 632, 57 P. 81, 71 Am.St. Rep. 17, and so far as we are able to discover the Supreme Court has not receded from the position therein taken. The

Anderson Case was followed in the case of Younger v. Younger, 112 Cal.App. 445, 296 P. 1104. In the Anderson Case, supra, the Supreme Court said: "The point is made * * * that the daughter is of age, and nothing should be awarded for her support. * * * In her case it appears from the findings that she is residing with her mother, and that, although of age, she is dependent upon her parents for support. Section 136 provides that, though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife 'and her children or any of them.' [Section 139 of the Civil Code contains similar provisions where a divorce is granted for an offense of the husband.] It has been held, under a statute of Oregon somewhat analogous, that the word 'children' must be construed to mean 'minor children.' Fitch v. Cornell, Fed.Cas. No. 4,834, 1 Sawy. 156. But the court adds: 'The reason is, they are no longer in the custody or under the control of their parents, nor are the latter bound to maintain them, except under peculiar circumstances, arising from poverty or sickness.' The same intimation appears in Snover v. Snover, 13 N.J.Eq. 261, where the chancellor says: 'From the evidence now before the court, I incline to the opinion that, if the daughter continues in health, the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time.' And so, in the present case, under any change of circumstances with reference either to son or daughter, the court may at any time make a modification of the judgment, if it hold that under the circumstances of the case the presence of the children influences the amount of the allowance. In this connection section 206 of the Civil Code is important, in the line of the intimations of the Oregon and New Jersey courts. That section provides that it is the duty of the father and mother of any poor person, who is unable to maintain himself by work, to maintain such person, to the extent of their ability. In view of the finding that the daughter is dependent upon her parents for support, we must presume that, from ill health or other cause, she is 'unable to maintain herself by work.' It does in fact appear in the testimony, without objection, that the daughter is an invalid. From the above reasons, which are sufficient to support the judgment on this point, it becomes unnecessary to determine." (Another question raised by respondent.)

[2, 3] Thus it appears that an order extending support and maintenance beyond the minority of a daughter was approved, with the admonition that under any change of circumstances with reference to the daughter "the court may at any time make a modification of the judgment." The cases relied upon by petitioner are appellate court cases in which the order was "during the minority" of the child, or, on the other hand, are cases in which the court's attention had been called solely to Civil Code, § 138, and in which the trial court's jurisdiction to make an order under section 139 was not discussed. Petitioner relies greatly upon the following paragraph taken from the case of Rife v. Rife, 272 Ill.App. 404: "Complainant's contention that the incorporation in the decree of the words 'until the further order of the court' vested the court with authority to enter the order for support of the adult daughter is absolutely without merit. The inclusion of these words contained no grant of authority the court did not have without them. If they had been omitted the court could have exercised its authority just as fully and completely for the care and support of minor children, and no language used in the decree could possibly confer jurisdiction on the court to order support, in a divorce proceeding, for an adult daughter. In the language of the court in the Boehler Case, supra [125 Wis. 627, 104 N.W. 840], the attempt of the chancellor to order such support 'was worse than mere error. It was extrajudicial. It was and is a nullity.'" The answer is that the inclusion of the words "until the further order of the court" in the instant case was not an attempt of the court to confer jurisdiction upon itself to order support for an adult daughter under section 138 of the Civil Code; it was the exercise of authority which it then properly had under section 139 of the Civil Code. The order of April 8, 1927, as such, is not before this court for review. The facts and circumstances upon which that order was made are not before us, and we must assume that there were proper circumstances upon which the order was based.

[4, 5] The order of April 8, 1927, was a continuing order subject to modification in case there should be a change of circumstances which would warrant a modification. In any hearing for a modification of the order the fact that the legislature had

changed the age at which a female child reaches the age of majority from eighteen years to twenty-one years would be a circumstance which might well be taken into consideration by the court along with any other fact or circumstance in evidence bearing upon the question of the advisability of modifying the order. Paraphrasing somewhat the language used in Moore v. Superior Court, 203 Cal. 238, at page 241, 263 P. 1009: The provisions of section 139 of the Civil Code are read into said order and, this being so, the order was not in the nature of a final judgment which determined the relation of the parties to each other or to the action or the subject-matter over which the court had thus retained all of the jurisdiction which it had during every stage of the proceedings. In the foregoing sense the trial court retained under said section, so read into its orders and decrees, the same jurisdiction over the parties and the subject-matter to which said section relates that it had and exercised prior to the making and entry of said order.

[6, 7] That the order was a continuing order and was so interpreted both by the parties and by the court is indicated by the following facts which appear in the record: For several months after the child reached the age of eighteen years petitioner continued to pay the monthly payments specified in the order. Thereafter and on April 9, 1935, the petitioner brought on an order to show cause why he should not be relieved from liability under the order of April 8, 1927, based upon the same grounds as urged herein. The court denied petitioner's application. No appeal was taken from this order. Again on July 8, 1935, the petitioner applied for and secured an order of respondent court directing the plaintiff in the divorce action to show cause why petitioner should not be relieved of liability subsequent to the time the child reached the age of eighteen years, and the respondent court on July 24, 1936, made its findings and order denying the petitioner's application for modification of the decree.

The petitioner also contends that because the child earned certain wages in the moving picture business as an actress during the period between her eighteenth and her twenty-first year this should be considered in this proceeding. Such facts were proper for presentation to the trial court as circumstances for the modification of the order. A transcript of the evidence is not before us and we must assume that all the facts were duly considered.

Order affirmed.

I concur: McCOMB, Justice pro tem.

I dissent: WOOD, J.

18 Cal.App.2d 77

DUNCAN v. J. H. CORDER & SON et al.
DUNCAN et al. v. SAME.
Civ. 10988, 10989.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1936.

Rehearing Denied Jan. 5, 1937.

Hearing Denied by Supreme Court Feb. 8, 1937.

1. Trial 🔑260(8)

In action for damages sustained in collision between automobile and defendants' passing truck whose horn was out of order, refusal to instruct on statutory duty to sound warning when passing or about to pass vehicle proceeding in same direction, *held* error, notwithstanding general instruction on duty to sound warning at all times where necessary for safety of others (St. 1931, pp. 2124, 2125, §§ 122, 125(a, d).

2. Automobiles 🔑172(4)

Motorist must be held to strict legal accountability for damages resulting from failure to give warning when passing another vehicle as required by statute (St.1931, pp. 2124, 2125, §§ 122, 125(a, d).

3. Negligence 🔑2, 6

Failure to perform duty imposed by statute or other legal authority is evidence of negligence.

4. Appeal and error 🔑996

Responsibility to place their own value on contradictory evidence rests on jury, and their decision thereon will not be disturbed when evidence is reasonably susceptible to contradictory inferences being drawn therefrom.

5. Trial 🔑203(1)

Litigants are entitled to appropriate instructions on all material issues raised by pleadings or developed by evidence.

6. Automobiles 🔑245(60)

Whether truck driver's failure to perform statutory duty to give warning was sole proximate cause of collision with automobile which he was passing *held* for jury (St.1931, pp. 2124, 2125, §§ 122, 125(a, d).

7. Trial ⚷252(8)

Instruction directing verdict for defendants if defendant truck driver was exercising ordinary care when he collided with automobile which he was passing *held* error where truck driver did not give warning as required by statute (St.1931, pp. 2124, 2125, §§ 122, 125(a, d).

8. Automobiles ⚷147

Motorist who fails to conform to statutory requirements cannot establish freedom from responsibility for accident on ground that he acted as prudent person.

9. Automobiles ⚷172(4)

Noise made by back-firing of defendants' truck and rattling of load thereon *held* not to relieve truck driver of statutory duty to give warning when passing automobile with which he collided (St.1931, pp. 2124, 2125, §§ 122, 125(a, d).

10. Trial ⚷308

Reading of only portion of testimony requested by jury after submission of cause *held* not reversible error where reading was stopped only after jurors announced that their desire was satisfied, and appellants did not request reading of such other testimony as they thought relevant.

11. Appeal and error ⚷110

Order denying motions for new trial for failure to instruct on statutory duty of truck driver to give statutory warning in passing automobile with which he collided *held* not appealable (St.1931, pp. 2124, 2125, §§ 122, 125(a, d).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Actions by Martha M. Duncan and by Martha M. Duncan, and others, against J. H. Corder and Son, a copartnership, and others, which by stipulation were tried together. From the judgments, the plaintiffs appeal. By agreement both appeals were consolidated.

Reversed and remanded for new trial.

Joseph Anderson and R. E. Parsons, both of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondents.

WHITE, Justice pro tem.

These appeals are prosecuted from judgments based upon verdicts of a jury. By stipulation the two cases were tried together and by agreement both appeals were consolidated for consideration together in this court. The accident out of which these actions arose occurred on the afternoon of August 3, 1935, between 3 and 4 o'clock, on that portion of United States highway No. 99 located between the towns of Gorman and Castaic. This portion of the highway extends in a general northerly and southerly direction, with a 6 per cent. grade from south to north at and near the place of the accident. The highway at and adjacent to the place of the accident is 30 feet wide and divided into three lanes, each lane measuring approximately 10 feet in width. The middle lane is separated from the right and left lanes by white lines four inches wide on the pavement. The middle lane is reserved for passing, the easterly lane for traffic going from south to north, and the westerly lane for traffic driving from north to south. The plaintiff Martha M. Duncan was operating a 1929 standard six Dodge sedan owned by her husband, Arch F. Duncan. Riding with her at the time of the accident were her husband, who was sitting in the front seat with the plaintiff, and a friend, Mrs. Wells, who sat in the rear seat of the car. The width of the Dodge automobile was approximately six feet.

The defendant Lance F. Hawkins, an employee of defendants J. H. Corder and Melvin Corder, copartners doing business as J. H. Corder & Son, was driving a large truck belonging to them. It was a Morland ten-wheeler. The truck weighed 7,400 pounds and the load on the truck weighed 2,200 pounds. The width of the truck varied; measuring from one front fender to the other its width was six feet, but the bed of the truck (on which the loads were carried) was eight feet in width. The defendant operator of the truck sat in an inclosed cab. A headboard, which was wider and higher than the cab, was situated directly in back of the cab, extending two feet beyond either side of the cab. The operator, when sitting in the cab, has no vision to the right rear of the truck.

The defendant Hawkins had driven this particular truck for a year and one month prior to the accident. Immediately prior to and at the time of the accident, both vehicles involved had been and were proceeding in a northerly direction. Prior to the accident both vehicles were being driven in the right-hand lane of the highway. The Dodge automobile was ahead of the truck and traveling at between 20 and 22 miles per hour. The defendant Hawkins first saw the Dodge clearly when the truck approached within 75 feet of the rear of it. When he got to a distance of 50 feet from it, he swung into the middle lane to pass it. When the truck got alongside the Dodge the vehicles collided. After the impact the plaintiff Martha M. Duncan, driver of the Dodge, lost control of her vehicle and it went over the east side of the road down a deep embankment. Arch F. Duncan and Mrs. Wells died as the result of injuries received in the accident, and the plaintiff Martha M. Duncan was very seriously injured. The evidence indicates that the Dodge car was thoroughly wrecked, while the damage suffered by the truck centered in the right-hand corner of the bed thereof. The angle-iron on that corner of the bed was bent back and under three or four inches from normal, and an auxiliary gas tank was jarred loose and caused to fall.

Appellants first complain of the failure of the trial court to give certain of their requested instructions, that the violation of a statute constitutes negligence, and upon the duty imposed by law on the driver of a vehicle, when overtaking and passing another vehicle; secondly, they attack the giving of an instruction directing a verdict for the defendants if the jury found that the defendant operator of the truck was exercising ordinary care, when appellants claim the evidence shows that such operator was guilty of violating the law in not giving an audible warning of his intention to pass the Dodge automobile; thirdly, it is contended by appellants that the court committed reversible error in giving an instruction which appellants claim charged the jury on a controverted question of fact; and finally, appellants claim the court committed reversible error by permitting only part of the testimony to be read to the jury when after submission of the cause to the jury they returned into court and requested the reading of all of the testimony, which appellants claim was conflicting on an issue of fact.

It is claimed on behalf of appellants, in the first place, that the court below erred in refusing to give certain instructions asked by plaintiffs. These instructions, in the first instance, relate to the violation of a statute constituting negligence and to the duties imposed by law upon the driver of a vehicle when overtaking and passing another vehicle. The following instructions were offered by plaintiffs and refused:

"You are hereby instructed that Section 122 of the Motor Vehicle Act of the State of California, in effect at the time of this accident [St.1923, p. 557 as amended by St. 1931, p. 2124] provided as follows:

"'(A) Upon all highways of sufficient width, * * * the driver of a vehicle shall drive the same upon the right half of the highway, * * * unless overtaking and passing another vehicle subject to the limitations set forth in section 125.'

"Section 125, Subdivisions (a) and (d) of said Motor Vehicle Act, states as follows:

"'Except as otherwise provided in Section 126, the following rules shall govern the overtaking and passing of vehicles:

"'(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.'

"* * *

"'(d) The driver of an overtaking motor vehicle when traveling outside of a business or residence district and under the conditions where necessary to insure safe operation, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction.'"

Upon this subject, the trial court instructed the jury as follows:

"You are instructed that the fact that the defendant, Mr. Hawkins, failed to sound a horn is of no consequence in this case unless you find that such omission on his part was a proximate cause of the accident."

"You are hereby instructed that it is the duty of a driver of a motor vehicle to operate his vehicle in such a cautious and prudent manner as not to endanger the life, limb or health of others, and it is the duty of such a driver to have attached to his automobile a horn, or other signal device, in good working order, and it is the duty of said operator to sound a warning at all times and places where necessary for the safety of others."

[1, 2] It is undisputed in the evidence that the horn or sounding device on the defendants' truck was out of order, and that the driver of the truck was unable to and

therefore did not give any audible warning with his horn or other warning device before passing or attempting to pass the automobile in which plaintiff Martha M. Duncan was riding. The highway upon which both vehicles were traveling in the same direction was a public highway and the location in question here was not within a business or residence district. It is the contention of respondents that the portion of the herein quoted instructions governing the duty to sound a warning was covered in all material respects by the instruction last above set forth. We are of the opinion that under the facts of this case the general instruction enunciating the duty to sound a warning at all times and places where necessary for the safety of others did not cure the error committed in rejecting the proffered instructions embodying the statutory duty to sound an audible warning by use of a horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. This provision of the Motor Vehicle Act was intended to subserve a good purpose, and doubtless would do so if obeyed. The failure to give audible warning with a horn or other warning device before passing or attempting to pass another vehicle is condemned by the law, and when damages result therefrom the offender must be held to a strict legal accountability.

[3-6] The failure of any person to perform a duty imposed upon him by statute or other legal authority is always evidence of negligence. Whether it constitutes such negligence as tended proximately to cause the injury to plaintiff is another question. At the trial it was the theory of respondents that the Dodge automobile was negligently turned to its left while respondents' truck was passing it, and that the collision occurred while respondent driver was attempting to swerve to avoid this movement on the part of the automobile; while appellants tried the case upon the theory that their automobile was at all times in its right-hand lane of traffic and was there when the collision occurred. However, the evidence on these issues was in conflict; and while the responsibility to place their own value on contradictory evidence rests upon the jury, and their decision thereon will not be disturbed in an appellate court when the evidence is reasonably susceptible to contradictory inferences being drawn therefrom, still all parties are entitled to appropriate instructions upon all the material issues raised by the pleadings or developed by the evidence. In the case before us respondent truck driver admitted the violation of two provisions of the Motor Vehicle Act, in that his truck was not equipped with a horn in good working order and he did not sound the same nor give warning by the use of any other warning device before passing or attempting to pass appellants' automobile. It is conceded that the accident happened while the truck was passing the other car; and whether the failure of respondent truck driver to perform his statutory duty was the sole proximate cause of the accident was for the jury to determine; but their determination should be guided by proper and correct instructions. "It is an axiomatic truth, that every person while violating an express statute is a wrong-doer, and as such is ex necessitate negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." Siemers v. Eisen, 54 Cal. 418, 421.

In our opinion, the giving of a general instruction on the duty to sound a warning at all times where necessary for the safety of others did not cure the error in refusing to give the proffered instruction as to the statutory duty to sound a warning when passing or about to pass another vehicle. We think it is impossible to say under the facts of this case that the failure to give the instructions in question had no part in weighing the balance in favor of respondents and against the appellants.

[7-9] Appellants complain of the action of the trial court in giving the following instruction: "If you find in this case that the defendant, Mr. Hawkins, while operating the truck at the time and place involved herein, used ordinary care, then he was not guilty of negligence, even though an accident occurred, and you should so find, because all the law requires of one operating a motor vehicle along a public highway as herein involved is to use the care that an ordinarily prudent person, under the same or similar circumstances, would use, in operating his car, and if you find that Mr. Hawkins did use such care, then, as I have just stated, he was not guilty of negligence and you should so find upon that issue, and your verdict should be against the plaintiffs and in favor of the defendants."

This instruction should not have been given. Where a driver, as in the instant case, has failed to conform to a statutory requirement, he cannot establish freedom from responsibility on the ground that he acted as a prudent person would have acted. 2 Cal.Jur.Ten-Year Supp., § 152, pp. 226, 227. Respondent further contends that there was no necessity for sounding a horn or giving any warning other than the noise being made by the truck back-firing and the load upon the truck rattling, but this does not excuse the omission to perform a legal duty enjoined upon respondent truck driver by statute. As was said in Hunt v. Los Angeles Ry. Corp., 110 Cal.App. 456, 461, 294 P. 745, 747, "Nor under such circumstances does the fact that the operation of the automobile is productive of noise relieve the driver of the duty to give warning where it appears that persons rightfully using the highway are unaware of his approach."

[10] We find no error in the action of the trial court in giving or refusing to give other instructions complained of, nor do we find any merit in appellants' final claim that the trial court committed reversible error by permitting only part of certain testimony to be read to the jury when after submission of the cause the jury returned into court and requested the reading of certain testimony. The record before us indicates that when the reading of the testimony reached a certain point the jurors announced that their desire was satisfied and they wished to hear no more. This being so, the object for which they had come into court was accomplished and the court was justified in ordering the reading stopped. United States v. Hammond (D.C.) 226 F. 849, 854. Appellants did not request the reading of any other testimony, nor did they make any objection or comment whatsoever. If they thought the part of the testimony read was an inadequate response to the jury's request, they should have asked for the reading of such other part as they thought relevant and material. Miller v. Royal Flint Glass Works, 172 Pa. 70, 33 A. 350, 351.

No other points raised require discussion.

[11] Since there is no appeal authorized from an order denying motions for a new trial on facts such as these, the attempted appeals from such orders are dismissed.

For the foregoing reasons, the judgments and each of them are reversed, and both of said causes are remanded for new trial.

We concur: YORK, Acting P. J.; DORAN, J.

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18 Cal.App.2d 112

UNITED BANK & TRUST CO. OF CALIFORNIA v. HUNT et al.*

Civ. 5474.

District Court of Appeal, Third District, California.

Dec. 11, 1936.

As Amended on Denial of Rehearing Jan. 8, 1937.

1. Judgment ⚷956(1)

Issue of wrongful foreclosure of mortgage could not be conclusively presumed to have been litigated in prior action between same parties because raised by pleadings, where examination of record and opinion of appeal in such action indicated that all parties concerned considered action solely as one to recover damages for loss of crop.

2. Appeal and error ⚷1099(3)

Where appellant on former appeal was held to have waived right to raise question of res judicata, introduction into record on second appeal of judgment roll in first action *held* insufficient to render inapplicable doctrine of law of case, where roll had been admitted only over appellant's objection and showed attempt to inject question which did not vary record on principal issue involved on second appeal.

3. Judgment ⚷633

Bank from whom defendants had recovered damages for breach of contract in action where bank by its actions limited issues to one item of damages and so treated contract as divisible *held* estopped to assert contrary by maintaining that defendants could not recover further damages for breach of same contract in another action.

4. Contracts ⚷176(10)

Question of what was a reasonable time during which bank promised to suspend foreclosure of trust deed *held* for jury.

5. Mortgages ⚷25(5)

Where bank terminated contract to advance money to other parties for farming, other parties, who had given trust deed on their property as security, were released from further obligation on their part.

6. Judgment ⚷747(1)

Parties against whom bank had recovered judgment by default in action in ejectment *held* not estopped by such judgment to assert, in action for breach of contract, that bank's foreclosure of trust deed was wrongful.

*Rehearing denied 64 P.2d 477.

7. Judgment ⚷735

There is no estoppel as to an equitable defense not set up.

8. Judgment ⚷619

Defendant in ejectment is not bound to litigate new matter constituting a cause of action in his favor.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by the United Bank & Trust Company of California against Gladys G. Hunt, as executrix of the estate of Arthur Pratt Hunt, also known as A. P. Hunt, deceased, and another, wherein defendants filed a counterclaim and cross-complaint. From a judgment for defendants, plaintiff appeals.

Affirmed.

Keyes & Erskine, of San Francisco, Butler, Van Dyke & Harris, of Sacramento, and Rich, Weis & Carlin, of Marysville, for appellant.

J. Oscar Goldstein, of Chico, DeLancey C. Smith, of San Francisco, and Ray Manwell, of Marysville, for respondents.

PER CURIAM.

This is a third appeal growing out of the transactions between A. P. Hunt and Gladys G. Hunt, his wife, who will be herein referred to as the Hunts, and United Bank & Trust Company of California, a corporation, the predecessor of Bank of America National Trust & Savings Association, to be referred to hereafter as the bank.

It is not necessary to again recite the facts applicable to the issues here presented, as a statement of the dealings between the parties to this appeal will be found in the case tried in Butte county (Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184), wherein a judgment entered in favor of the Hunts upon its complaint was affirmed and the judgment entered in favor of the bank, pursuant to the action of the trial court in granting defendant's motion for a judgment notwithstanding the jury's verdict, upon its counterclaim was reversed, and judgment ordered in plaintiffs' favor upon their counterclaim without further proceedings in the trial court; and in an appeal taken from the superior court of the county of Yuba, wherein, upon the issues raised by the cross-complaint the court granted a nonsuit against the Hunts, and which in United Bank & Trust Co. v. Hunt, 1 Cal. (2d) 340, 34 P.(2d) 1001, was returned for further proceedings upon the issues presented by the counterclaim and cross-complaint, whereupon judgment was rendered in favor of the Hunts, and from that judgment this appeal is now taken.

[1] Among the many points presented by the bank for consideration is the contention that the judgment in the Butte county case was res judicata with respect to the claim of wrongful foreclosure of the trust deed. The bank claims that as the pleadings in the Butte case raised the issue of wrongful foreclosure there is a conclusive presumption that it was there litigated. Price v. Sixth District Agricultural Association, 201 Cal. 502, 258 P. 387; Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.(2d) 1003. However, an examination of the record and the opinion of the first appeal (210 Cal. 108, 291 P. 184, 187) clearly indicates all concerned considered the action solely as one "to recover damages in the sum of $20,000 from defendant [bank] by reason of the loss of the crop," and elsewhere in the same opinion it was said:

"The trial proceeded on the theory that defendant [bank] was obligated to furnish the amounts as contended for by plaintiffs, defendant's defense being merely that certain advancements had been made which exhausted the credit."

[2] In the first appeal taken in this Yuba county case it became necessary to construe the pleadings in the Butte county case and it was there contended that the prior judgment from that county was a bar, but the Supreme Court said in answer to that claim [1 Cal.(2d) 340, 34 P. (2d) 1001, 1004] that the issue decided in the Butte county case was the single issue of damages through loss of a rice crop by reason of a breach of contract, and the bank waived its right to raise the question of res judicata by its opposition to defendants' motion in the Butte case to include therein the various causes of action set forth in the cross-complaint, and the denial of that motion was tantamount to an express determination by the court with the consent of opposing counsel to reserve those issues for future adjudication. The bank further claims that the record on this appeal is different from the former appeal from Yuba county and therefore the doctrine of the law of the case does not apply, but the only difference is the introduction

of the judgment roll in the Butte action which was introduced only to show that the question of value was attempted to be injected into the former trial, but such reference does not vary the record upon the principal issue here before us, that is, as to the conduct of the bank in attempting to limit the issues to one item of damage only, and even as to value it was admitted only over the objection of the bank, and the court said in United Bank & Trust Co. v. Hunt, supra:

"Counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata. The course pursued by the court and counsel in the Butte county case was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication. Asher v. G. F. Stearns, etc., Co., 241 Ky. 292, 43 S.W.(2d) 1012. Litigants cannot successfully assume such inconsistent positions."

[3] It is the claim of the bank that, having recovered damages for the breach of the contract, the Hunts cannot now in a second action recover further damages for the breach of the same contract. However, as before pointed out, by the actions of this appellant the issues in the Butte county case were definitely limited to one item of damages, that was for failure to supply to the Hunts sufficient money with which to raise a crop, and that was the only matter directly adjudged. The bank, having in the former action treated the contract between itself and the Hunts as divisible, is now estopped to assert the contrary view to the detriment of the Hunts.

[4, 5] It is also claimed that the bank did not violate its promise to postpone the foreclosure of the deed of trust. The Supreme Court in its opinion on the appeal in the Yuba county case said:

"In April of that year [1924] the parties met and adjusted their financial relations, which resulted in the execution of the following instruments: * * *

"(4) A written agreement whereby the bank was to make the future advance referred to; to suspend foreclosure under the trust deed for a reasonable time."

It will thus be seen that the agreement to refrain from foreclosure was an agreement to suspend foreclosure for a reasonable time, and what that reasonable time was became a question of fact for the jury. It is also a matter of evidence that the rice crop of 1924 yielded a very substantial sum, with which money the Hunts could have carried out their part of the contract so that foreclosure would have been prevented, and therefore it is apparent that, as a result of the loss of the rice crop through fault of the bank, the damage to the Hunts occurred. In this connection the Supreme Court in the case of Hunt v. United Bank & Trust Co., supra, said:

"Because of its [the bank's] unjustified act in refusing to advance the money which defendant [the bank] had obligated itself to do, plaintiffs [the Hunts] were in no position to acquire the necessary funds, for they were at the end of their financial resources."

And later, in the same opinion, the court said:

"The loss of the prospective profits was the natural and direct consequence of the breach, plaintiffs [the Hunts] being in no financial position to borrow elsewhere, they having been stripped of all control of their property by defendant bank to secure it for the very advances it had obligated itself to furnish."

The bank, therefore, having terminated the contract, the Hunts were released from further obligation upon their part. In support of this rule the court relied upon the cases of McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.(N.S.) 1171; Walker v. Price, 163 Cal. 617, 126 P. 482; Alderson v. Houston, 154 Cal. 1, 96 P. 884.

[6-8] An action in ejectment had also been filed by the bank against the Hunts to recover the possession of the home place. To this the Hunts filed an answer, and thereupon, upon default of defendants, a judgment was entered holding the bank was the owner and entitled to the possession of the property described in the complaint. It is the claim of the bank that the judgment estopped the Hunts from asserting that the foreclosure of the deed of trust was wrongful. However, as said in 9 California Jurisprudence 1020, "There is no estoppel as to an equitable defense not set up."

The precise question here presented was before the Supreme Court in Ayres v. Bensley, 32 Cal. 620, where the court held that a defendant in an action in ejectment is not bound to set up or litigate new matter constituting a cause of action in his favor.

Criticism is made of certain instructions, but if what we have already said is correct, no fault can be found with the instructions. An instruction was given in which, after summarizing the first cause of action of the Hunts covering the loss of the rice crop, the court told the jury that the Hunts had been compensated for this loss in their action in Butte county and therefore they could not recover any further damages on this claim, but the instruction sets up the three other breaches alleged, namely, failure of the bank to lease the Adobe ranch to Bayless; foreclosure of the trust deed, and the conversion by the bank of the personal property covered by the chattel mortgage. We find no fault with the instructions complained of and they are consistent with the theory upon which the case was tried, and in accordance with the principles herein set forth.

We might discuss at length the various other points urged by the bank, such as the claim that the testimony shows without dispute the bank did not violate its promise to postpone the foreclosure of the deed of trust; that as a matter of law the bank did continue the sale for a reasonable time and therefore did not breach the contract; that in other particulars the bank performed its full duty toward the Hunts, and several other alleged errors, and we have noted the specifications, but to comment upon them would extend this opinion unduly. All we can say is we have carefully studied and examined the points and the authorities cited in support thereof, but do not find they carry sufficient weight for this court to change the conclusions reached by the trial court.

The judgment is affirmed.

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17 Cal.App.2d 647

STROSNIDER et al. v. SUPERIOR COURT IN AND FOR EL DORADO COUNTY et al.

Civ. 5621.

District Court of Appeal, Third District, California.

Nov. 25, 1936.

Hearing Denied by Supreme Court Jan. 21, 1937.

1. Prohibition 🔑3(2)

District Court of Appeal may, in exercise of discretion, grant writ of prohibition, where appeal is not plain, speedy, or adequate (Code Civ.Proc. § 1103, as amended by St. 1935, p. 386).

2. Appeal and error 🔑113(3)

Appeal does not lie from order denying motion to vacate default.

3. Prohibition 🔑3(2)

Where default had been entered against trust company and motion in trial court to set default aside had not been made within statutory time, trust company *held* entitled to writ of prohibition as against contention that it had speedy and adequate remedy by appeal, since to require trust company to first permit judgment by default to be entered against it, and then appeal, was neither speedy nor adequate (Code Civ.Proc. § 473, as amended by St.1933, p. 1851; § 1103 as amended by St. 1935, p. 386).

4. Bankruptcy 🔑279

Where trustee in bankruptcy had been elected and qualified, title to property of bankrupts vested in trustee, and trustee and not receiver had right to sue or maintain action to recover property for estate (Bankr.Act § 74, 47 Stat. 1467).

5. Judgment 🔑564(1)

Where trustee in bankruptcy during bankruptcy proceedings entered into agreement with third party settling dispute between bankrupts and third party, and agreement was approved by court order, and bankrupts' appeal was dismissed, order *held* final (Bankr.Act § 74, 47 Stat. 1467).

6. Prohibition 🔑10(1)

Prohibition will lie to restrain one court from assuming jurisdiction over matter when another tribunal having concurrent jurisdiction has assumed and is exercising it over same matter.

7. Judgment 🔑102

Where plaintiff had filed amended complaint setting up new matters without serving such amended complaint on one of defendants, such defendant was not in default for failure to appear.

◆

Prohibition proceeding by Girlie Strosnider and R. H. Strosnider and the Metropolitan Trust Company of California against the Superior Court in and for El Dorado County and George H. Thompson, Judge.

Alternative writ made permanent.

White, Miller, Needham, Harber & Mering, of Sacramento, and Frank S. Hutton and William H. B. Haymond, both of Los Angeles, for petitioners.

I. Henry Harris, Jr., and Henry S. Lyons, both of Los Angeles, for respondents.

PER CURIAM.

By this writ of prohibition petitioners seek to prevent respondents from proceeding further in an action wherein C. R. Woodruff, as receiver of the estates of Harry L. Henry and Clara S. Henry, and Harry L. Henry and Clara S. Henry, individually, are plaintiffs, and Metropolitan Trust Company of California, a corporation, Girlie Strosnider and R. H. Strosnider are defendants, and where plaintiffs, among other things, seek declaratory relief and damages in the sum of $200,000 for violation of a certain contract or agreement.

Very briefly, it appears that the Henrys were indebted to the Strosniders and the trust company upon two promissory notes secured by contracts upon lands near Lake Tahoe in the county of El Dorado. The Henrys were unable to meet their obligations as they became due, and in June, 1933, filed a debtor's petition under section 74 of the Federal Bankruptcy Act, 47 Stat. 1467 (see 11 U.S.C.A. § 202), and thereafter entered into an extension agreement with their creditors, C. R. Woodruff being appointed receiver or custodian.

Thereafter the Henrys defaulted under this extension, and on February 12, 1934, were adjudged bankrupts in the District Court of the United States. Thereafter C. R. Woodruff, apparently known as the receiver under the proceedings provided for by section 74 of the act, and not as receiver of the Henrys as bankrupts, was authorized by a judge of the District Court to institute an action in his name as receiver on behalf of Harry L. Henry and against the Strosniders and the trust company to determine their rights under a certain trust agreement with relation to the Tahoe property. It appears, however, no order was ever made authorizing the receiver to file any action upon behalf of Clara S. Henry, a bankrupt.

Pursuant to the foregoing order the action from which springs this writ of prohibition was filed on March 2, 1934. Shortly thereafter a first amended complaint was filed, and on April 26th summons and a copy of this amended complaint was served upon the trust company and the Strosniders. On May 2d a stipulation was entered into that the demurrer to plaintiffs' amended complaint be sustained and that plaintiffs have until May 25th to file a second amended complaint, and further stipulating that in that event *all* defendants were granted thirty days in which to plead thereto. This stipulation was signed by I. Henry Harris, attorney for plaintiffs, and Frank S. Hutton, attorney for defendants. On May 22d a further stipulation was entered into giving the plaintiffs until June 1st to file their second amended complaint. This stipulation was likewise signed by I. Henry Harris, attorney for plaintiffs, and Frank S. Hutton, attorney for defendants. Thereafter a second amended complaint was filed and service thereof made upon Frank S. Hutton, who acknowledged receipt thereof as attorney for defendants.

To this second amended complaint a demurrer upon behalf of the Strosniders only was interposed by Hutton, and no appearance was made upon behalf of the trust company. On December 31, 1934, the default of the trust company was entered. Nothing further appears of record until January, 1936, when the trust company, having learned that a default had been taken against it, sought to have the same set aside under the provisions of section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851). This motion was supported by affidavits of Frank S. Hutton, attorney for the Strosniders, Howard H. Rolapp, assistant trust officer of defendant Metropolitan Trust Company, and W. H. B. Haymond, secretary and trust counsel for the trust company. Upon the hearing of the motion the trial court promptly and properly held that the same, not having been made within the time prescribed by the statute, must be denied. With this order petitioners here are agreed, and, recognizing that the superior court was without the power to correct the situation, have applied to this court through a writ of prohibition to prevent the respondents from proceeding further toward a judgment therein.

[1-3] Respondents maintain that prohibition is not the proper remedy, claiming petitioners have redress by appeal in the ordinary course of law. Section 1103,

Code Civ.Proc. (as amended by St.1935, p. 386). However, if an appeal should lie, if it is not plain, speedy, or adequate, this court may in the exercise of its discretion grant such writ. The case of King v. Superior Court, 12 Cal.App.(2d) 501, 56 P.(2d) 268, collects the authorities and clearly states the general rule applicable to the situation before us. Furthermore, no appeal lies from an order denying a motion to vacate a default. Sherman v. Standard Mines Co., 166 Cal. 524, 137 P. 249. Also to require that before petitioner could obtain redress the trust company must first permit a judgment by default to be entered with all of the consequences that would flow from such a result is neither speedy nor adequate. In Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037, where it was sought to prevent entry of a default after a failure to appear in response to a summons served upon an officer while in this state as a witness in another case, it was held that prohibition was an appropriate remedy. Reference is also made to Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 137, 10 L.R.A. 627, 18 Am.St.Rep. 192, where the court at considerable length discusses the nature of a writ of prohibition and its own proper application. It is there said:

"As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone."

As already noted, the Henrys have been adjudicated bankrupts and such proceedings are still pending. The other plaintiff is the receiver of their estate.

[4] We are here called upon to pass upon the power of these plaintiffs to maintain this action. As to the Henrys, the bankrupts, we know of no authority, nor have we been cited to any such, that authorizes or permits a bankrupt after adjudication to maintain an action to recover assets of his estate, nor to proceed as a debtor under the provisions of section 74 of the Bankruptcy Act. Neither have we been cited to any authority which justifies a custodian or a receiver to maintain or institute an independent plenary suit to recover property of the estate, nor are we acquainted with any authority that will permit him to go out of the jurisdiction of his appointment to institute actions or to do any other official act. Remington (4th Ed.) vol. 1, § 456. The record further discloses that a few days after this suit was commenced a trustee in bankruptcy was elected and qualified, and in him, and not in the receiver, vests the title to the property of the bankrupts, and the right to sue or maintain an action to recover property for the estate. Sec. 1266, Remington on Bankruptcy.

[5] It furthermore appears from paragraph VIII of the petition for writ of prohibition filed herein that during the bankruptcy proceedings the trustee in bankruptcy entered into negotiations with the Strosniders and the trust company to settle the controversies existing between themselves and the Henrys, and on April 22, 1935, an agreement was entered into whereby, for a valuable consideration paid, all matters of dispute were settled and the agreement approved. The Henrys appealed from the order approving the compromise, but said appeal was dismissed by the federal court and said order is now final.

[6] While some of these allegations are denied, it is apparent that the bankruptcy court assumed jurisdiction and purported to settle and dispose of all the matters here involved, and in the case of Lee v. Superior Court, 191 Cal. 46, 214 P. 972, it is held that it is conceded that prohibition will lie to restrain one court from assuming jurisdiction over a matter when another tribunal having concurrent jurisdiction has assumed and is exercising it over the same matter, and citing in support thereof Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119, and Evans v. Evans, 154 Cal. 644, 98 P. 1044.

It furthermore appears that a petition was filed in the bankruptcy proceeding asking that the duly elected and qualified trustee in bankruptcy be substituted in the place and stead of Woodruff and the Henrys as plaintiffs in the action against the trust company and the Strosniders. After a hearing on this petition, an order was made by the referee directing this substitution. A review of this order was taken by the receiver, but was dismissed by the District Court, and upon petition for leave to appeal therefrom such permission was refused by the United States Circuit Court of Appeals, by which action the order of the referee directing the substitution of the trustee in the place and stead of Woodruff and the Henrys as plaintiff was approved, and the trustee is therefore the only plaintiff to be recognized by the court.

Respondents lay considerable emphasis upon the conflict in the affidavits filed by petitioners upon the motion to be relieved of default, and the affidavits filed in this court. It is true that some of the allegations in the two sets of affidavits are difficult to reconcile. In the affidavits filed to be relieved of default it is alleged that Mr. Hutton was authorized as attorney to appear for the trust company. In the affidavits filed in this court it is represented that no such authority was granted Mr. Hutton. However, there may have been an honest misunderstanding as to the authority granted, and the inclination of courts is and should be to permit causes to be tried upon their merits. We are therefore inclined to the view that there was a misunderstanding and conflict as to the authority of Mr. Hutton to appear for the trust company, due to mistake and inadvertence of the parties involved. It further appears that counsel were, during several months of the period of default, negotiating for a settlement of the dispute, but no reference to any default was made by the attorneys for plaintiffs until after the expiration of the time prescribed in section 473 of the Code of Civil Procedure, which leaves some ground to believe that counsel for plaintiffs were planning to and anticipated the shutting out of defendants from any relief under that section by the expiration of time.

[7] It is further claimed that by filing a second amended complaint setting up new matters, the default of the trust company was vacated. A reading of the two complaints discloses that there was a material change in a matter of substance in the second amended complaint, and, Mr. Hutton not being authorized to appear for the trust company, that company should have been served with such amended complaint before it could be held to be in default. Linott v. Rowland, 119 Cal. 452, 51 P. 687.

It therefore appearing that the alternative writ of prohibition should be made permanent, it is so ordered.

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18 Cal.App.2d 69

CARPENTER et al. v. HAMILTON.

Civ. 10873.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1936.

Hearing Denied by Supreme Court Feb. 8, 1937.

1. Fraud ⚷22(1)

Purchasers of realty had right to rely on representations made by vendor concerning matters of fact which were unknown to them, without making inquiry concerning truth thereof, and vendor could not evade consequences of any fraudulent statements he may have made by showing that means of knowledge of truth were easily available to purchasers.

2. Fraud ⚷20

Right to rely on representations does not exist where purchaser chooses to inspect property before purchase, and, in making such inspection, learns true facts.

3. Fraud ⚷22(1)

Purchaser of property has not been defrauded unless he has been misled, and purchaser has not been misled where he has acted with actual or imputed knowledge of true facts.

4. Fraud ⚷22(1)

Generally, where purchaser undertakes to investigate property or truth of representations concerning property and proceeds with investigation without hindrance, it will be considered that purchaser went far enough to be satisfied with what he learned.

5. Fraud ⚷58(4)

Where it fairly appears from evidence that buyer undertook to investigate for himself matters as to which representations had been made, buyer cannot later claim that he acted on representations even though he voluntarily abandoned his investigation before it was completed.

6. Fraud ⚷22(1)

Buyer who chooses to make inspection of property does not in every case forfeit right to rely on representations.

7. Fraud ⚷22(1)

Exception that buyer need not employ experts to investigate matters of technical nature as to which seller has full knowledge and buyer none and may show reliance on representations as to matters not investigated *held* not available to purchasers of realty who alleged fraudulent inducement to purchase, where common physical conditions alone were involved.

8. Fraud 🔑22(2)

Exception that buyer is not chargeable with knowledge of conditions which he fails to discover because of artifice or deception of seller *held* not available to purchasers of realty who alleged fraudulent inducement to purchase, where no artifice was used to forestall complete investigation.

9. Fraud 🔑22(1)

Purchasers seeking damages for alleged fraudulent inducement to purchase realty, who inspected realty with ample opportunity to judge of its condition, *held* charged with knowledge of what they learned and what they would have learned in exercise of ordinary care.

10. Trial 🔑142

Situations which call for measurement of conduct by standards of ordinary care usually present questions of fact for jury, but question of law arises where established facts lead to a single tenable conclusion.

11. Appeal and error 🔑934(1)

Upon review of order denying defendant's motion for judgment notwithstanding verdict, Court of Appeal *held* required to give plaintiffs' testimony and inferences properly to be drawn therefrom full effect and to disregard evidence in conflict therewith.

12. Fraud 🔑22(1)

Purchasers who knew that buildings were eighteen years old and who had discovered decay underneath house had no right to make mere casual inspection, but were required to exercise such care as circumstances demanded, as respects right to rely on vendor's representations.

13. Fraud 🔑22(1)

Where buyer is aware of suspicious circumstances or has learned of falsity of one or more representations, he is under legal duty to make complete investigation and may not rely on seller's statements.

14. Fraud 🔑22(1)

Purchasers who discovered decay under house, which they knew to be eighteen years old, and inspected buildings but did not notice that floors had sunk, that roof was defective, and that walls had cracked *held* not entitled to recover from vendor for fraudulent inducement to purchase, since purchasers had duty to make complete investigation and must be held to have had knowledge of falsity of vendor's representations.

15. Appeal and error 🔑13

Defendant's appeal from judgment for plaintiffs would be dismissed where defendant's motion for new trial had been granted as to all issues, since judgment was vacated when new trial was granted.

◆

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Margaret Carpenter and another against A. J. Hamilton. Defendant's motion for a new trial was granted, and from a judgment for plaintiffs and from an order denying his motion for judgment notwithstanding the verdict, defendant appeals.

Order reversed and cause remanded, with directions, and appeal from judgment dismissed.

Hearing denied by Supreme Court; CURTIS and LANGDON, JJ., dissenting.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant.

Lee A. Dayton, of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiffs sued to recover damages for alleged fraud by which they were induced to purchase certain real property. Defendant moved for a directed verdict, which was denied. A verdict was returned in plaintiffs' favor in the sum of $2,500. Defendant made a motion for judgment notwithstanding the verdict, which also was denied. Defendant's motion for a new trial was granted upon the grounds, among others, that the damages were excessive and that the evidence was insufficient to justify the verdict. Defendant appeals from the judgment and from the order denying his motion for judgment notwithstanding the verdict. Our attention will first be given to the appeal from the order.

Plaintiffs testified to the following principal representations, which they claim to have believed and relied upon in making purchase of a residence located in the city of Los Angeles; that the house and garage buildings were in good condition and were not in need of paint or repair work of any kind; that the walls were in good condition; that the floors were absolutely level; that the house had a new roof of redwood shingles; and that the garage also had a new roof. Other statements made were mere expressions of opinion and need not be enumerated. The evidence disclosed that the floors were not level; that the foundation on three sides of the house had sunk, causing a sinking of portions of the floors in the dining room, breakfast room, play room, maid's room, and garage, as well as numerous cracks in the plaster on the walls. The roof of the house was not new but had been patched with tin shingles, and the garage roof was not new. There were other defects which it is unnecessary to particularize.

The principal contention of the defendant upon this appeal is that the evidence conclusively shows that plaintiffs did not rely upon and were not induced to make the purchase by the representations; that they not only had ample opportunity to inspect the property, but that they did so inspect it not only once but several times; and that the purchase was made in reliance upon what they saw or could have seen and in the free exercise of their judgment.

[1-3] Plaintiffs had a right to rely upon the representations made to them concerning matters of fact which were unknown to them, without making any inquiry concerning the truth thereof, and had they done so defendant could not evade the consequences of any false and fraudulent statements he may have made by showing that means of knowledge of the truth were easily available to plaintiffs. Bank of Woodland v. Hiatt, 58 Cal. 234; Dow v. Swain, 125 Cal. 674, 58 P. 271; Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Macdonald v. DeFremery, 168 Cal. 189, 142 P. 73. But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in making such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. Ruhl v. Mott, 120 Cal. 668, 53 P. 304; Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899; Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899.

[4-9] Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned. Mr. Pomeroy says, in speaking of one who has undertaken to make an inspection of the property, "The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." 2 Pomeroy's Equity Jurisprudence (3d Ed.) § 893. "One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied." Id. If it fairly appears from the evidence that the buyer undertook to investigate for himself the matters as to which representations had been made, he cannot be allowed to later claim that he acted upon the representations, even though he voluntarily abandoned his investigation before it was completed. But it is not to be understood that in all cases he will be precluded from proving that he relied upon the representations, nor does Mr. Pomeroy state that the rule is invariable. A buyer who chooses to make an inspection of the property does not in every case forfeit his right to rely upon the representations. There are exceptions. One exception relied upon by plaintiffs is that a buyer is not required to employ experts to investigate matters of a technical nature as to which the seller has full knowledge and the buyer none, and if for this reason the investigation is incomplete, he may show that he relied upon the representations as to matters which he did not investigate. Dow v. Swain, supra; Stockton v. Hind, 51 Cal.App. 131, 196 P. 122; Fay v. Mathewson, 179 Cal. 318, 180 P. 939. This rule is not available to plaintiffs under the facts of the present case where common physical conditions alone were involved which any one was competent to see and understand. Another exception relied upon by plaintiffs is that a buyer is not chargeable with knowledge of conditions which he fails to discover because of some artifice or deception of the seller. Plaintiffs cannot invoke this rule for the reason that no artifice was used to forestall a complete investigation. Plaintiffs' case falls squarely within the strict rule stated

by Mr. Pomeroy. There was no reason or excuse for their failure to make a full investigation and therefore they should be charged with knowledge of all facts which such an investigation would have disclosed. But there is another reason why the charge of fraud must fail. Having inspected the property to be purchased with ample time and opportunity to judge of its condition, they must be charged with knowledge of what they learned and what they would have learned in the exercise of ordinary care and diligence. They may not deny knowledge of facts which would have been known to them but for their negligence. It is to be conceded that if they had made no examination of the property defendant could not excuse his fraud by the plea that plaintiffs were negligent in believing what he said and in failing to make an independent investigation, but having undertaken the inquiry, plaintiffs were obliged to look with seeing eyes. When the inspection was over, they could not excuse their ignorance of what they should have seen by pleading the superficial character of their examination.

[10-14] Situations which call for the measurement of conduct by the standards of ordinary care usually present questions of fact for the jury, but a question of law arises when the established facts lead to a single tenable conclusion. The facts as testified to by plaintiffs and their witnesses present a pure question of law. It may be stated as follows: Does the evidence admit of the single conclusion that plaintiffs did not rely upon the representations? The answer will appear from a statement of the extent of plaintiffs' knowledge concerning the matters alleged to have been misrepresented, for it will be manifest that the defects and disrepair of the dwelling were of such a conspicuous nature that they must have been discovered in the course of a reasonably careful inspection of the premises made by one intending to purchase. In reaching this conclusion, we have given to the testimony on behalf of plaintiffs, and the inferences properly to be drawn therefrom, full effect, and have disregarded the evidence in conflict therewith, since this is the rule which applies upon review of an order denying a motion for judgment notwithstanding the verdict. Plaintiffs were taken through the buildings and inspected all but two of the rooms, the chauffeur's quarters in the garage and the maid's room. The failure to see these rooms is not significant; the conditions of which plaintiffs complain were visible in the parts of the buildings which they did examine. They went upon the property for the purpose of satisfying themselves as to its desirability as a home and as to its condition and value. They were in and about the building four times before they purchased and had ample opportunity to make a full investigation. Their inspection progressed to the point where further effort would have been inconvenient, when they voluntarily abandoned it. They contend now that they did so because they relied upon the representations of defendant as to conditions which they failed to investigate and that they purchased upon their faith in what they were told and were influenced not at all by what they saw. They had been told by defendant, as they claimed, that the buildings needed no repairs; that the house "was as sound as a rock and as good as the day he (defendant) bought it." The buildings were eighteen years old, as plaintiffs well knew. They inquired about dry rot and termites which they knew had appeared in buildings in the vicinity, and not being satisfied with defendant's statement that none had ever appeared, they employed a man to make an inspection. Both dry rot and termites were found underneath the house, whereupon defendant agreed to pay the cost of repairs in the sections affected, if it did not exceed $100. Plaintiffs' position is, in substance, that their inspection of the buildings was casual because of their belief in the truth of defendant's statements. But they had no right to make a mere casual inspection in the light of their knowledge as to the age of the buildings and the decay which they had discovered. They were required to exercise such care and diligence as the circumstances of the case demanded. Having discovered that portions of the building had been attacked by dry rot and termites, they were put on notice that the buildings were not sound and in good repair. But even then they made no real effort to find out the condition of other parts of the buildings. In the exercise of the slightest diligence, they would have learned that termites had attacked the woodwork in the attic, a fact which became known to them after they entered into possession. Plaintiffs made no effort to acquaint themselves with the general conditions of the buildings except by a mere cursory inspection, although many

defects would have been readily discovered by the use of slight diligence. It is an admitted fact, and one established by actual measurement, that the floors in several of the rooms had sunk in a number of places as much as 3½ inches. Plaintiffs went through these rooms but did not discover the condition of the floors. They say they were deceived as to the sloping floors because there were rugs on the floors—an explanation which is not all persuasive since it was not attempted to be shown that the rugs gave the floor a level appearance. It would be idle to contend that this most extraordinary condition of the floors did not constitute a patent defect. Window frames which had been forced out of shape by the settling of the walls had been squared up by the insertion of triangular strips of wood. These repairs plaintiffs claim to have overlooked because of drapes which were hung at the windows. Stains upon the walls were not seen, according to plaintiffs' testimony which was of a most general nature, because articles of furniture obscured them. Numerous large cracks in the plaster were not seen because, as plaintiffs explain, they had been mended. Plaintiffs inquired about a section of plastering which had been repaired and were informed by defendant that the plaster had fallen off during an earthquake. This circumstance should have caused plaintiffs to look carefully for other damage to the plaster but they saw fit not to do so. It is perhaps believable that plaintiffs did not discover these plainly defective conditions, but it is altogether unreasonable to suppose that if they had made slight use of their powers of observation, they could have overlooked them. So much for the things which plaintiffs looked at and failed to see, but which must have been seen in the exercise of ordinary care. There were other conditions such as the sinking of the foundations and the old and patched condition of the roofs which plaintiffs could have discovered easily if they had made the slightest effort. After the discovery of termites and dry rot under the house, plaintiffs made no further inspection there nor did they inspect the roofs. They make much of the fact that the roof of the house could not be seen from the ground because of a wall which surrounded the roof. They maintain that they were not required to look at the roof although there were stains on the ceilings and walls which indicated that leaks had occurred. It might have caused plaintiffs some inconvenience to make an examination of the foundation or the roofs, or to employ some one to make the examination for them, but they could not otherwise have learned of the existing conditions. The duty of a purchaser who has undertaken to make an inspection is not limited to doing the things he may find to be convenient. The difficulties which plaintiffs have pointed out, if they could be properly so called, were not such obstacles as would excuse them from making a complete investigation. All of the means of knowledge were at hand. The true condition of the buildings was before them. If they neglected to discover what was in plain sight, the law will nevertheless charge them with knowledge of what they should have discovered. They cannot deny knowledge of the patent defects which existed in the parts of the buildings which they did examine. Having knowledge of the falsity of some of the representations, they had no right to rely upon others. The rule is universally recognized in fraud cases that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more of the representations he is under a legal duty to make a complete investigation and may not rely upon the statements of the seller. Gratz v. Schuler, supra; 12 Cal.Jur. § 37, p. 763. Plaintiffs were not dissuaded from making a complete investigation by any artifice of defendant and they therefore cannot complain of conditions which they would have discovered if they had pursued their investigations to the end.

Plaintiffs' testimony that they relied upon the representations cannot stand against the evidence that they must be held to have had knowledge of their falsity. Courts cannot be expected to extricate persons from entanglements into which they have fallen through their own neglect of duty. The rule which applies in the case of actual knowledge of the facts has equal application where the facts would have been ascertained in the performance of a duty to use ordinary care.

For each of the reasons stated, the evidence was insufficient to support a recovery based on fraud. It is therefore unnecessary to decide whether plaintiffs' evidence of damage, consisting only of a statement of opinion by a witness called as an expert, was wholly devoid of evidentiary value.

The order denying defendant's motion for judgment notwithstanding the verdict is reversed and the cause is remanded with directions to enter judgment in favor of defendant.

[15] The judgment was vacated when a new trial was granted as to all of the issues and the appeal which was taken from the judgment is therefore dismissed.

We concur: HOUSER, P. J.; DORAN, J.

18 Cal.App.2d 41

McLAUGHLIN v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 11155.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1936.

1. Municipal corporations 🔑919

City charter provision, requiring water commissioners to apportion from city revenue fund amount sufficient to pay sums due on city waterworks bonds providing for payment exclusively from taxes on property in improvement district, did not give bondholder additional security for payment of bonds or become part of contract thereof (St.1915, p. 99, as amended; St.1925, p. 1098, § 223).

2. Constitutional law 🔑137

Construction of city charter provision, requiring water commissioners to apportion from city revenue fund sufficient amount to pay sums due on waterworks bonds providing for payment exclusively from taxes on property in improvement district, as giving bondholders additional security for payment thereof, would result in unconstitutional impairment of contractual obligations of taxpayers, whether such provision requires apportionment of revenue from fund of each district or from general city revenue fund derived from operation of waterworks (St.1915, p. 99, as amended; St.1925, p. 1098, § 223).

3. Municipal corporations 🔑953

City charter provisions, requiring board of water commissioners to apportion from city revenue fund amount sufficient to pay sums due on waterworks bonds providing for payment exclusively from taxes on property in improvement district and reposing discretion in board as to apportionment of water revenue funds to payment of such bonds, cannot be so construed as to result in double payment of bonds by taxpayers, as by holding that one bondholder may require payment from revenue fund while others may require levy of taxes for same purpose (St.1915, p. 99, as amended; St.1925, p. 1098, § 223; St.1927, p. 2026, § 223).

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Edward H. McLaughlin for a writ of mandate to the Department of Water and Power of the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Clyde R. Burr and Philip Grey Smith, both of Los Angeles (A. M. Cathcart, of Palo Alto, of counsel), for appellant.

Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., and Kenneth K. Scott and Francis H. Lindley, Deputy City Attys., all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants entered after their demurrer was sustained without leave to amend. In his complaint plaintiff alleges that he is the owner of eighteen bonds of Municipal Improvement District No. 35, located in the city of Los Angeles, the said bonds being each in the principal sum of $1,000 and becoming due at various times from January 1, 1942, to January 1, 1964; that the bonds were issued on or about April 10, 1925, and the proceeds thereof used to construct a portion of the waterworks of the city; that the Department of Water and Power of the City of Los Angeles has charge of the waterworks of the city, of the municipal improvement district mentioned and of the collection and disbursement of revenues of said works; that "the Board have been and now are collecting revenues from the Municipal Water Works of said City, and have caused the same to be set aside and deposited in the revenue fund in the city treasury pertaining to the Municipal Water

Works of the said city; that said fund now contains more than sufficient moneys to satisfy all interest on all bonds in said issue now outstanding and due and unpaid in addition to all other obligations against said fund." He seeks a writ of mandate to compel defendants to "apportion and set aside out of the revenue fund in the City Treasury pertaining to the Municipal Water Works of the said City, an amount or amounts sufficient to pay at maturity all sums which have become due on the said bonds held by petitioner and to apportion and set apart out of the said revenue fund in each year an amount or amounts sufficient to pay at maturity all sums coming due in said year for principal and interest on said bonds of petitioner."

[1] The bonds in question were issued under the provisions of the Municipal Improvement District Act enacted in 1915 (St.1915, p. 99, as amended). It is provided in each of the bonds that "the principal and interest of this bond are payable exclusively out of taxes levied upon the taxable property in said Municipal Improvement District No. 35 of the City of Los Angeles, and neither the City of Los Angeles nor any officer thereof is holden for the payment thereof otherwise." On July 1, 1925, new charter provisions were adopted, among them section 223 (St.1925, p. 1098) providing in part as follows: "The board shall each year apportion and set apart out of the revenue fund in the city treasury pertaining to each such municipal works an amount or amounts sufficient to pay at maturity all sums coming due in said year for principal and interest, upon all outstanding bonds, general or district, issued for the purposes of the works, to which such revenue fund pertains, and said amounts shall be transferred forthwith into a special fund in the city treasury, to be designated by a name indicating the nature or purpose of such special fund and the works from which said amount or amounts were derived, and the money in such special fund shall be subject to apportionment by the Controller, as may be required to make such payments on the principal and interest of said bonds, and for no other purpose. Any interest or increment received on the money in any such special fund shall be paid into such special fund and become a part thereof. The foregoing provisions of this section shall apply to all such bonds now outstanding or hereafter issued." In 1927 the charter of the city of Los Angeles was amended (St.1927, p. 2026, § 223) to provide that the allocation of water revenue funds to payment of bonds should be discretionary with the board of water and power commissioners. The city charter as in force on July 1, 1925, contained this provision: "No special proceedings relating to local improvements or to local assessments, pending at the date this charter takes effect, shall be invalidated or affected in any respect, by reason of this charter taking effect, but all such special proceedings shall continue, in accordance with the law applicable thereto." St.1925, p. 1152, § 439.

It is conceded that the provisions contained in the bonds, that they are payable exclusively out of taxes levied upon property in the district, is inconsistent with the provisions of section 223 of the charter, by which it is provided that the board of water and power commissioners shall apportion from the revenue funds in the city treasury an amount sufficient to pay sums coming due on the bonds. Plaintiff contends that section 223 gave him "additional security" for the payment of the bonds and argues that the provisions of the section "became an integral part of the contract of the bonds." We cannot take this view. The bonds established the contract between the taxpayers in the improvement district and the holders of the bonds, a contract which embraced as one of its component parts the existing laws providing for the issuance of the bonds and for the manner of their enforcement. Hershey v. Cole, 130 Cal.App. 683, 20 P.(2d) 972; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962. If the argument advanced by plaintiff is to be sustained, it must be held that the giving of the "additional security" to the bondholders was a gratuitous act on the part of the city, which did not become a part of the contract. No vested rights were given plaintiff by section 223 of the charter. If the people had the right to thus provide additional security for the bondholders, they had the right to remove such additional security. If in fact such security was given, it was effectively removed by the charter amendment of 1927, by which discretion in the matter of the apportionment of funds was reposed in the board of water and power commissioners.

[2] Defendants argue that under any view that may be taken of section 223 the contention of plaintiff necessarily results in a violation of the constitutional inhibition against the impairment of the obligation of a contract. Divergent views are expressed by counsel in their briefs on the question whether section 223 requires, if applicable to the bonds in question, that the revenue shall be apportioned from the fund of each district or from the general city revenue fund derived from the operation of the city waterworks. In either view of the matter, it is apparent that, if the additional security claimed be held to be mandatory, a change in the contract would be brought about which would result in violation of constitutional provisions. If a fund sufficient to pay the bonds should be apportioned from the revenue of the entire department, the result would be that taxpayers throughout the city would be called upon to pay the obligation of the taxpayers of District No. 35. Clearly the taxpayers in District No. 35 cannot be compelled to pay the costs of establishing waterworks in other parts of the city from which they derive no benefit and it is also clear that taxpayers in districts outside of No. 35 cannot be compelled to assume the burden of paying the costs of waterworks in this district. Such a procedure would bring about unjust discrimination among the tax and ratepayers of the various districts. An increase in the general water rate would be necessary to meet the payments due on the bonds of the various improvement districts if the obligation rested upon the board to pay from revenue principal and interest on all of the bonds issued. Powell v. Allan, 70 Cal.App. 663, 234 P. 339. If the view be taken that the revenue for the payment of the bonds is to be apportioned from the money paid by users of water within District No. 35, we face a situation in which the obligation of the original contract is impaired. The principal of the bonds is made payable over a period of years and the taxpayers within the district have the right to make payments in accordance with the entire periods stipulated in the bonds. Water rates are paid at brief intervals and in small amounts. If any surplus revenue is received during any year it can be used to defray expenses in succeeding years and the rates payable in subsequent years might be established to the advantage of the ratepayers. To require payment of the principal and interest of the bonds from revenue would result in a change of the obligations of the taxpayers.

[3] While contending that he can require the payment of the bonds from the revenue fund on the theory that he has been given additional security, plaintiff concedes that the original remedy is available to the bondholders to require payment from taxes. If his position is correct, one set of bondholders might demand the apportionment of sufficient funds from the revenue to retire the bonds and at the same time another set of bondholders might require that taxes be levied in a sufficient amount to reach the same end. Such a condition would result in double payment by the taxpayers. The statutes in question cannot be construed in such a way as to bring about this result.

In Security Trust & Savings Bank v. City of Los Angeles, 120 Cal.App. 518, 7 P.(2d) 1061, 1064, the court considered the obligations of the property owners of Municipal Improvement District No. 27 of the city of Los Angeles, a district which also was created under the Municipal Improvement District Act of 1915. In that case the plaintiff was the owner of property within the district and paid under protest taxes which had been levied upon its property to pay the bonds which had been issued. The plaintiff sought to recover the taxes and contended that section 223 of the Charter made it obligatory to apportion funds for the payment of bonds. In deciding against the plaintiff the court referred to section 13 of the act of 1915 (St.1915, p. 104), in which it is provided that "when proceeding under the provisions of this act, its provisions and none other shall apply." The court said: "The bonds constitute a contract between the bondholder and the taxpayers of the district. Among other things, the contract (bond) contains the provision that 'the principal and interest of this bond are payable exclusively out of taxes levied upon the taxable property in said Municipal Improvement District No. 27,' and to substitute any other method for the payment of the bond would be to change the express terms of the contract, which is not permissible. [Citing cases.] The condition of the bonds just quoted is a material part of it, goes to its substance, and may not be changed whether the holder of the bonds or some other interested party be the objector."

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

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18 Cal.App.2d 96

CARRASCO v. MARCUS et al.

Civ. 1674.

District Court of Appeal, Fourth District, California.

Dec. 10, 1936.

Appeal and error 🔑627(2), 773(2)

Appeal would be dismissed, upon motion, where neither transcript nor briefs had been filed and no appearance had been made by appellants, although legal time within which to do so had long since expired (Rules of Supreme Court and District Courts of Appeal, rule 5).

Appeal from Superior Court, Inyo County.

Action by Cris Carrasco, as administrator of the estate of Andrew Gaugler, also known as Andy Gaugler, deceased, against Charles Marcus and another. From an adverse judgment, defendants appealed to the District Court of Appeal, Second District, and the case was transferred to the Supreme Court and by that court to the District Court of Appeal, Fourth District, and plaintiff moves to dismiss the appeal.

Motion granted, and appeal dismissed.

Robert Richards, of Bishop, for appellants.

Jess G. Sutliff, of Independence, and Glenn E. Tinder, of Bishop, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal from a judgment of the superior court of Inyo county under the provisions of rule 5, Rules of the Supreme Court and District Courts of Appeal.

The certificate of the county clerk of Inyo county shows that judgment was rendered and entered on October 4, 1935, and that notice of appeal to the District Court of Appeal, Second District, was filed on December 30, 1935. Because of jurisdiction the case was transferred to the Supreme Court, and by that court transferred here.

Neither transcript nor briefs have been filed, and no appearance has been made by appellants although the legal time within which to do so has long since expired.

The motion is granted, and the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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18 Cal.App.2d 122

PACIFIC WESTERN OIL CO. v. BERN OIL CO., Limited, et al.

Civ. 1369.

District Court of Appeal, Fourth District, California.

Dec. 11, 1936.

Appeal and error 🔑790(3)

Appeal from order granting preliminary injunction would be dismissed, upon motion, where permanent injunction had been issued after hearing on merits, and no appearance was made in opposition to motion, since, so far as appeared before Court of Appeal, question as to whether preliminary injunction should have been issued was moot.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Pacific Western Oil Company against the Bern Oil Company, Limited, and others. From an order granting a preliminary injunction, defendants appeal, and plaintiff moves to dismiss the appeal.

Motion granted and appeal dismissed.

Hy Schwartz, of Los Angeles, Claflin & Dorsey, of Bakersfield, and Abe Richman and Sidney J. Unickel, both of Los Angeles, for appellants.

Borton, Petrini & Conron, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This appeal is from an order granting a preliminary injunction. After a hearing on the merits, a permanent injunction was issued.

The respondent has moved to dismiss this appeal upon the ground that the questions involved have become moot since the preliminary order has become merged in the permanent order.

No appearance was made in opposition to the motion and, so far as here appears, the question as to whether or not the preliminary injunction should have been issued is now moot. Mailhes v. Investors Syndicate, 220 Cal. 735, 32 P.(2d) 610; Sheward v. Citizens' Water Company, 90 Cal. 635, 27 P. 439; People's Ditch Co. v. Foothill Irr. Dist., 103 Cal.App. 321, 284 P. 514.

The motion is granted and the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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18 Cal.App.2d 104

OLINGER et al. v. PACIFIC GREYHOUND LINES.

Civ. 2002.

District Court of Appeal, Fourth District, California.

Dec. 10, 1936.

Appeal and error ⚷627(2)

Where judgment was entered February 15, motion for new trial denied April 18, notice given April 22, and notice of appeal filed May 29, no proceedings are pending for preparation of transcript or settlement of bill of exceptions, and no transcript has been filed or appearance made by appellant in appellate court, appeal must be dismissed (Rules of Supreme Court and District Courts of Appeal, rule 5).

Appeal from Superior Court, San Diego County.

Action by Annie Olinger and another against the Pacific Greyhound Lines, a corporation. Judgment for defendant, and plaintiffs appeal.

Appeal dismissed.

C. C. Pease, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal under the provisions of rule V, Rules of the Supreme Court and District Courts of Appeal.

The certificate of the county clerk of San Diego county shows that judgment was entered on February 15, 1936; that motion for new trial was denied on April 18, 1936, and notice given on April 22, 1936; that notice of appeal was filed May 29, 1936; that no proceedings are pending for preparation of a transcript nor settlement of a bill of exceptions.

No transcript has been filed here and no appearance made by appellant.

The appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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